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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 1, 2023

IN RE A.W. ET AL.¹

Appeal from the Juvenile Court for Anderson County
No. J34702210056, J34705210057, J34704210058 Brian J. Hunt, Judge

No. E2022-01088-COA-R3-PT

Mother appeals the trial court's termination of her parental rights as to two of her children. The trial court found as grounds for termination abandonment for failure to provide a suitable home, persistent conditions, and failure to manifest an ability and willingness to assume legal and physical custody of the children. The trial court also found that termination was in the best interest of both children. We find clear and convincing evidence supports the trial court's findings as to the grounds for termination and the best interests of the children. Accordingly, we affirm the trial court's judgment.

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

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

Christine L. Dummer, Knoxville, Tennessee, for the appellant, T.W.

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

OPINION

I.

In March 2018, the Department of Children Services (DCS) received a referral alleging physical abuse and a drug-exposed child. DCS Case Manager Christopher Speers

¹ It is the policy of this Court to protect the privacy of children in parental termination cases by avoiding the use of full names.

was assigned to the matter. The family involved included T.W. (Mother) and B.W. (Father) and their four children R.W., G.W., A.W., and J.W. When DCS first engaged with the family in 2018, R.W. was eleven years old, G.W. was nine years old, A.W. was two and one-half years old, and J.W. was one and one-half years old. When DCS began investigating, Mother and Father were married; however, at some point during the pendency of the multi-year proceedings, Mother and Father divorced.²

Through his investigation, Mr. Speers determined that Father had choked G.W., doing so until Father blacked out. DCS learned of Father's history of drug use, including methamphetamines, opioids, and marijuana. Based upon these disclosures, DCS asserted dependency and neglect and sought an order controlling the parents' conduct, a restraining order, and protective supervision of all four children.

On March 23, 2018, the juvenile court found probable cause of dependency and neglect, allowing the children to remain in Mother's custody subject to the supervision of the court, but the court restricted Father's custody. The court ordered that Father have no unsupervised contact with the children or overnight visitation until he complied with DCS requirements. Father's contact was required to be supervised by either Dawna C. (Maternal Grandmother) or another DCS-approved supervisor other than Mother. After this point, Father would remain under court order prohibiting unsupervised visitation with any of the couple's children. Father was required to submit to an alcohol and drug assessment and mental health treatment and to follow all resulting recommendations. Both parents were required to complete parenting classes; cooperate with DCS and other service providers; sign any release of information necessary to monitor compliance with this plan; comply with all court orders, DCS rules and regulations, and State laws; and maintain contact with DCS and notify DCS of any change in contact information.

On April 5, 2018, Mr. Speers spoke with R.W. in connection with concerns that she had raised regarding her parents' actions. R.W. informed Mr. Speers that in contravention of the court's order, Father was staying with Mother and all four children in a hotel. R.W. also stated that she did not feel safe with her parents due to Father's continuing acts of physical violence and threats. She reported that Father had choked G.W. and had threatened R.W. that he would choke her also if she did not leave while Father was choking G.W. Father also attempted to hit R.W. in the car but missed, hitting Mother instead and causing a black eye. R.W. also reported that Father told her he wanted to kill Maternal Grandmother, and Father threatened her younger brothers as a result of the attention Mother paid to the boys. R.W. informed Mr. Speers that Father was also extremely verbally and physically abusive of Mother.

The next day, on April 6, 2018, Mr. Speers went to speak with G.W. at his elementary school. There, Mr. Speers learned that G.W. had 27 unexcused absences, 16

² The record is silent as to when Mother and Father divorced.

excused absences, and 25 tardies for that school year. Mother happened to bring in G.W. late that day, so Mr. Speers spoke with Mother and G.W. when she dropped him off at school. G.W. and Mother both told Mr. Speers that Father, the children, and the paternal grandmother were all staying in a hotel together. Mother confirmed that Father was arrested the night before for domestic violence involving Mother and the paternal grandmother. When Father attempted to hit the paternal grandmother, Mother intervened and Father pushed Mother. G.W. indicated that he had been left alone with Father. G.W. informed Mr. Speers that Father had choked him on several occasions and punched him in the arm. Both Mother and Father, according to G.W., had also hit him in his mouth. Talking with Mr. Speers, G.W. stated that Mother “always puts [Father] first and does not put the kids first.”

On April 9, 2018, the trial court found there was probable cause to believe all the children were dependent and neglected, subject to an immediate threat to their health and safety, and that it was contrary to the children’s best interest to remain in Mother’s custody. The trial court awarded temporary custody to Maternal Grandmother. Neither parent was allowed contact with any of the four children pending further orders of the court. Mother was instructed to complete domestic violence counseling; maintain stable housing; complete a clinical parenting assessment and follow all recommendations; cooperate with DCS and other service providers; financially support all four children; and comply with all court orders, DCS rules and regulations, and state laws. The court subsequently granted Mother supervised visitation and directed her to pay \$50 per month in child support. Father was allowed supervised visitation only at an independent visitation center approved by DCS or the children’s Guardian Ad Litem.

The parents stipulated to improper guardianship in the care of Mother and Father at the time of removal pursuant to Tennessee Code Annotated section 37-1-102(b)(13)(F). All four children were adjudicated dependent and neglected and remained in the physical custody of Maternal Grandmother. At a subsequent hearing, the trial court noted Mother’s progress and compliance with her permanency plan and allowed Mother to have unsupervised day visits and “loosely supervised” overnight visits at Maternal Grandmother’s home. In December 2018, the trial court held a review hearing, noting that Mother had completed her domestic violence counseling and a parenting assessment and was employed, but the court ordered custody to remain with Maternal Grandmother.

After DCS closed the initial dependency and neglect case in December 2018, Maternal Grandmother allowed Father to move into her home with Mother and the children in contravention of the court’s orders limiting Father’s contact. Father was still limited by court order to supervised visitation at a DCS approved facility with no unsupervised contact or overnight visits. However, Father, nevertheless, lived in the home until mid-January 2019.

On February 5, 2019, DCS received a new referral alleging a lack of supervision

and psychological harm. Mr. Speers met with R.W. who reported an incident with Mother, Father, and the other three children that began at a movie theater two days earlier. Mother and Father took all four children to the movies. Father became upset with A.W. for acting up and took him outside. Mother got upset with Father. Mother and the Children got inside the family's truck while Father was outside of it. Father became extremely upset and tried to attack Mother through the driver's side window. Father pulled the door handle off the truck. Father stood in front of the truck trying to prevent Mother from driving off with the children. Mother was able to get around Father and leave the movie theater. Trying to evade Father, Mother took backroads. Nevertheless, Father caught up with them, tried to run Mother and the children off the road, and sped around Mother stopping in front of her vehicle. Mother successfully got away from Father. She, nevertheless, continued to allow the children to have contact with Father after this incident.

R.W. also reported to Mr. Speers that Mother would take all the children to meet Father, usually without Grandmother present, three to four times a month. Mother would take the children to see Father at Mother's new house, the paternal grandmother's hotel, or a restaurant. G.W. and Maternal Grandmother both confirmed R.W.'s reports.

Father confirmed to Mr. Speers that Maternal Grandmother let him live with her in December of 2018 and January of 2019. Father also confirmed that he had recently, under Maternal Grandmother's direction, taken R.W. to Knoxville to get a dog. Maternal Grandmother admitted that Father lived with her and all the children in her home, but not to the extent Father suggested, and that Father was being allowed, in contravention of court orders, unsupervised and overnight visits. Maternal Grandmother did confirm to Mr. Speers that she had asked Father to transport the four children, but she thought Mother was with them. On February 27, 2019, G.W. reported to Mr. Speers that Father had been living with Mother and all four children in Mother's new trailer.

After these reports regarding multiple violations of its orders, the court began exploring alternative custody arrangements. Two family members agreed to take custody. Custody of G.W., A.W., and J.W. was transferred from Maternal Grandmother to the children's great uncle Thomas (Great Uncle). Custody of R.W. was transferred from Grandmother to another family member, Kylie C. The court also ordered Great Uncle and Kylie C. to supervise all contact between Mother, Maternal Grandmother, and all four children. Both Great Uncle and Kylie C. were directed by the court that Father was to have no contact with any of the children.

Nine days later, Mr. Speers went to G.W.'s elementary school to speak to him. G.W. reported that he was scared to stay with Great Uncle because Great Uncle called him derogatory names, threatened to spank G.W., A.W., and J.W. whenever they cried, and did spank them. Great Uncle, according to G.W., would call him a "sh** head" and refer to him as "fuc**** kid." G.W. told Mr. Speers that his Great Uncle also grabbed him by the arm, left nail marks, pushed him onto the couch, stated "I dare you to get up," and then spit

in his face. Mr. Speers addressed these concerns with Great Uncle on March 15, 2019, and he agreed to an Immediate Protection Agreement (“IPA”) that prohibited Great Uncle from using corporal punishment, demeaning the children, and repercussions against any of the children for the statements made by G.W. to Mr. Speers.

On March 19, 2019, Mr. Speers met with G.W. at school again to see how the weekend went with Great Uncle. G.W. told Mr. Speers that Great Uncle told G.W. that he had to sign a piece of paper that did not allow Great Uncle to speak to G.W. anymore. Great Uncle also did not allow G.W. to enter his room, preventing him from playing his X-Box and making him sleep on the couch. Great Uncle also took G.W.’s phone away. While G.W. did say the most recent weekend was better than the previous weekend, he still did not feel comfortable staying with Great Uncle since Great Uncle was always so angry and yelled at the boys on a regular basis. Great Uncle would also yell at Maternal Grandmother when she visited. G.W. indicated that the circumstances of the home, particularly Great Uncle’s continuous yelling, were such that he was thinking about killing himself.

In response, Mr. Speers immediately called a Child and Family Team Meeting. In attendance were Mr. Speers, Maternal Grandmother, and Mother. Great Uncle informed Mr. Speers that he did not intend to appear, despite his requirement to appear in the IPA. Maternal Grandmother confirmed that Great Uncle yells at her and the three boys frequently. Mother voiced concerns about Great Uncle emotionally abusing the boys. The court removed G.W., A.W., and J.W. from Great Uncle’s custody and placed them in foster homes.

A new permanency plan was put in place, requiring Mother to continue working with Omni Community Health on life skills, emotional regulation, non-offending parenting education, and domestic violence, and to follow all recommendations; participate in family therapy when recommended by individual therapists; be compliant with all court orders; maintain monthly contact with DCS and notify DCS of any address/phone changes within 24 hours; maintain legal transportation or knowledge of how to use public transportation; maintain safe, appropriate, drug free housing; maintain legal employment; and maintain therapeutic supervised visits with all the children.

Mother engaged with Omni Community Health. She completed domestic violence and parenting classes. On May 2, 2019, DCS and Mother entered into an agreed order allowing G.W., A.W., and J.W. to enter into a trial home placement with Mother. The home placement was monitored by Omni Community Health. On July 11, 2019, the court divested custody of G.W., A.W., and J.W. from DCS and returned custody to Mother. Custody of R.W. remained with Kylie C. DCS continued to work with the family via permanency plans and child and family team meetings.

Subsequently, Mr. Speers was replaced by Alexis Baker as the DCS case manager.

Ms. Baker learned that Mother and Father were living in the same apartment complex. On October 3, 2019, the trial court found probable cause to believe that G.W., A.W., and J.W. were dependent and neglected and/or abused due to Mother's violations of court orders regarding contact with Father and overall safety concerns regarding the boys remaining with Mother. The court entered a bench warrant awarding temporary custody of G.W., A.W., and J.W. to DCS and restricted both Mother's and Father's visits to supervised visitation. A.W. and J.W. were sent to a foster family together, while G.W. was sent to live in a separate facility. DCS had concerns as to the safety of A.W. and J.W. with G.W., so the boys were separated. The concerns arose because A.W. disclosed that G.W. touched him in an inappropriate manner. A.W. and G.W. were given therapy and, at the request of the therapists, were reunited in a therapeutic setting. At the time of the hearing, Mother and Father were living in separate apartments in the same community, but after removal, Mother and Father moved into a family member's home together.

Both parents participated in the creation of a permanency plan with the end goal of G.W., A.W., and J.W. returning to them or returning to a relative. The plan required Mother to: complete a parenting assessment and follow the recommendations; submit to drug screens; complete a full psychological evaluation; provide documentation of housing, transportation, and income; maintain contact and visitation with the children; and participate in domestic violence education. DCS provided Mother with the resources, and Mother did complete the domestic violence classes, a parenting assessment, and a psychological evaluation. In December 2019, the trial court noted that Mother was in substantial compliance with her permanency plan and allowed visits that were therapeutic in nature.

For the first four months that A.W. and J.W. were in continuous DCS custody, Mother lived with Father, a barrier to reunification. Father was not in compliance with his permanency plan, and due to the court orders, Father could only see A.W. and J.W. in therapeutic visits. Living with Father, Mother also could not obtain her own housing with the housing authority because of Father's criminal history. DCS informed Mother that continuing to live with Father would prevent her reunification with A.W. and J.W.

In July 2020, the court adjudicated G.W., A.W., and J.W. dependent and neglected due to improper guardianship in both Mother's and Father's care for violation of prior court orders regarding Father's contact with the children.

The parents made progress on their permanency plans, with both parents passing drug screens and participating in the required classes. For a period of time, Mother, Father, A.W., and J.W. all participated in family therapy. However, at some point Father stopped participating. On January 25, 2021, DCS filed the petition to terminate the parental rights of Mother alleging abandonment by failure to support, abandonment by failure to provide a suitable home, persistent conditions, and failure to manifest an ability and willingness to assume custody and control.

By April 2021, the court noted that Mother was in substantial compliance with her plan, but Father was not. Father stopped participating and his whereabouts became unknown. The court allowed Mother to begin unsupervised visits in the community as approved by DCS. The initial termination hearing was continued to allow Mother more time to demonstrate consistent and appropriate unsupervised visitation. Father was not allowed to be present for these visits.

In April 2021, as soon as Mother began her unsupervised visitation, A.W. and J.W. disclosed to their therapist that they saw Father again during Mother's unsupervised weekend visitation. Mother's visitation occurred at a local Rural King store rather than under appropriate supervision for Father. A Child and Family Team Meeting was called, but, due to concerns regarding the veracity of the statements made by A.W. and J.W., no agreement was made to modify visitation at this time.

The Children's therapist reported a second incident where A.W. and J.W. told her they saw their Father during Mother's scheduled, unsupervised visitation. A.W. and J.W. stated they had stayed with their paternal grandmother during the weekend of Mother's unsupervised visitation and saw Father. It is unclear from the record as to whether Mother knew that the paternal grandmother allowed Father to see the Children. However, Mother did allow the paternal grandmother to watch A.W. and J.W. while she was at work and the paternal grandmother allowed Father to see the Children. In addition, A.W. and J.W. stated that Father spent the night at Mother's home during their visitation. The therapist reported this to Ms. Baker.

In August 2021, Father failed to appear for a judicial review and show cause hearing. Mother appeared and was granted a trial home placement with G.W. due to Mother's continued compliance with her permanency plan. Mother was ordered not to allow Father to see G.W. during the trial home placement. In conjunction with the trial home placement, the court continued the permanency hearings.

After Mother's weekend visitation on September 10-12, 2021, A.W. and J.W. told their foster parents about a fishing trip with Mother and G.W. After Mother's weekend visitation the following weekend, A.W. and J.W. told their foster parents about another fishing trip with Maternal Grandmother and G.W. The foster parents informed Ms. Baker, and she investigated. She contacted Mother and Maternal Grandmother to determine if the children had contact outside of their therapeutic visitation. Mother stated she did take the three children fishing, but not together. If G.W., A.W., and J.W. saw each other, it was in passing when Mother took G.W. to Maternal Grandmother to leave G.W. and pick up A.W. and J.W. Maternal Grandmother confirmed that there were two separate fishing trips: one for G.W. and one for A.W. and J.W. Ms. Baker was unable to definitively conclude whether G.W., A.W., and J.W. all went fishing together in one trip or whether it was two separate trips with the children seeing each other in passing. It is unclear from the record

whether the Children went on a fishing trip with G.W. or only saw him in passing at this time.

In October 2021, the court granted custody of G.W. to Mother due to her progress during the trial home placement. At the time, Mother was living in Maternal Grandmother's home with G.W. A.W. and J.W. remained in foster care, but were allowed therapeutic visits with G.W. under the care of their individual therapists. DCS became concerned, however, that Mother was allowing G.W. to have contact with A.W. and J.W. in non-therapeutic settings and that Father was continuing to see the children. A.W. and J.W. reported to Ms. Baker on multiple occasions that they were regularly seeing Father during Mother's unsupervised visits.

Around February 2022, Mother moved from Maternal Grandmother's home in Anderson County to Clarksville, Tennessee with her then-paramour, Nathan L. Nathan had a history of domestic violence and had at that point been recently released from a drug rehabilitation program. Nathan had previously been arrested in connection with aggravated assault of his ex-girlfriend. G.W. disclosed that Nathan put him in a headlock, pushed him around, had been physically abusive to him generally, and was extremely derogatory and negative in his speech toward him. Mother was aware of Nathan's history of domestic violence and continued to live with him, even after Nathan was physically abusive to G.W. In response to Nathan's abuse of G.W., Mother took no action other than to tell G.W. not to say anything about the abuse because she would not regain custody of A.W. and J.W. G.W. did, however, inform DCS of the abuse.

After concerns were raised with Mother by DCS about the abuse and her paramour, Mother sent G.W. away to live with his Great Uncle again in Campbell County, Tennessee. She did so despite G.W. having been previously removed from his Great Uncle's custody due to abuse. Mother maintained her residence in Clarksville with her paramour. It appeared to Ms. Baker, the DCS case manager, that Mother "chose Nathan . . . over her son."

As the termination hearing approached, Mother did return to Anderson County, Tennessee and indicated that she was leaving her paramour. Mother did not, however, provide any information to DCS as to where she was actually residing as of the day of the hearing.

During the time A.W. and J.W. were in foster care, A.W. and J.W. began to thrive. The foster parents have built a rapport and a healthy parent-child relationship with them. Both A.W. and J.W. were attending school, received mental health services, played both basketball and baseball, and participated in the Boys and Girls Club. A.W. and J.W. have been doing better since entering their current foster home. Their behavior has improved and they "seem very happy." A.W. and J.W. are comfortable in the foster home, confident that they will not be physically disciplined but rather talked to as a form of punishment.

The foster family meets A.W. and J.W.'s mental health, educational, and medical needs. DCS did not have any concerns with leaving A.W. and J.W. in the foster home. Ms. Baker testified that it would be detrimental for A.W. and J.W. to be removed from the foster family because they have finally settled down.

On April 14, 2022, the trial court held a final hearing regarding the termination of Mother's and Father's parental rights. While the petition for termination requested the termination of parental rights to G.W., A.W., and J.W., G.W. was, at the time, in a trial home placement with Maternal Grandmother.³ Accordingly, proof regarding the termination of parental rights as to G.W. was held in abeyance pending the outcome of the trial home placement. At the hearing, Mother requested and signed a voluntary surrender of her parental rights. Therefore, the court proceeded in the hearing to consider Father's parental rights to A.W. and J.W. The trial court terminated Father's parental rights.

Mother subsequently withdrew her voluntary surrender, so the trial court set a trial date to determine whether Mother's parental rights to A.W. and J.W. should be terminated. At trial on June 9, 2022, Ms. Baker testified. After the presentation of proof, the trial court terminated Mother's parental rights based upon (1) abandonment by failure to provide a suitable home; (2) persistent conditions; and (3) failure to manifest an ability and willingness to assume legal and physical custody of A.W. and J.W.⁴ The trial court also found that termination was in A.W. and J.W.'s best interests. Mother appealed.

On appeal, Mother challenges the sufficiency of the evidence to support the grounds for termination found by the trial court. Mother also challenges the trial court's conclusion that termination was in the best interest of A.W. and J.W.

II.

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 507, 522 (Tenn. 2016) (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 a statutory ground for termination exists 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).

³ The record before this court is unclear regarding the custodial transition from Mother to a trial placement with Maternal Grandmother after Mother sent G.W. to live with Great Uncle.

⁴ At the outset of the hearing, DCS announced it was not seeking termination based upon abandonment by failure to support.

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 which “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts” and which “eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596; see 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)). All other questions of law are reviewed de novo with no presumption of correctness. *In re Carrington H.*, 483 S.W.3d at 524. This court applies the versions of the parental termination statutes in effect on the date the petition was filed. See *In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding “that the version of the statute in effect at the time of the petition’s filing controls this action”).

III.

A. Grounds for Termination

The trial court found clear and convincing evidence that Mother’s parental rights should be terminated based upon: (1) abandonment for failure to provide a suitable home; (2) persistent conditions; and (3) failure to manifest an ability and willingness to assume custody. Tenn. Code Ann. 36-1-113(g)(1),(3), (14). On appeal, Mother challenges each of these grounds for termination. DCS defends the trial court’s ruling as to each ground.

1. Abandonment for Failure to Provide a Suitable Home

The trial court found Mother’s parental rights were subject to termination because she abandoned A.W. and J.W. by failing to provide a suitable home. Abandonment is defined, in relevant part, as

(a) The child has been removed from the home or the physical or legal custody of a parent or parents or guardian or guardians by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child

was placed in the custody of the department or a licensed child-placing agency;

(b) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and

(c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians have not made reciprocal reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department

Tenn. Code Ann. § 36-1-102(1)(a)(ii).

A suitable home is more than just an adequate physical space. *In re Roger T.*, No. W2014-02184-COA-R3-PT, 2015 WL 1897696, at *8 (Tenn. Ct. App. Apr. 27, 2015). “A suitable home for purposes of termination of parental rights is not merely a solidly built structure.” *In re Jonathan F.*, No. E2014-01181-COA-R3-PT, 2015 WL 739638, at *12 (Tenn. Ct. App. Feb. 20, 2015). It must be a safe and stable environment in which a child can live with “the presence of a care giver who can supply the care and attention [a child] needs.” *In re Malaki E.*, M2014-01182-COA-R3-PT, 2015 WL 1384652, at *9 (Tenn. Ct. App. Mar. 23, 2015) (quoting *In re A.D.A.*, 84 S.W.3d 592, 599 (Tenn. Ct. App. 2002)). “[A] home may be rendered unsafe and unsuitable by the conduct of its occupants.” *In re Kayla B.*, No. E2016-01192-COA-R3-PT, 2017 WL 438622, at *6 (Tenn. Ct. App. Feb. 1, 2017) (quoting *In re Joshua S.*, No. E2010-01331-COA-R3-PT, 2011 WL 2464720, at *18 (Tenn. Ct. App. June 16, 2011)). A suitable home must be free from violence. *In re Nevada N.*, 498 S.W.3d 579, 595 (Tenn. Ct. App. 2016); *In re Josiah T.*, No. E2019-00043-COA-R3-PT, 2019 WL 4862197, at *7 (Tenn. Ct. App. Oct. 2, 2019).

To establish this ground, “DCS must make ‘reasonable efforts’ to assist the parents by doing more than simply providing a list of service providers.” *In re Masson S.*, E2021-01196-COA-R3-PT, 2022 WL 17104403, at *5 (Tenn. App. Nov. 22, 2022). DCS must use its resources to assist parents, but its efforts need not be Herculean. *Id*; *In re Jamarcus*

K., No. M2021-01171-COA-R3-PT, 2022 WL 3755383, at *8 (Tenn. Ct. App. Aug. 30, 2022); *In re Lily C.*, No. M2021-00885-COA-R3-PT, 2022 WL 2301598, at *6 (Tenn. Ct. App. June 27, 2022). “Although section 36-1-102(1)(A)(ii)(c) requires DCS to make reasonable efforts towards the establishment of a suitable home for ‘a period of four (4) months following the physical removal’ of the child, ‘the statute does not limit the court’s inquiry to a period of four months immediately following the removal.’” *In re Masson S.*, 2022 WL 17104403, at *5 (quoting *In re Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016)).

The trial court concluded that clear and convincing evidence was presented that DCS had provided Mother with reasonable assistance but that Mother failed to provide a suitable home for A.W. and J.W. The trial court concluded that DCS had repeatedly endeavored to assist Mother to live independently from Father and to keep the children safe from the dangers he posed to the children. The trial court concluded that instead of making the safety of her children her priority that Mother instead “has continued to choose live-in romantic partners who abuse her and physically abuse her children.”

On appeal, Mother argues that there is not clear and convincing evidence to establish the ground of failure to provide a suitable home. Mother points to the fact that she divorced Father and has made progress with the permanency plan as evidence that she could provide a suitable home. Mother argues that divorcing Father and no longer residing with him, in addition to completing the steps of her permanency plan, removed the conditions that brought the children into DCS custody.

The record demonstrates that Mother has made progress with regard to multiple aspects of the permanency plan. However, Mother has repeatedly made decisions in favor of Father and later her paramour Nathan at the expense of the safety of the children. DCS has endeavored to assist Mother to avoid these dangers, including efforts at helping her to live independently of Father and by providing education related to domestic violence. DCS’s efforts have been reasonable. We agree that Mother has made progress, at times even gaining unsupervised visitation or custody, but these advances have repeatedly culminated in Mother exposing her children to partners who engage in acts of violence against them. Furthermore, at the time of trial, Mother had failed to provide DCS with her current address, stating she had moved back to the Anderson County, Tennessee area. DCS’s last confirmed address for Mother, however, was in Clarksville, Tennessee. Simply stated, the trial court’s finding that Mother has failed to provide a suitable home is supported by clear and convincing evidence.

2. Persistence of Conditions

The trial court also found persistence of conditions as another ground for termination of Mother’s parental rights as to A.W. and J.W. Parental rights may be terminated for the persistence of conditions when:

(A) The child has been removed from the home or the physical or legal custody of a parent for a period of six (6) months by a court order entered at any stage of the proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

(i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home.

(B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard. . . .

Tenn. Code Ann. § 36-1-113(g)(3).

On appeal, Mother argues that DCS failed to prove the ground of persistence of conditions by clear and convincing evidence. Mother argues that the children were initially removed because of Mother's violation of a court order regarding contact with Father. At the beginning of the case, Mother was in a relationship with Father in which there were recurring acts of domestic violence being perpetrated. By the time of the termination of parental rights trial, Mother had divorced Father. Mother's argument is essentially the problematic condition was the presence of Father. She has now divorced Father; ergo, there is no longer a problem. Additionally, Mother also argues that the fact that G.W. was returned to her custody and Mother had unsupervised visitation with A.W. and J.W. shows that Mother has improved in her parenting skills.

As properly pointed to by DCS, the trial court expressly stated its basis for putting the Children into DCS custody was not only the violation of the court's order as to the presence of Father around the children but also the "overall safety concerns regarding the children remaining with [M]other." Mother has repeatedly allowed Father, who is abusive, to have access to the children in contravention of the court's orders to the contrary. Furthermore, Mother chose to live with a paramour with a history of abuse. Her response when her paramour Nathan started to abuse G.W. was not to protect the child, but instead

to insist G.W. tell no one about what was happening. When G.W. did tell of the abuse that he was suffering and Mother became aware, rather than leaving the home that she was sharing with Nathan, Mother instead sent G.W. to live with Great Uncle, from whose home G.W. had previously been removed because of abuse.

Additionally, while Mother touts her progress in regaining custody of G.W. and unsupervised visitation with A.W. and J.W., Mother fails to acknowledge that she also subsequently lost custody of G.W. and unsupervised visitation with A.W. and J.W. DCS presented evidence that during the unsupervised visitation, Mother allowed A.W. and J.W. to have continued contact with both G.W. and Father. Both were in violation of court orders for the safety and well-being of the Children. Alternatively, A.W. and J.W. have been in the same foster home since removal, and DCS presented evidence indicating that it is a loving, safe, and supportive environment for the two of them.

The trial court's finding of persistent conditions as a basis for termination of parental rights is supported by clear and convincing evidence.

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

Parental rights may also be terminated when a parent or guardian has (1) “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 (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.” Tenn. Code Ann. § 36-1-113(g)(14).

In construing this statute, the Tennessee Supreme Court has “held that the first prong requires clear and convincing proof that the parent ‘has failed to manifest either ability or willingness’ to assume custody of or responsibility for the child.” *In re Manning H.*, No. M2020-00663-COA-R3-PT, 2021 WL 2935047, at *6 (Tenn. Ct. App. July 13, 2021) (quoting *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020)). In order to satisfy the second prong, DCS must show “clear and convincing proof that placing the child in the parent’s physical custody would likely cause substantial harm.” *Id.* at *6.

In Re Travionna W., No. W2021-01349-COA-R3-PT, 2022 WL 8080022, at *10 (Tenn. Ct. App. Oct. 14, 2022).

“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). On 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 may instead consider “whether a parent has attempted ‘to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child.’” *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) (quoting *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.* The risk of harm need not be inevitable or a theoretical possibility, but “must be sufficiently probable to prompt a reasonable person to believe the harm will occur more likely than not.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

Mother argues that she has demonstrated an ability and willingness to assume custody of A.W. and J.W. Mother points to the fact that she completed a parenting assessment, completed domestic violence classes twice, submitted to drug screens, completed a psychological evaluation, had transportation and income, and continued to follow the requirements of her permanency plan. Mother again points to regaining custody of G.W. and her unsupervised visitation with A.W. and J.W.

The trial court found that Mother failed to manifest an ability and willingness to assume custody in her actions by failing to put A.W. and J.W. first. The trial court found that returning A.W. and J.W. to Mother’s custody would result in a substantial risk of harm to A.W. and J.W. due to Mother’s inability to maintain sufficient housing and failure to improve her parenting skills.

Mother continued her abusive relationship with Father, leading to her inability to obtain stable housing independent of Father. Once Mother left Father, she was able to make progress on her permanency plan to the point she had a trial home placement with G.W. and unsupervised visitation with A.W. and J.W.

However, as noted above, while Mother had custody of G.W., Mother chose to live with a paramour with a history of abuse. Her response when her paramour Nathan started to abuse G.W. was not to protect the child but instead to insist G.W. tell no one about what was happening. When G.W. did tell of the abuse that he was suffering and Mother became aware, instead of leaving the home that she was sharing with Nathan, Mother instead sent G.W. to live with Great Uncle from whose home G.W. had previously been removed because of abuse.

Furthermore, when Mother had unsupervised visitation, she also let A.W. and J.W. still see Father. Father had made no significant steps to improve his parenting abilities and continued to pose a threat of physical harm to them.

Alternatively, A.W. and J.W. have been in the same foster home since removal.

A.W. and J.W. have bonded with their foster family and have thrived in the environment. The foster family is fulfilling A.W. and J.W.’s needs, and A.W. and J.W. wish to remain there.

The evidence supports the trial court’s conclusion that Mother has failed to manifest an ability and willingness to assume custody of A.W. and J.W. and that returning A.W. and J.W. to Mother would pose a substantial risk of harm to them. The trial court’s determination that this ground for termination has been demonstrated is supported by clear and convincing evidence.

B. Best Interest Analysis

If a statutory ground for termination of parental rights has been shown by clear and convincing evidence, the focus shifts to what is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The Tennessee Supreme Court has summarized the law regarding the best interest analysis as follows:

Facts considered in the best interests 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 interests.” 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 General Assembly amended the best interest factors of Tennessee Code Annotated section 36-1-113(i) effective April 22, 2021. *See* 2021 Tenn. Pub. Acts, Ch.

190 § 1 (S.B. 205). As the petition in this case was filed prior to the effective date, the previous statute applies. *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022); *see also In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at *6 (Tenn. Ct. App. Jan. 10, 2023) (noting “[t]his court applies the versions of the parental termination statutes in effect on the date the petition was filed.”).

On appeal, Mother argues best interests pursuant to the expanded best interest factors of the post-amendment statute rather than the factors in effect at the time of the filing of the petition. While the trial court’s written order in the present case utilizes a lettering approach in delineating its best interest analysis that does not correspond precisely with the numbering of the pre-amendment statute, DCS is, nevertheless, correct that the trial court’s actual analysis plainly and properly tracks the pre-amendment version of the statute. We shall consider Mother’s best interest analysis as applied to the version of the statute in effect at the time of the filing of the petition, which was the version of the statute considered by the trial court. *See generally In re Bralynn A.*, M2021-01188-COA-R3-PT, 2022 WL 2826850, at *9 (Tenn. Ct. App. July 20, 2022), *perm. app. denied* (Aug. 12, 2022) (noting that there was “no reversible error when the trial court relies on the wrong factors because the old factors are essentially contained within the new factors”); *In re Navaiya R.*, M2021-01387-COA-R3-PT, 2022 WL 4374928, at *6 (Tenn. Ct. App. Sept. 22, 2022) (on appeal, the Court of Appeals applied the nine statutory factors in effect at the time the petition for termination was filed and found no reversible error when the trial court applied the expanded factors in its best interest analysis). But we also consider arguments Mother has made regarding any other relevant factors regarding the best interest analysis. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005) (noting that the statutory factors are a non-exhaustive list.)

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

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established

between the parent or guardian and the child;

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

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

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

Tenn. Code Ann. § 36-1-113(i) (effective Mar. 6, 2020, to Apr. 21, 2021).

The trial court found that Mother failed to obtain stable housing or demonstrate that she could parent A.W. and J.W. *See* Tenn. Code Ann. § 36-1-113(i)(1). The trial court concluded that Mother made no lasting changes to her lifestyle despite DCS's efforts through permanency plans, child and family team meetings, providing resources for housing options, and providing mental health, alcohol and drug, and parenting assessments. *See* Tenn. Code Ann. § 36-1-113(i)(2). The trial court did observe that evidence showed that Mother has engaged in regular visitation with A.W. and J.W., but the court expressed concern that during visitation she allowed Father to see A.W. and J.W. despite the court's orders preventing such contact. *See* Tenn. Code Ann. § 36-1-113(i)(3). The trial court found no meaningful parent/child relationship between Mother and A.W. and J.W. *See* Tenn. Code Ann. § 36-1-113(i)(4).

The trial court concluded that A.W. and J.W. are thriving in their pre-adoptive foster home together and that their needs are being met in that home. *See* Tenn. Code Ann. § 36-1-113(i)(5). The trial court found that it would be detrimental for A.W. and J.W. to change caregivers from their foster parents at this stage in their life. *See* Tenn. Code Ann. § 36-1-113(i)(5). The trial court determined that Mother failed to protect A.W. and J.W. from

Father's abuse. *See* Tenn. Code Ann. § 36-1-113(i)(6). The trial court found that Mother neglected A.W. and J.W. by exposing them to domestic violence and Father's substance abuse in the home. *See* Tenn. Code Ann. § 36-1-113(i)(6). The trial court concluded that the physical environment of the home was not healthy or safe nor could Mother safely parent A.W. and J.W. *See* Tenn. Code Ann. § 36-1-113(i)(7). Moreover, the trial court determined that Mother's mental and emotional state were detrimental to A.W. and J.W. and prevent Mother from effectively and safely parenting. *See* Tenn. Code Ann. § 36-1-113(i)(8).

These adverse findings against Mother's parental rights continuing are supported by the record, with the exception of the determination as to a lack of meaningful relationship between Mother and A.W. and J.W. Based upon the evidence presented, the trial court's conclusory determination on this point is insufficiently supported by the record. *See* Tenn. Code Ann. § 36-1-113(i)(4). There is insufficient evidence to demonstrate a meaningful relationship between Mother and A.W. and J.W., but there is also insufficient evidence to deny such a relationship. The evidence presented does suggest that A.W. and J.W. do not want to live with Mother. Additionally, while the trial court made no finding in relation to Mother's payment of child support,⁵ the evidence does preponderate in favor of Mother as to this ground based upon Ms. Baker's testimony and the evidence presented that she was paying child support. *See* Tenn. Code Ann. § 36-1-113(i)(9).

The trial court's concern for A.W. and J.W., which is reflected in its decision to terminate Mother's parental rights, was plainly animated by safety considerations. Mother repeatedly chose the interests of abusive partners over the safety and well-being of the Children. This recurring parenting deficiency exposed the children to abuse and resulted in a failure to properly address abuse that had occurred. Mother's response to the abuse of G.W. by her then-paramour Nathan reflects the unfortunate reality that despite repeated attempts by DCS and Mother's own efforts at compliance that she still continued to fall back into prioritizing abusive partners over the safety of the children. Mother's arguments that she completed her permanency plan requirements and demonstrated a lasting adjustment of circumstances are unpersuasive. Mother states that she progressed to a point of regaining custody of G.W. and unsupervised visitation with A.W. and J.W., but Mother overlooks that she subsequently lost custody and visitation based upon her repeated actions of ignoring court orders aimed at keeping the children safe. While Mother did divorce Father, she still allowed Father, in violation of court orders, to see the children.

Alternatively, the foster parents in the present case have created a stable and nurturing environment that has allowed A.W. and J.W. to move forward in a healthy and safe manner. Both are making progress in this environment. Unfortunately, Mother has simply failed to provide the type of home, or show that she is likely to be able to do so, in which A.W. and J.W. will be safe. The record in the present case supports the trial court's

⁵ The trial court stated "[Father] has not paid child support consistent with the child support guidelines."

conclusion that termination is in the best interests of A.W. and J.W. by clear and convincing evidence.

IV.

The judgment of the Anderson County Juvenile Court is affirmed. Costs of this appeal are taxed to Appellant T.W., for which execution may issue if necessary.

JEFFREY USMAN, JUDGE