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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 RILEY B. ET AL.

**Appeal from the Juvenile Court for Sevier County
Nos. 21-1100; 21-1101 Jeffrey D. Rader, Judge**

No. E2022-00684-COA-R3-PT

A mother appeals the trial court’s decision to terminate her parental rights based on the grounds of (1) abandonment by failure to support; (2) persistence of conditions; and (3) failure to manifest an ability and willingness to personally assume custody or financial responsibility of the child. She further challenges the trial court’s finding by clear and convincing evidence that termination of her parental rights was in the best interest of the children. We reverse the trial court’s finding of abandonment by failure to provide a suitable home, but we affirm the trial court in all other respects.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Vicki Tucci Krusel, Seymour, Tennessee, for the appellant, Heather H.

Jonathan Skrmetti, Attorney General and Reporter, and Jordan Keith Crews, Senior Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Heather H. (“Mother”) and Dustin B. (“Father”) are the parents of a son and daughter (collectively, “the children”) born in 2010 and 2012, respectively. On June 25, 2020, the Tennessee Department of Children’s Services (“DCS” or “the Department”) filed a Petition to Transfer Temporary Legal Custody alleging that the children were dependent and neglected due to the parents’ methamphetamine use and environmental concerns in the

home. By Ex Parte Custody Order also entered on June 25, 2020, the children were temporarily placed with family members. Later, however, the family members notified the Department that the daughter was exhibiting “sexually reactive behaviors” and that they were “unwilling to keep custody of the children due to feeling that more intensive services [we]re needed.” On July 10, 2020, DCS filed a Petition for Temporary Legal Custody and for Ex Parte Order, and the children were placed in DCS custody on that same day. The daughter was initially placed in a residential facility for intensive therapy, and the son was placed with a foster family. By order entered July 14, 2020, Mother and Father were allowed supervised visitation with the children. On October 7, 2020, Mother and Father stipulated to a finding that the children were dependent and neglected due to the parents’ substance abuse issues. In July 2021, the daughter was placed in a foster home and, in February 2022, the son joined her in the same foster home.

On October 4, 2021, DCS filed a petition to terminate the rights of Mother and Father. The Sevier County Juvenile Court heard the petition on April 27, 2022. The court heard testimony from Mother; Father; foster mother; and Elizabeth Norwood, resource coordinator from Omni Visions. Deposition testimony from DCS foster care manager, Mikayla Morie was also presented at the hearing. The relevant testimony from these witnesses will be summarized as it relates to issues presented on appeal. On May 5, 2022, the trial court entered an order terminating both parents’ parental rights on the following grounds: Tenn. Code Ann. § 36-1-113(g)(14), failure to manifest an ability and willingness to personally assume custody; Tenn. Code Ann. § 36-1-113(g)(3), persistence of conditions; and Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(ii)(c), abandonment by failure to provide a suitable home. The court also found clear and convincing evidence that termination of the parents’ rights was in the best interest of the children. Mother appeals the three grounds for termination as well as the court’s finding that termination is in the best interest of the children.¹

STANDARD OF REVIEW

Under both the federal and state constitutions, a parent has a fundamental right to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 249-50 (Tenn. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996) (citing *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Although this right is fundamental, it is not absolute and may be terminated in certain situations. *In re Angela E.*, 303 S.W.3d at 250. Our legislature has identified ““those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.”” *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B., IV.*, Nos. M2004-

¹ Father did not appeal the termination of his parental rights.

00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)).

Tennessee Code Annotated section 36-1-113 provides the grounds and procedures for terminating parental rights. First, a petitioner seeking to terminate parental rights must prove that at least one ground for termination exists. Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d at 251. Second, a petitioner must prove that terminating parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The termination of a parent’s rights is one of the most serious decisions courts make because “[t]erminating parental rights has the legal effect of reducing the parent to the role of a complete stranger.” *In re W.B., IV*, 2005 WL 1021618, at *6. Moreover, termination of parental rights severs “forever all legal rights and obligations of the parent.” *Id.* (quoting Tenn. Code Ann. § 36-1-113(l)(1)). Consequently, a parent has a constitutional right to fundamentally fair procedures during termination proceedings. *In re Hannah C.*, No. M2016-02052-COA-R3-PT, 2018 WL 558522, at *2 (Tenn. Ct. App. Jan. 24, 2018) (citing *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016)).

Tennessee law ensures fundamental fairness in termination proceedings by requiring a heightened standard of proof—clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *In re Carrington H.*, 483 S.W.3d at 522. Before a parent’s rights may be terminated, a petitioner must prove both the grounds and the child’s best interest by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. “Clear and convincing evidence ‘establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *In re Serenity B.*, No. M2013-02685-COA-R3-PT, 2014 WL 2168553, at *2 (Tenn. Ct. App. May 21, 2014) (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004)).

We review the trial court’s findings of fact de novo with a presumption of correctness unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *In re Serenity B.*, 2014 WL 2168553, at *2. In light of the heightened standard of proof, we must then make our 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 (quoting *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)).

ANALYSIS

I. Grounds for Termination

A. Failure to manifest an ability and willingness to personally assume custody

The trial court terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated when (1) he or she "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 (2) "placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14). Both of these elements must be proven by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1).

The Tennessee Supreme Court has held the first element of Tenn. Code Ann. § 36-1-113(g)(14) "places a conjunctive obligation on a parent . . . to manifest *both* an ability and willingness to personally assume legal and physical custody or financial responsibility for the child." *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (emphasis added). Due to this conjunctive obligation on a parent, a petitioner seeking to terminate a parent's rights under this ground need only prove that a parent failed to manifest *either* an ability *or* a willingness to assume custody. *Id.* (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13-14 (Tenn. Ct. App. June 20, 2018)). "Ability focuses on the parent's lifestyle and circumstances[,] and willingness focuses on the parent's attempts "to overcome the obstacles that prevent [him or her] from assuming custody or financial responsibility for the child." *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). Thus, a parent's mere desire to reunite with his or her child is insufficient to demonstrate an ability or a willingness. *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019).

Regarding the time period during which we must focus our inquiry on Mother's conduct, this Court has held:

[T]he critical time period for this ground is the time preceding the filing of the petition to terminate parental rights, *see In re M.E.N.J.*, No. E2017-01074-COA-R3-PT, 2017 WL 6603658, at *6 (Tenn. Ct. App. Dec. 27, 2017), though this court will also consider the parent's actions following the filing of the petition and up to the time of trial, *see In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. April 4, 2018).

In re Jeremiah S., No. W2019-00610-COA-R3-PT, 2020 WL 1951880, at *7 (Tenn. Ct. App. Apr. 23, 2020); *see also In re Kendall K.*, No. M2021-01463-COA-R3-PT, 2022 WL 10331612, at *7 (Tenn. Ct. App. Oct. 18, 2022).

Here, the trial court made the following findings regarding this termination ground:

14. Neither parent has made significant changes to the circumstances that were in place at the time the children were placed into DCS custody:

a. Although each parent has passed drug screens at various points in the case, they then fail screens once again, indicating that they cannot maintain sobriety. They have both also had gaps in time when they refused to appear for drug screens. Mother completed a 30-day inpatient treatment program in April 2021 but was failing drug screens again the following month. Most recently, in September 2021 their hair follicle results were both positive for methamphetamine and amphetamine.

b. The parents are now living with a family member who also uses methamphetamine.

c. The mother is not consistently participating in mental health treatment or medication management.

15. Placing the children in either parent’s legal and physical custody would pose a risk of substantial harm to the physical and/or psychological welfare of the children. The children would be going back to the same environment of drug use. The parents now live with a family member who, by the mother’s own account, is a drug user. The [daughter] has participated in residential treatment to address sexually reactive behaviors and needs a consistent and stable environment, as well as parents who are able to get her to her therapy and medication management appointments.

In reaching its conclusion that Mother had not manifested an ability or willingness to assume custody of the children, the court focused on Mother’s inability to maintain a sober lifestyle. A review of the timeline of the procedural history of the case as well as Mother’s drug screens is helpful to illustrate her challenges with sobriety:

July 10, 2020:	Children are placed in DCS custody
July 28, 2020:	Mother positive for amphetamine, methamphetamine, and marijuana (THC)
October 7, 2020:	Parents stipulate to a finding that the children are “dependent and neglected”
December 10, 2020:	Mother positive for amphetamine, methamphetamine, and marijuana (THC)
March – April 2021:	Mother completes 30-day inpatient rehabilitation

April 27, 2021:	Mother positive for amphetamine and methamphetamine
May 5, 2021:	Negative drug screen
June 9, 2021:	Negative drug screen
July 29, 2021:	Mother positive for amphetamine, methamphetamine, and marijuana (THC)
August 16, 2021:	Mother positive for amphetamine, methamphetamine, and marijuana (THC)
September 9, 2021:	Mother positive for amphetamine, methamphetamine, and cannabinoids
October 4, 2021:	DCS files petition to terminate parental rights
December 1, 2021:	Mother positive for amphetamine and methamphetamine
February 25, 2022:	Mother did not complete drug screening and admitted drug use
March 21, 2022:	Mother positive for methamphetamine on hair follicle test
April 27, 2022:	Hearing on termination petition

Mother testified regarding the effects she felt when high on drugs as well as the impact her drug usage had on her ability to parent:

Q. When you use methamphetamine how did that feel when you were high on methamphetamine?

A. I was numb.

Q. Could you remember things that happened when you were high on methamphetamine?

A. Yeah.

Q. Do you feel you could effectively parent when you were high on methamphetamine?

A. No. No, ma'am.

Q. How long would that high usually last?

A. Hours. It just depend. Sometimes a day, a day.

Q. And how long would the come-down period last?

A. About two days.

Q. How did you feel when you were coming down off methamphetamine?

A. Sick. Headaches, fatigue, nausea. Just didn't feel very good at all.

The evidence shows that despite completing a thirty-day rehabilitation program, and despite having two months with negative drug screens, Mother repeatedly relapsed. Indeed, Mother confirmed she had a propensity to relapse:

Q. And did you also fail -- I think you've reported that you stated the last time you used was January of this year. January 21st of 2022.

A. Yes.

Q. So you're pretty much good for about two to three months, and then you end up relapsing; is that correct?

A. Uh-huh (affirmative).

Mother recognized that she could not effectively parent when she was using drugs. Her most recent drug screen, approximately one month before trial, was positive for methamphetamine, and she acknowledged her pattern of relapse.

We acknowledge that Mother's testimony conflicts with the trial court's finding that "[t]he parents are now living with a family member who also uses methamphetamine." Mother stated that she had recently obtained an apartment and was in the process of distancing herself from Father (who was an active drug user and lived with drug abusers). We commend Mother for these efforts; however, these improvements have not overcome the evidence showing her drug issues remain unresolved. In *In re Evan M.*, No. M2020-01673-COA-R3-PT, 2021 WL 3506801, at *12 (Tenn. Ct. App. Aug. 10, 2021), the court cited a "long history of substance abuse, which has not been fully addressed or resolved" as evidence that a parent has failed to manifest an ability to assume custody. In light of Mother's recent positive drug screen, we agree with the trial court that clear and convincing evidence shows that she failed to manifest an ability to assume custody of the children.

Regarding the second element of Tenn. Code Ann. § 36-1-113(g)(14), the evidence in the record demonstrates that placing the children in Mother's 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). "Substantial harm" requires (1) "a real hazard or danger that is not minor, trivial, or insignificant" and, (2) "[w]hile the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not." *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *8 (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)). Mother's positive drug screens coupled with her testimony that she could not effectively parent the children while on drugs, show that placing the children in her custody "would pose a risk of substantial harm" to the welfare of the children. Tenn. Code Ann. § 36-1-113(g)(14). We conclude that DCS proved this ground for termination by clear and convincing evidence.

B. Persistence of conditions

The trial court also terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). This ground is often referred to as "persistence of conditions." *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). Persistence of conditions may be a basis for terminating a parent's parental rights if:

The child has been removed from the home or the physical or legal custody of a parent . . . for a period of six (6) months by a court order entered at any

stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

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

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

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

Tenn. Code Ann. § 36-1-113(g)(3)(A). A petitioner seeking to terminate parental rights pursuant to this ground must prove each of the statutory elements by clear and convincing evidence. *In re Justin D.*, No. E2019-00589-COA-R3-PT, 2020 WL 4473032, at *9 (Tenn. Ct. App. Aug. 4, 2020) (citing *In re Michael B.*, No. M2019-01486-COA-R3-PT, 2020 WL 2988932, at *10 (Tenn. Ct. App. June 4, 2020)).

The persistence of conditions ground “focuse[s] on the results of the parent’s efforts at improvement rather than the mere fact that he or she had made them.” *In re Audrey S.*, 182 S.W.3d at 874. The purpose behind this ground for termination is “to prevent the child’s lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child.” *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)). Therefore, the court must determine “the likelihood that the child can be safely returned to the custody of the [parent], not whether the child can safely remain in foster care.” *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000). Moreover, “[a] parent’s continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent’s care.” *In re Nevada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016) (quoting *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008)).

We begin our analysis by examining whether the threshold requirements of Tenn. Code Ann. § 36-1-113(g)(3)(A) have been met, because the persistence of conditions ground only applies if the child has been “removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at

any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child.” See *In re Lucas S.*, No. M2019-01969-COA-R3-PT, 2021 WL 710841, at *4 (Tenn. Ct. App. Feb. 24, 2021). In this case, DCS filed a Petition to Transfer Temporary Legal Custody, and for Ex Parte Order on June 25, 2020, alleging that the children were dependent and neglected due to the parents’ methamphetamine use and environmental concerns in the home. Also, on June 25, 2020, the children were placed in the temporary custody of family members by an Ex Parte Protective Custody Order entered in the juvenile court. Approximately fifteen months after the children were removed from Mother’s custody, DCS filed the petition to terminate parental rights. Therefore, the threshold requirements are met because the children had been removed from the physical or legal custody of Mother for a period of at least six months by a court order entered during proceedings in which a petition was filed alleging that the children were dependent and neglected. See Tenn. Code Ann. § 36-1-113(g)(3)(A); *In re River L.*, No. M2019-02049-COA-R3-PT, 2021 WL 830006, at *13 (Tenn. Ct. App. Mar. 4, 2021) (applying the persistence of conditions ground where the petition for dependency and neglect was filed on the same day children were placed in DCS custody).

The primary reasons for the children’s removal from Mother’s care were her drug use and environmental concerns. Mother testified as follows about the reasons for removal:

Q. What’s your understanding of why they were originally removed from you and [Father]?

A. For drug use.

Q. What drugs were you using at the time?

A. Methamphetamine.

Mother attempts to deemphasize her drug use. As outlined in the prior section, however, Mother continued to struggle with drug abuse throughout the pendency of this case, and as recently as a month before trial, she tested positive for methamphetamine.²

This Court has recognized that parents with addiction can have “false starts and set backs, as well as successes and, regrettably, backsliding.” *In re Joshua S.*, No. E2010-01331-COA-R3-PT, 2011 WL 2464730, at *12 (Tenn. Ct. App. June 16, 2011). Here, Mother’s false starts, setbacks, and backsliding have been more frequent and sustained than her successes. Unfortunately, in the two years since the children have been removed from Mother’s custody, Mother has not established the stability necessary to assume custody.

² Mother attempts to downplay the significance of the March 2022 failed drug screen, pointing to Counsel’s statement during closing arguments that “the failed screen for methamphetamines in March was only positive as the drugs were leaving her system, and if the test has been performed one month later there would have been no methamphetamines in her system at all as she was so close to the cutoff.” However, these assertions of counsel “are neither evidence nor a substitute for testimony.” *Elliott v. Cobb*, 320 S.W.3d 246, 250 (Tenn. 2010). There was no testimony (expert or otherwise) regarding the specific results of the drug test. Counsel’s conjecture about Mother’s ability to remain sober is purely hypothetical.

She testified that she obtained suitable housing a few days before trial; however, for the prior two years she lived with active drug users in various locations. *See Dep't of Children's Servs. v. C.B.H.*, No. E2003-03000-COA-R3-PT, 2004 WL 1698209, at *2 (Tenn. Ct. App. July 29, 2004) (“[T]he history of past behavior is relevant to the issue of future behavior.”). We agree with the trial court’s determination that the conditions that led to the children’s removal—namely drug abuse and environmental concerns—persist, and the evidence supports the trial court’s finding by clear and convincing evidence that there is little chance those conditions will be remedied such that the children will be able to be safely returned to Mother’s care in the “near future.” Furthermore, in light of Mother’s continued drug use and the children’s placement with foster parents who wish to adopt them, continuation of the parent-child relationship diminishes the children’s chances of being placed into a safe, stable, and permanent home. We conclude that DCS proved this ground for termination, Tenn. Code Ann. § 36-1-113(g)(3), by clear and convincing evidence.

C. Abandonment by failure to provide a suitable home

A parent’s rights may be terminated for abandoning his or her child. Tenn. Code Ann. § 36-1-113(g)(1). Tennessee Code Annotated section 36-1-102(1)(A) provides five alternative definitions of “abandonment,” but only the definition provided in subsection (ii) is relevant in this case. That subsection defines “abandonment” 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 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).

For purposes of this ground, DCS must make “reasonable efforts” to assist parents in obtaining a suitable home by using its “superior insight and training.” *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015) (quoting *Dep’t of Children’s Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008)). To be considered reasonable, the Department’s efforts need not be “Herculean,” *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014), but they must be equal to or greater than those of the parent. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). A suitable home requires “more than a proper physical living location.” *In re Daniel B.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Dep’t of Children’s Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that “[a]ppropriate care and attention must be given to the child,” *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016), and that the home “be free of drugs and domestic violence,” *In re Hannah H.*, 2014 WL 2587397, at *9.

In its petition to transfer temporary legal custody, DCS alleged that the children were dependent and neglected and should be removed from the parents’ custody because, among other reasons, the parents were using methamphetamine. On the same day the petition was filed, the children were placed with family members by an ex parte order. Later, the children were placed in DCS custody. Therefore, the children were removed from Mother’s custody and placed in DCS custody during proceedings alleging that the children were dependent and neglected. DCS established the first requirement of this ground for termination. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a).

Regarding Tenn. Code Ann. § 36-1-102(1)(A)(ii)(b), the juvenile court found that “[r]easonable efforts were made to prevent the children’s removal from the home” and that “[i]t was reasonable to make no effort to maintain the child in the home due to the circumstances of the family and the child[ren]” in a June 25, 2020 ex parte order that “brought [the children] into the protective jurisdiction of” the juvenile court. Therefore, the second requirement of the ground is established.

Next, we consider whether the Department made reasonable efforts to assist Mother following removal of the children. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). This Court has previously stated that DCS “may establish this ground by offering proof of reasonable efforts during *any four-month period* following a child’s removal.” *In re Roderick R.*, No.

E2017-01504-COA-R3-PT, 2018 WL 1748000, at *11 n.13 (Tenn. Ct. App. Apr. 11, 2018); *see also In re Rahjada W.*, No. E2019-01798-COA-R3-PT, 2020 WL 2893434, at *5 (Tenn. Ct. App. June 3, 2020). Following removal of the children from Mother's custody, DCS created permanency plans, administered drug screens, paid for Mother's inpatient treatment, arranged for supervised visits with the children, conducted a home visit, provided Mother with resources for housing in the area, and sent a letter to the housing authority on Mother's behalf. Mother does not dispute that DCS made reasonable efforts in this matter, and we agree that DCS did make reasonable efforts to assist Mother following the children's removal.

We continue our analysis under Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c) to determine whether DCS provided clear and convincing evidence that Mother had "not made reciprocal reasonable efforts to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that [she] will be able to provide a suitable home for the child at an early date." Mother argues that the trial court erroneously found that she failed to make reciprocal reasonable efforts and erroneously concluded that she demonstrated a lack of concern for the children. After carefully reviewing the evidence, we agree with Mother.

Regarding her efforts to provide a suitable home, Mother testified as follows about her living situation at the time of trial:

Q. All right. What's your housing situation as of today?

A. I just got an apartment actually Monday, so I signed the lease and I have got keys. So I do have housing.

Q. Is that with public housing in Sevier County?

A. Yes, ma'am.

Mother testified that the apartment she obtained had three bedrooms and one bathroom. In order to obtain this housing, she distanced herself from Father (who continued to abuse drugs at the time of trial), and she held down a job at Dairy Queen making \$14.25 per hour for nearly a year. Mother also testified that she consistently attended therapy for the previous six months and felt "mentally stable" and "really strong." This Court has held that "a parent's compliance with counseling requirements is "directly related to the establishment and maintenance of a suitable home.""*In re Alexis C.*, No. M2017-02052-COA-R3-PT, 2018 WL 4092048, at *5 (Tenn. Ct. App. Aug. 28, 2018) (quoting *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016)). We find Mother's efforts to obtain housing, address her mental health issues, and maintain a job were significant and reasonable efforts toward providing a suitable home for her children. Although Mother did relapse and has had difficulty maintaining her sobriety throughout the pendency of the case, she attended bi-monthly visitation with the children and maintained a bond with them. She also paid child support for the children during the pendency of the case, and she provided food and gifts for the

children during some visits, including bringing a birthday cake and birthday gifts for her daughter's birthday. These efforts on Mother's part demonstrate concern for the children.

In sum, Mother testified that she acquired a suitable physical structure for the children; however, DCS had not done a home visit at the time of the hearing to substantiate Mother's testimony. Mother was distancing herself from Father, she was making efforts to discontinue abusing drugs (although she had setbacks and relapses), she was working on her mental health through therapy, and she showed concern for the children by continually attending visitation and providing monetary support for the children. In light of this evidence, we find that DCS did not prove by clear and convincing evidence that Mother did not make "reciprocal reasonable efforts to provide a suitable home" or that she did not demonstrate concern for the children. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). We therefore reverse the trial court's finding that Tenn. Code Ann. § 36-1-102(1)(A)(ii) was proven by clear and convincing evidence.

II. Best interest

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Mother's parental rights, we must next consider whether the trial court properly found that termination of Mother's parental rights was in the best interest of the children. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Audrey S.*, 182 S.W.3d at 860.

After a court finds that clear and convincing evidence exists to support a ground for termination, the child's interests diverge from those of the parent and the court focuses on the child's best interests. *In re Audrey S.*, 182 S.W.3d at 877. A court must view the child's best interest from the perspective of the child, not that of the parent. *Id.* at 878. A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent's rights be terminated. *Id.* at 877. Because some parental misconduct is redeemable, our termination of parental rights statutes recognize that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* A court's factual findings in connection with its best interest analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). Once a court makes the underlying factual findings, it should "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." *Id.*

"The best interest analysis is a fact-intensive inquiry, and each case is unique." *In re Kenneth D.*, No. M2021-00214-COA-R3-PT, 2022 WL 556739, at *7 (Tenn. Ct. App. Feb. 24, 2022) (citing *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004)). A trial court must consider the factors enumerated in Tenn. Code Ann. § 36-1-113(i), but it is not required to find that each of the enumerated factors exists before concluding that it is in the best interest of the child to terminate a parent's rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Although in some circumstances "the consideration of

one factor may very well dictate the outcome of the analysis,” *In re Audrey S.*, 182 S.W.3d at 878, a court is still obligated to consider “all the factors and all the proof.” *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017).

The Tennessee General Assembly amended the statutory best-interest factors in 2021 “by deleting the previous subsection in its entirety and substituting a new subsection providing, inter alia, twenty factors to be considered in determining a child’s best interest.” *In re Jeremiah G.*, No. M2022-00869-COA-R3-PT, 2023 WL 2784608, at *9 (Tenn. Ct. App. Apr. 5, 2023); see 2021 TENN. PUB. ACTS ch. 190 § 1 (S.B. 205), eff. Apr. 22, 2021. Because DCS filed the termination petition after April 22, 2021, the revised best interest factors apply in this case. See *In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (quoting *In re Tianna B.*, No. E2015-02189-COA-R3-PT, 2016 WL 3729386, at *7 (Tenn. Ct. App. July 6, 2016)) (holding the version of a termination statute ““that was in force when the petition was filed governs this case”).

The trial court reviewed each of the twenty factors and made specific findings as to each relevant factor. Specifically, the trial court determined that thirteen factors ((A), (B), (C), (H), (J), (K), (L), (M), (N), (P), (Q), (R), and (T)) weighed in favor of terminating Mother’s parental rights; two factors ((D) and (E)) weighed against terminating Mother’s rights, and five factors were inapplicable or neutral ((F), (G), (I), (O), and (S)). We will review each factor in turn.

As for the first factor, the effect that termination will have on the children’s need for stability and continuity of placement, Tenn. Code Ann. § 36-1-113(i)(1)(A), the trial court found that termination of Mother’s parental rights would have a beneficial effect:

These children are getting stability in their current placement. They need this stability and continuity especially considering their behavioral issues. The children have been through a great deal and it is not surprising that they are dealing with these issues. Thus, the Court finds that this factor weighs heavily in favor of terminating [Mother’s] parental rights.

Mother’s failure to provide solid evidence that she remedied her drug use raises concern that she will not be able to provide continuity and stability for the children. While in DCS custody, the children have experienced a change in caretakers and physical environments, but their therapeutic needs have been met, and their current foster family indicates a desire to adopt them. The evidence in the record preponderates in favor of the trial court’s finding.

Regarding “[t]he effect [of] a change of caretakers and physical environment,” Tenn. Code Ann. § 36-1-113(i)(1)(B), the trial court found that a change of caretakers would have a negative effect on the children’s emotional and psychological welfare:

The children are doing well in the foster home. The Court cannot place the children back with the parents because the father will be gone for a year and the mother just got housing. As such, the Court finds that this factor weighs heavily in favor of terminating the Respondents' parental rights.

The evidence in the record preponderates in favor of this finding. Both children have behavioral issues. The evidence shows that the daughter has PTSD, ADHD, and an adjustment disorder and the son has "unspecified ADHD" and "unspecified anxiety disorder." Since being in DCS custody, the children have routinely participated in individual therapy, sibling therapy, and medication management. The DCS case manager, Ms. Morie, testified regarding the children's anxieties about their custodial situation:

Q. Do the kids ever make comments about the state of custody or the state of being in foster care?

A. Yes. At the last visit that I supervised this month, actually, [the son] became very upset. He said that his parents weren't doing what they were supposed to do and that he was going to die in foster care because they weren't doing what they were supposed to do. So there's a lot of anxiety surrounding that for him.

Ms. Norwood, the resource coordinator for Omni Visions, testified that the daughter expressed that she was "concerned about the people that are currently in her life that . . . would disappear" if she was to go back home to her parents. Another change in the children's environment is likely to have a negative effect on their emotional and psychological welfare.

The trial court then considered whether Mother had consistently met the children's needs, Tenn. Code Ann. § 36-1-113(i)(1)(C), and it found that Mother had not demonstrated continuity or stability in this regard:

[T]he parents have not demonstrated continuity and stability in meeting the children's basic material, educational, housing and safety needs. All of these things are in limbo. The Court does not believe that the parents have the ability to obtain or maintain an environment for the children that is healthy, stable, and consistent. Thus, the Court finds that this factor weighs in favor of terminating the Respondents' parental rights.

Mother's recent positive drug screen coupled with her testimony that she was unable to effectively parent the children when under the influence of drugs supports the trial court's finding. Indeed, the daughter reported that "there was a time where she would have to climb on the stove to get food out of the cabinets because her parents were in their room all day." Mother's inability to remain consistently sober has affected her ability to

demonstrate continuity and stability in meeting the children's needs. The evidence preponderates in favor of the trial court's finding.

The trial court determined that the next two factors concerning "parental attachment," Tenn. Code Ann. § 36-1-113(i)(1)(D), and whether the parent has maintained regular visitation "to cultivate a positive relationship with the child," Tenn. Code Ann. § 36-1-113(i)(E), both weighed against termination of parental rights. We agree. Unlike many of the termination cases analyzed by this Court, the record shows that Mother has maintained a meaningful relationship with the children. Ms. Morie testified as follows about parental visitation:

A. The[] [children] seem to have a very strong bond with the parents.

Q. And parents are supportive of them when they're in visits?

A. Yes. They do a very good job, actually, in visits supporting their anger and letting them know that's a valid emotion.

Q. And you say they're visiting -- are they visiting twice a month?

A. Yes.

Q. How long are those visits?

A. Two hours each.

Evidence showed that the Mother provided gifts for the children during visitation and acted "appropriately." The children remain bonded with Mother; thus, we agree these factors weigh strongly against termination.

The trial court found that the next two factors—"[w]hether the child is fearful of living in the parent's home," Tenn. Code Ann. § 36-1-113(i)(1)(F), and "[w]hether 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," Tenn. Code Ann. § 36-1-113(i)(1)(G)—did "not weigh in favor of, or against, termination." We agree. There was no significant testimony on these factors.

The next factor is "[w]hether the child has created a healthy parental attachment with another person or persons in the absence of the parent." Tenn. Code Ann. § 36-1-113(i)(1)(H). The trial court found this factor weighed in favor of termination, stating: "The children are bonded with the foster mother. Both parents admit that the children seem well cared for in the foster home." The foster mother testified that the daughter had resided with her for approximately nine months, and the son moved in with the foster mother approximately two and a half months prior to the hearing. The foster mother testified that she and the son were "still working on our relationship and getting that trust and the bond going." In light of the son's relatively recent placement with the foster mother, we cannot say that the evidence preponderates in favor of the trial court's finding that he has developed a "healthy parental attachment" with foster mother. Indeed, Ms. Morie testified:

Q. And ha[ve] the children brought up or discussed with you about their permanency and what that would look like?

A. Yes. [The son] still holds a hope and, you know, need that he feels he wants to go home. [The daughter] has said to me that she feels like she's going to end up being adopted.

Q. And is she okay with that?

A. She seems to be.

However, the evidence shows that the daughter had developed more of a "healthy parental attachment" at the time of trial. Thus, we find this factor is neutral or weighs only slightly in favor of termination.

The trial court found the next factor inapplicable. We agree that there was little evidence regarding "[w]hether 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." Tenn. Code Ann. § 36-1-113(i)(1)(I).

The question posed by the next factor is whether Mother has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the children to be in her home. Tenn. Code Ann. § 36-1-113(i)(1)(J). The trial court found that this factor weighed in favor of termination: "The parents are not in a better position because they have not followed through and successfully addressed their drug issues." Mother's residential circumstances had recently improved, but there are still concerns about Mother's substance abuse. Therefore, we agree that the evidence regarding this factor weighs in favor of terminating Mother's parental rights.

The next factor is whether Mother "has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions." Tenn. Code Ann. § 36-1-113(i)(1)(K). The trial court found that this factor weighed in favor termination:

[T]he Court finds that it is in the children's best interest for termination to be granted, because the parents have not taken advantage of available programs, services, or community resources to assist them in making a lasting adjustment of circumstances, conduct and/or conditions. DCS has tried to assist in all aspects and these efforts have not been accepted.

We disagree with the trial court's assessment of this factor with respect to Mother. We find that the evidence shows Mother did take advantage of available services. She completed her alcohol and drug assessment and parenting assessment. She completed an outpatient program, participated in individual therapy, and gained housing. Mother continued to struggle with drug issues, but she did participate in available programs and

resources to improve her circumstances to assist in making lasting adjustments to her circumstances. We respectfully disagree with the trial court and find this factor weighs against termination.

The next factor involves whether DCS made reasonable efforts to assist Mother in making a lasting adjustment while the children were in DCS custody. Tenn. Code Ann. § 36-1-113(i)(1)(L). The trial court found that this factor weighed in favor of termination because “DCS tried to assist both parents” and “the mother reports she has only been clean for 2-3 months.” Mother does not dispute that DCS made reasonable efforts and the evidence shows that DCS offered services that were reasonably related to remedying the conditions that necessitated foster care. The evidence preponderates in favor of the trial court’s finding that DCS made reasonable efforts to assist Mother. Thus, this factor favors terminating Mother’s parental rights.

The next factor is whether Mother “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[.]” Tenn. Code Ann. § 36-1-113(i)(1)(M). The trial court found that this factor weighed in favor of termination: “The parents have had almost two years to be in a position for a return of custody and they are not there yet.” We agree. Mother waited until the eleventh hour to obtain housing and continued to test positive for drugs the month prior to the hearing. The evidence does not preponderate against the trial court’s finding that this factor weighs in favor of termination.

The next factor to consider is 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.” Tenn. Code Ann. § 36-1-113(i)(1)(N). The trial court found that this factor weighed in favor of termination. We agree. The parents stipulated to a finding that they both neglected the children due to their drug use. The evidence does not preponderate against the trial court’s finding that this factor weighs in favor of termination.

The next factor is “[w]hether the parent has ever provided safe and stable care for the child or any other child.” Tenn. Code Ann. § 36-1-113(i)(1)(O). The court found this factor did “not weigh in favor of, or against termination.” Despite the fact that the children were nearly ten and eight years old when they were removed from their parents’ custody, there was very little testimony regarding the early years of the children’s lives. Father testified that the children were always well taken care of, and Mother testified that the children were “her world.” Nevertheless, there was a negligible amount of testimony elicited regarding how long Mother was able to provide safe and stable care for the children before her drug abuse caused DCS to become involved. Therefore, we agree that this factor does not weigh in favor of or against termination.

The next factor requires us to consider whether Mother has “demonstrated an understanding of the basic and specific needs required for the child[ren] to thrive.” Tenn. Code Ann. § 36-1-113(i)(1)(P). The trial court found that this factor weighed in favor of termination because, “The parents have not demonstrated that they can provide a home free from drug use.” We interpret this factor to focus on Mother’s ability to *understand* the children’s needs, and her testimony indicates she does understand their medical conditions, their need for therapy, their medications, and the fact that they have legitimate anger stemming from their current circumstances. Mother also understands that the children need a home free from drugs, and she has attempted to provide that through her recent acquisition of housing away from Father and other family members who use drugs. Thus, contrary to the trial court’s finding, we find this ground is neutral or weighs only slightly in favor of termination.

The next factor is whether Mother has “demonstrated the ability and commitment to creating and maintaining a home that meets [the children’s] basic and specific needs and in which the child can thrive.” Tenn. Code Ann. § 36-1-113(i)(1)(Q). The trial court found that this factor weighed in favor of termination due to the Mother’s unresolved drug issues. The evidence preponderates in favor of this finding.

Next, we consider whether the physical environment of Mother’s home is healthy and safe for the children. Tenn. Code Ann. § 36-1-113(i)(1)(R). The trial court held:

[T]he physical environment of the parent’s home is not healthy and safe for the children. The parents both resided with the maternal grandfather who also uses methamphetamine. The father still lives there and admits to using methamphetamine with the grandfather. The mother partially resides with the father. Methamphetamine is an accepted practice in that home.

The evidence shows that at the time of trial, Mother had recently obtained housing away from Father and other family members who abused drugs. This was a positive step. However, the Department had not been able to visit the apartment to corroborate that it was a healthy and safe environment for the children. Therefore, we find this factor is neutral.

Tennessee Code Annotated section § 36-1-113(i)(1)(S) poses the question of whether Mother has consistently provided more than token financial support for the children. The trial court found this factor “not applicable in this matter and does not weigh in favor of, or against, termination.” The record contains very little evidence concerning Mother’s ability to provide child support. She made \$14.25 per hour working at Dairy Queen, and she provided approximately \$500 in child support to the children over a nine-month period. Without more evidence of her expenses, however, it is difficult to determine whether this constitutes “token financial support.” Accordingly, we agree with the trial court’s decision not to afford any particular weight to this factor.

The final factor to be considered is “[w]hether 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)(1)(T). The trial court found this factor weighed in favor of termination, holding: “The Court is concerned about the parents’ continued drug use and their ability to provide a safe environment. The mother also admitted to using drugs as a coping mechanism.” Mother’s testimony regarding her abuse of drugs as a coping mechanism is as follows:

Q. Were you using [drugs] to self-medicate from mental health issues?

A. Yes, absolutely.

Q. What are some of your mental health issues you’ve struggled with?

A. Co-dependency. I co-depended on my mother constantly. And she had passed away in 2019 and I just -- I didn’t know what to co-depend on and I picked up drugs as a co-dependency.

Q. You had a coping mechanism?

A. Yes, ma’am.

Q. What types of substance abuse treatments have you gone through?

A. I’ve done IOP and I did rehab. Sorry.

Q. Take a deep breath.

A. I did a thirty day rehab in Journey Pure and completed the program.

Mother also testified that she had been consistently in therapy and was feeling “mentally stable” and “strong.” Like the trial court, we are concerned with Mother’s ability to remain sober given her testimony and drug screens showing her tendency to relapse. The evidence shows that Mother has been working on her mental and emotional fitness, and we acknowledge the challenge of losing a parent and the effect of that loss on one’s mental health. Nevertheless, we must view this factor from the viewpoint of the children, and we thus conclude that this factor weighs in favor of termination.

As the trial court stated in its oral ruling:

[U]nder this record, the Court believes that the Department has met its burden. And it doesn’t give me any pleasure whatsoever to say that. But it certainly is [a] circumstance where we’re looking at parents who have continuously throughout the time these children were placed in custody, and up until today have continued to struggle with drug issues and the conditions that brought the children into custody. And there’s no assurance in this Court’s mind that in another month or month and a half, especially as it relates to the Mother’s history, we’re not right back where we were.

We agree with this summation. Having analyzed the best interest factors and the clear preference in the factors for consistency and stability for the children at an early date, we agree with the trial court’s conclusion that the combined weight of the proven facts

amounts to clear and convincing evidence that termination of Mother's parental rights is in the best interest of the children.

CONCLUSION

Having affirmed the trial court's findings that two grounds exist for terminating Mother's parental rights and having determined that termination of Mother's parental rights is in the best interest of the children, we affirm the termination of Mother's parental rights. We reverse the trial court's finding that the ground of abandonment by failure to provide a suitable home was proven by clear and convincing evidence. In all other respects, the judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, Heather H., for which execution may issue if necessary.

/s/ Andy D. Bennett
ANDY D. BENNETT, JUDGE