IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 1, 2021

IN RE J. H.[1] ET AL.

Appeal from the Juvenile Court for Cocke County
No. TPR-05902 Brad L. Davidson, Judge

No. E2021-00624-COA-R3-PT

Tennessee Department of Children's Services ("DCS") removed two children from the custody of Polly H. ("Mother") and Billy H. ("Father") in March 2020 after receiving a referral regarding the family and allegations of abuse, and after Mother's partner was found at the home with Mother and the children in violation of a permanent restraining order against Mother's partner. In December 2020, DCS filed a petition to terminate Mother's and Father's parental rights. DCS alleged, as statutory grounds for termination, abandonment by failure to support, abandonment by failure to establish a suitable home, failure to manifest an ability and willingness to parent, persistence of conditions, and severe child abuse. Father voluntarily surrendered his parental rights on the day of the trial. The trial court found that DCS proved four of the five grounds for termination of Mother's rights by clear and convincing evidence and that termination was in the children's best interests. Mother appeals. We affirm in part and reverse in part. We affirm the trial court's ultimate holding that the parental rights of Mother should be terminated.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and CARMA DENNIS MCGEE, J., joined.

Claire Addlestone, Kingsport, Tennessee, for the appellant, Polly H.

Herbert H. Slatery III, Attorney General and Reporter, and Courtney J. Mohan, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

[1] In actions involving juveniles, it is this Court's policy to protect the privacy of the children by using only the first name and last initial, or only the initials, of the parties involved.

OPINION

BACKGROUND

Mother and Father (together, "Parents") are the biological parents of J.H. and W.H. (together, the "Children"). J.H. was born in August 2012 and W.H. was born in August 2015. The Children were in the care and custody of Parents, but at the time of DCS's investigation, Mother and Father lived separately. Mother and the Children were living in maternal grandmother's home, along with Mother's paramour, Rayanna Keene ("Keene").

In February of 2020, DCS received a referral regarding abuse of the Children. Following the referral, DCS Investigator Tiffany Hall[2] ("Investigator Hall") interviewed J.H., W.H., and Mother. All three reported several instances of Keene physically abusing the Children. J.H. reported that Keene once hit W.H. so hard that his head bounced off of the floor. Mother also reported that Keene previously beat her and forced her to drive Keene and the Children to Florida at knifepoint. Following the interviews, on March 3, 2020, DCS filed a petition to adjudicate the Children dependent and neglected ("First Petition") in Cocke County Juvenile Court based upon the allegations of physical abuse against Keene. On March 4, 2020, the juvenile court entered an *ex parte* restraining order prohibiting Keene from having contact with the Children.

Further investigation by DCS later revealed additional allegations of sexual abuse of W.H. against Father. Additionally, Mother testified that Father was physically and emotionally abusive to both her and the Children. Mother also testified that J.H. had been sexually abused on three prior occasions while in Mother's custody.[3]

On March 10, 2020, Parents and Keene were present at the juvenile court for a preliminary and injunctive hearing on the first petition. Parents waived their rights to the preliminary hearing and stipulated to probable cause and clear and convincing evidence of dependency and neglect. Parents further stipulated that prohibiting contact with Keene and the Children was necessary. Keene waived her right to an injunction hearing and stipulated that an injunction prohibiting her contact with the Children was necessary to prevent conduct that is detrimental or harmful to the Children. The trial court entered a permanent restraining order preventing Keene from contacting the Children. Parents retained custody of the Children.

On March 17, 2020, Mother called Investigator Hall to inform her that she obtained an order of protection against Father because he beat her and the Children. The following

[2] Sometimes referred to in the record as Tiffany Pierce, who married and became Tiffany Hall after the investigation but before the trial.

[3] One of the instances of abuse occurred at church, while the other two instances occurred in Mother's home. Father was not the perpetrator in any of these three instances.

day, Mother called Investigator Hall again to inquire about dropping the restraining order against Keene because she and Keene planned to rekindle their romance. That same day, Investigator Hall made an unannounced home visit at the maternal grandmother's home, where Mother and the Children were still living. During the visit, Investigator Hall discovered Keene at the home with the Children in violation of the restraining order.

Based on the order of protection that Mother obtained against Father and the violation of the restraining order against Keene, DCS filed a second petition to adjudicate the Children dependent and neglected ("Second Petition") on March 18, 2020. That same day, the trial court entered a protective custody order awarding DCS temporary custody of the Children and allowing Mother to have supervised visitation with the Children. The trial court later modified Mother's visitation to prohibit contact with the children pending further hearing.[4] Mother filed a motion for supervised visitation on May 5, 2020.

On June 30, 2020, the trial court held a hearing and entered an order adjudicating the Children dependent and neglected and denying Mother's motion for supervised visitation. Specifically, the trial court found that Mother willfully violated the order prohibiting Keene's contact with the Children, that dependency and neglect continues, that DCS made reasonable efforts to prevent removal, and that no contact with Mother until a therapist recommends otherwise was in the Children's best interests. The trial court further found that "Mother's testimony is entirely unbelievable." Although the box ordering child support is not checked on the order, it is undisputed that Mother was ordered to pay $50.00 monthly per child in child support. Additionally, on May 27, 2020, DCS Family Services Worker Kaitlyn Wetzel ("FSW Wetzel") met with Mother to review the Criteria and Procedures for Termination of Parental Rights. DCS records indicate that FSW Wetzel supplied a copy of the document to Mother, and FSW Wetzel testified that Mother opted to speak with her attorney before signing. Mother never provided DCS with the signed document.

On October 15, 2020, a Permanency Plan was created with the goal of reuniting the Children with the Parents. Under the Permanency Plan, Mother was required to acquire a legal source of transportation, safe and appropriate housing, and a legal source of income. Additionally, Mother was required to complete a parenting assessment, mental health assessment, and alcohol and drug assessment. DCS assisted Mother by showing her transportation and housing options, setting up a parenting assessment, and obtaining the necessary records for the mental health and alcohol and drug assessments. Mother obtained both a mental health and drug and alcohol assessment pursuant to the Permanency Plan. She began attending therapy and taking prescribed medication as recommended by her

[4] While the reason for the modification is not clear in the record, DCS states in its brief that the modification was due to the Children continuing to exhibit negative behaviors as a result of past trauma and abuse while in Mother's care. Further, trial testimony indicates that the no contact order was put in place between Mother and the Children because the court did not trust Mother's testimony, and that Mother was not to have contact with the Children until a therapist recommended such contact.

mental health assessment. Mother also obtained a legal source of transportation and employment. Mother continued, however, to live in the removal home[5] and to maintain contact with Keene.

On December 3, 2020, DCS filed a petition to terminate Parents' rights ("Termination Petition"), and a final hearing was held on May 6, 2021. Prior to the hearing, Father voluntarily surrendered his parental rights. The trial court heard testimony from several witnesses, including: FSW Wetzel; Investigator Hall; former foster parent, Amy Smith ("Smith"); mother's friend, Timothy Stevens; and Mother.

At the trial, Mother testified that although she was still living in the removal home, she would be willing to change the locks of the home or take Keene's key away. No evidence was introduced that Mother had, in fact, taken such steps. Additionally, Mother testified that she continues to talk to Keene once or twice per week. With respect to Father, Mother testified that he was both physically and emotionally abusive to her and the Children.

Smith testified as to various disclosures that the Children made to her while in her care from December 5, 2020 until March 31, 2021. The first of these disclosures occurred when Smith was clipping the Children's nails one evening. Smith stated:

> The first day they actually came, we were getting them—I was getting them ready for bed and for church on Sunday. And I went to clip their nails. And [W.H.] was sitting on a stool in the bathroom floor. And I went to clip his nails and kind of, he kind of jerked before I clipped his nail. And I said, "it's okay." I said, "I'm not going to hurt you." And he told me, he said, "when my mom cut our nails, she used to cut them until they would bleed." And so, then separately, it was [J.H.'s] turn in the bathroom. So, I was clipping his nails. [W.H.] had already left. They were completely separate. So, I went to clip [J.H.'s] nails. And when we finished, I said, "see, that wasn't too bad, was it?" And he said, "no." And then he said "my mom used to clip our nails until they would bleed."

Smith also testified that the Children disclosed to her that they were afraid of their Parents, and that they never asked about their Parents or to speak with their Parents. She further testified that J.H. "was very clear that he was very afraid and he did not want to go home to his parents."

The trial court also heard from FSW Wetzel, who managed the Children's case since they entered DCS custody in March 2020. FSW Wetzel testified as to the allegations of

[5] The "removal home" is the term that the trial court used to refer to the maternal grandmother's home, where the Children, Mother, and Keene were living at the time the Children were removed to DCS custody.

abuse that initiated the DCS investigation, the investigation, and each of the petitions filed and hearings held, leading up to the Termination Petition.

FSW Wetzel also testified regarding each ground for termination. With respect to the failure to support ground, FSW Wetzel testified that during the relevant time period, Mother made one support payment.[6] FSW Wetzel further testified that Mother was not working during the relevant time period, that Mother had told her she filed for disability, which was denied, and that Mother stated her attorney was appealing that denial. Nothing in the record indicates why Mother was seeking disability and unable to work during the relevant period. FSW Wetzel also testified:

> There have been absolutely no changes to the removal home. The people that were there, which would be [Polly H.] and her mother, are still in the home. At the—at one of the earlier Court hearings, the grandmother of the boys did testify that Ms. Keene would be allowed to come and go as she pleased, which is breaking a No Contact order that was just recently put in place at that time and that is still in place to this day. I do have multiple concerns about the mother's maintaining contact with Ms. Keene. Due to maintaining that contact and the desire for the mother and the grandmother to not follow the No Contact order, I have a very, very large reservation about this home. I did not deem it to be suitable.

Furthermore, FSW Wetzel explained that around Christmas, after the Termination Petition was filed, Keene dropped off Christmas cards from Mother for the Children at FSW Wetzel's office, and that after a hearing on December 8, 2020, she witnessed Keene and Mother speaking "casually, personably" as they left the courtroom.

The Children also made various disclosures to FSW Wetzel throughout her work on the case. Specifically, FSW Wetzel testified that J.H. has a burn on his hand, and that J.H. mentioned to her that his parents would flick or smack the burn if they felt he did something bad. Additionally, J.H. disclosed to FSW Wetzel that "both parents would slap or punch him and [W.H.] in the head," that food was withheld from them as punishment, and that "there were a couple of times where both boys were stripped naked and kicked out of the home and told to go figure it out."

Finally, FSW Wetzel provided testimony regarding the Children's progress since entering DCS custody. She explained that the Children have been placed in separate foster homes due to J.H.'s aggression towards W.H., and that the current placements are potential adoptive homes. She also stated:

[6] The relevant time period is August 2, 2020 to December 2, 2020. *See* Tenn. Code Ann. § 36-1-102(1)(D). Mother made a payment on November 19, 2020.

> [W.H.] is doing great. He actually went bowling the other day. And he was all smiles. He's doing very well in school. He is just having a very, very good time. Actually, he's just all happiness all the time. [J.H.] is still struggling a little bit with his behaviors. As far as he's doing in the foster home, though, he is very well taken care of and we are working with continuing services for him, as well, to continue working through those behaviors.

Investigator Hall also testified regarding DCS's additional investigation of the alleged physical and sexual abuse. This investigation revealed the "pink crayon" incident. After speaking with the Parents, Investigator Hall learned that the "pink crayon" was a dildo. Investigator Hall testified that the allegation regarding the "pink crayon" incident is that Father "put the pink crayon in [W.H.'s] butt," and that the Children reported this incident to Mother. Investigator Hall also testified that she previously observed the Children interacting with Mother, and that the Children were "timid" and told her that they were afraid of Mother.

Stevens testified that he is familiar with Mother and the Children, that he spent time around them on weekends, and that the Children "love their mom to death." Stevens also testified that he has never seen the Children act afraid of Mother, but that they appeared "scared-ish" of Father.

The trial court entered its final order on May 25, 2021, determining that DCS proved four out of the five alleged grounds for termination as to Mother. The trial court also determined that termination of Mother's rights was in the Children's best interests. Mother filed a timely appeal to this Court.

ISSUES PRESENTED

We consider the following issues:

1) Whether the trial court correctly determined that DCS proved the grounds for termination by clear and convincing evidence.[7]

2) Whether the trial court correctly determined that DCS proved, by clear and convincing evidence, that termination is in the Children's best interests.

[7] The trial court did not find clear and convincing evidence for the ground of severe child abuse, and DCS does not challenge this ruling on appeal. Thus, the four grounds at issue in this case are abandonment by failure to support, abandonment by failure to establish a suitable home, failure to manifest an ability and willingness to assume custody of the children, and persistence of conditions.

STANDARD OF REVIEW

Our Supreme Court has explained that:

> A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547–48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578–79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. "'[T]he [S]tate as *parens patriae* has a special duty to protect minors....' Tennessee law, thus, upholds the [S]tate's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child." *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250.

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

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

> An appellate court reviews a trial court's findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the

> evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596–97. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. *In re M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

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

DISCUSSION

I. Grounds for Termination

The trial court terminated Mother's parental rights to the Children pursuant to multiple statutory grounds.[8] We address each statutory ground, as it pertains to Mother, in turn.

A. Abandonment by Failure to Support

Parental rights can be terminated for abandonment, as that term is defined in Tennessee Code Annotated section 36-1-102. Tenn. Code Ann. § 36-1-113(g)(1). One form of abandonment is failure to support, which occurs when a parent, "for a period of four (4) consecutive months, [fails] to provide monetary support or . . . more than token payments toward the support of the child." *Id.* § 36-1-102(1)(D). Support is considered "token" when "the support, under the circumstances of the individual case, is insignificant given the parent's means." *Id.* § 36-1-102(1)(B). An adult parent is presumed to know that he or she has a duty to provide support. *Id.* § 36-1-102(1)(H); *In re Braxton M.*, 531 S.W.3d 708, 724 (Tenn. Ct. App. 2017). A parent may assert, as an affirmative defense, that the failure to provide financial support was not willful. Tenn. Code Ann. § 36-1-102(1)(I). However, the parent bears "'the burden of proof that the failure to . . . support was not willful' and must establish the lack of willfulness by a preponderance of the evidence." *In*

[8] Father voluntarily surrendered his parental rights to the Children on the day of trial and he is not participating in the present appeal.

re Braelyn S., No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *8 (Tenn. Ct. App. July 22, 2020) (quoting Tenn. Code Ann. § 36-1-102(1)(I)).

Here, DCS filed the Termination Petition on December 3, 2020. Consequently, the pertinent four-month period is August 2, 2020 through December 2, 2020. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) ("[T]he applicable four-month window for determining whether child support has been paid in the context of . . . failure to support includes the four months preceding the day the petition to terminate parental rights is filed but excludes the day the petition is filed."). The trial court found that, despite Mother's payment of $110.00 in support payments during the relevant period, Mother was "in no way incapacitated or prevented from supporting the Children" and, therefore, she failed to support the Children. We disagree with the trial court that clear and convincing evidence exists to show Mother abandoned the Children through failure to support. Tenn. Code Ann. § 36-1-102(1)(B).

During the relevant four-month period, Mother made one payment of $55.00 per child.[9] Because Mother made a payment during the relevant four-month period, we must determine whether her payment was token. *See* Tenn. Code Ann. § 36-1-102(1)(D). Tennessee courts have defined token support as follows:

> Token support refers to support that "under the circumstances of the individual case, is insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B). This Court has explicitly held that while the burden to prove a lack of willfulness now falls on the parent under section 36-1-201(1)(A), the burden to prove that support is token remains on DCS as the petitioner. *See In re Josiah T.*, No. E2019-00043-COA-R3-PT, 2019 WL 4862197, at *7 (Tenn. Ct. App. Oct. 2, 2019) (citing *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); Tenn. Code Ann. § 36-1-102(1)(A)(i), (D)) (holding in a case following the amendment to section 36-1-102(1)(A) that "[t]he burden f[alls] on DCS to prove that Mother's payments were 'token support' within the meaning of the statute.").
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> Although willfulness is not explicitly injected into the statutory definition of token support, it appears that we have often treated the two questions—token support and willfulness—as related. *See, e.g.*, *In re Aden H.*, No. M2017-01453-COA-R3-PT, 2018 WL 3039821, at *7 (Tenn. Ct. App. June 19, 2018) (noting that the father was not willfully failing to secure employment in determining that his payments were not token). In other

[9] This payment was made on November 19, 2020. The trial court ordered Mother to pay $50 per child per month. Thus, Mother's payment of $55 per child was in excess of the amount owed for the month of November.

> words, if a parent's ability to provide additional support is limited by factors outside her control, it cannot be determined that her support is merely token.

In re Jayda J., No. M2020-01309-COA-R3-PT, 2021 WL 3076770, at *18–19 (Tenn. Ct. App. July 21, 2021).

In the present case, the record is devoid of any evidence as to Mother's financial means during the relevant four-month period. Because there is no evidence as to Mother's financial means during the relevant period, DCS failed to show that Mother's payment of $55 per child on November 19, 2020, was insignificant given her means. *See id.* (holding that the burden of proving whether a payment was merely token is on DCS). While the parties' briefs focus on willfulness, we need not reach a conclusion as to willfulness because the evidence shows that Mother did provide some support to the Children during the relevant four-month period, and DCS failed to prove that Mother's payment was merely token support. *Id.*; *see also* Tenn. Code Ann. § 36-1-102(1)(B), (D).

Based on the foregoing, the trial court erred in finding that DCS proved by clear and convincing evidence that Mother failed to support the children during the relevant time period. We reverse the trial court's judgment with respect to this ground.

B. Abandonment by Failure to Provide a Suitable Home

Abandonment can also occur when:

> (*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
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> (*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)–(c).

Here, we "consider[] whether a child has a suitable home to return to after the child's court-ordered removal from the parent." *In re Adaleigh M.*, No. E2019-01955-COA-R3-PT, 2021 WL 1219818, at *3 (Tenn. Ct. App. Mar. 31, 2021). To terminate parental rights under this ground, the trial court must find "that a parent failed to provide a suitable home for his or her child even after DCS assisted that parent in his or her attempt to establish a suitable home." *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015). 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 *Tenn. 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 entails "[a]ppropriate care and attention" for 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 is "free of drugs and domestic violence." *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014). DCS must make "reasonable efforts" to assist the parent by doing more than simply providing a list of service providers. *In re Matthew T.*, 2016 WL 1621076, at *7. The Department should utilize its superior resources in assisting with establishment of a suitable home, but "[its] efforts do not need to be 'Herculean.'" *In re Hannah H.*, 2014 WL 2587397, at *9 (quoting *Dep't of Children's Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008)), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015); *see also In re Matthew T.*, 2016 WL 1621076, at *7. Sole responsibility does not lie with DCS, and "[p]arents must also make reasonable efforts towards achieving the goals established by the permanency plan to remedy the conditions leading to the removal of the child." *In re Hannah H.*, 2014 WL 2587397, at *9.

While the statute 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 Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016).

Here, the trial court found that Mother failed to establish a suitable home due to Mother's continued relationship with Keene. The trial court explained:

> Mother does not appear to have learned anything because she still has a relationship with Ms. Keene, the person with whom the children are ordered to have no contact. The Court takes note of the original fraud that Mother attempted to perpetrate on this Court during the dependency and neglect matter. The Court previously found that the violation of the no contact order was willful. The Court finds that nothing has changed with Mother that would lead the Court to believe that she could or would uphold the no contact order now. Due to the trauma, both physical and mental, the children suffered from Ms. Keene previously, this Court finds that her continued presence in Mother's life presents a clear and continuing danger should they be placed back in Mother's care.
>
> The court notes that Mother testified that there is no Order of Protection between Ms. Keene and Mother that would legally prevent them from having their own relationship. Mother also testified that she was willing to change locks and uphold the no contact order between Ms. Keene and the children. Unfortunately, Mother had not made that decision in the 14 months prior to termination and therefore this Court cannot credit that testimony any more now than when the willful violation of the no contact order was found 14 months ago.
>
> Despite the efforts of DCS, Mother has been unable to provide suitable housing for the children.

On appeal, Mother argues that DCS did not make reasonable efforts to assist her in establishing a suitable home. Additionally, Mother argues that DCS failed to prove by clear and convincing evidence that she "has a lack of concern for the children that will result in a lack of a suitable home being provided at an early date." In contrast, DCS asserts that Mother failed to clear the most significant hurdle to reunification by continuing to live in the removal home to which Keene retains access and by maintaining contact with Keene. DCS urges that during the four months following the Children's removal, DCS made reasonable efforts to help Mother establish a suitable home and that, because Mother has maintained contact with Keene, this ground has been proven by clear and convincing evidence.

The record does not preponderate against the finding that Mother's home remains unsuitable for the Children and that DCS made reasonable efforts assist Mother. While it is undisputed that the physical structure of Mother's residence is safe and appropriate, a suitable home requires "more than a proper physical living location." *In re Daniel B.*, 2020 WL 3955703, at *4. Keene's presence in the home was an issue from the outset of this case, as her prior abuse of the Children is what led to the trial court's issuance of a no contact order against her, and Mother's willful violation of the no contact order is what led to the removal of the Children. Although Mother testified that she was willing to change

the locks of the removal home and uphold the no contact order, by the time of trial Mother had fourteen months to make such changes and failed to do so. The grandmother testified at an earlier hearing that Keene was "allowed to come and go as she pleased." Additionally, after the trial court issued the no contact order against Keene, Mother contacted DCS at least twice to request that the no contact order against Keene be dropped. The trial court did not credit Mother's testimony, and it previously found at the June 30, 2020 hearing, that Mother's testimony was "entirely unbelievable." The trial court reiterated this credibility finding in its final order.[10] *See Franklin County Bd. of Educ. v. Crabtree*, 337 S.W.3d 108, 111 (Tenn. Ct. App. 2010) (citing *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2005)) (noting that, if the trial court's factual determinations are based on its assessment of witness credibility, the court would not reevaluate that assessment absent clear and convincing evidence to the contrary).

Mother does not dispute that a no contact order exists between Keene and the Children, yet Mother continues to maintain a relationship with Keene. Insofar as a suitable home is one "free of . . . domestic violence[,]" *In re Hannah H.*, 2014 WL 2587397, at *9, we conclude, as the trial court did, that Keene's continued presence in Mother's life and her ability to come and go from the removal home as she pleases renders Mother's home unsuitable. It is unlikely this issue will be resolved at an early date.

Further, throughout the period following removal, DCS made reasonable efforts to help Mother with establishing a suitable home. DCS provided Mother with funding for a parenting assessment, assisted Mother with obtaining drug and alcohol and mental health assessments, and provided Mother with resources for locating housing and transportation. Although DCS discussed concerns with Mother regarding Mother's continued contact with Keene and Keene's access to the home, Mother failed to take any steps to uphold the no contact order and keep Keene away from the children. In fact, after the Termination Petition was filed, Mother sent Keene to drop off Christmas cards for the Children at DCS. "Ultimately, [ ] we must 'analyze the reasonableness of DCS's efforts to assist a parent on a 'case-by-case basis in light of the unique facts of the case.'" *In re Edward R.*, No. M2019-01263-COA-R3-PT, 2020 WL 6538819, at *10 (Tenn. Ct. App. Nov. 6, 2020) (quoting *In re Kaden W.*, No. E2018-00983-COA-R3-PT, 2019 WL 2093317, at *7 (Tenn. Ct. App. May 13, 2019)). Under the circumstances of this case, we conclude, as the trial court did, that Mother failed to establish a suitable home for the Children. We agree with the trial court that this ground was proven by clear and convincing evidence.

[10] Specifically, the Court stated:

> The Court takes note of the original fraud that Mother attempted to perpetrate on this [C]ourt during the dependency and neglect matter. [. . .] The Court finds that nothing has changed with Mother that would lead the Court to believe that she could or would uphold the no contact order now.

C. Failure to Manifest an Ability and Willingness to Parent

Tennessee Code Annotated section 36-1-113(g)(14) provides an additional ground for termination when:

> A parent . . . has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

This ground requires clear and convincing proof of two elements. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020). The petitioner must first prove that the parent has failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child. *Id.* The petitioner must then prove that placing the child in the custody of the parent poses "a risk of substantial harm to the physical or psychological welfare of the child." *Id.* The statute requires "a parent to manifest both an ability and willingness" to personally assume legal and physical custody or financial responsibility for the child. *Id.* at 677. Therefore, if a party seeking termination of parental rights establishes that a parent or guardian "failed to manifest *either* ability or willingness, then the first prong of the statute is satisfied." *Id.* (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, *13 (Tenn. Ct. App. June 20, 2018)).

Regarding the second prong of section 36-1-113(g)(14), this Court has previously explained:

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

In re Virgil W., No. E2018-00091-COA-R3-PT, 2018 WL 4931470, at *8 (Tenn. Ct. App. Oct. 11, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)).

In the present case, the trial court found that Mother has not manifested an ability or willingness to parent the Children. Specifically, the trial court explained:

> The Court finds that in the time since the children have come into state's custody Mother manifested no ability to parent the children and the children

> would be unsafe if placed back with Mother. This Court has already addressed the safety concerns with allowing the children to return to Mother's custody in sections above, but will reiterate here simply that Mother's ongoing relationship with Ms. Keene presents a danger to the children from which Mother clearly has no intention of protecting the children.
>
> When it comes to a willingness and ability to parent, this Court finds that Mother is not willing. [. . .] Mother never seems to take responsibility for what is going on with her life and her children. Anytime she is confronted with something, it is someone else's fault. The Court notes that she even blames her children for her no contact order, despite the fact that the children were restricted by this Court for the Mother's willful violation of a no contact order that placed the children directly in harm's way.

The trial court also noted that Mother is currently employed and has made some recent child support payments, indicating that she may have the ability to financially support the Children. The trial court ultimately concluded, however, that Mother was not presently able or willing to parent the Children.

Mother argues that the trial court erred in finding that she lacked the ability or willingness to parent because, at the time of trial, Mother testified that she was willing to take steps such as change the locks on the home to ensure that Keene could not enter, and because she obtained stable employment and transportation, as well as requested visitation with the Children. Nonetheless, Mother had ample opportunity to take such action in the fourteen months before trial and failed to do so. Mother's actions indicate that she was simply not willing to take the steps necessary to assume custody over the Children, and, as the trial court noted, Mother is unable to acknowledge any responsibility for the traumas that the Children have faced and the circumstances that ultimately led to their removal. Additionally, the trial court previously found that Mother's testimony was not credible, and, absent clear and convincing evidence to the contrary, we have no reason to reevaluate the trial court's finding as to Mother's credibility. *See Jones*, 92 S.W.3d at 838; *Franklin Cnty. Bd. of Educ.*, 337 S.W.3d at 111. Thus, the first prong of section 36-1-113(g)(14) was proven by clear and convincing evidence.

We also agree with the trial court that reinstating Mother's custody poses a risk of substantial harm to the physical or psychological welfare of the Children. As previously noted, Mother was not permitted visitation with the Children until a therapist recommends such contact because the Children are still working through the trauma that they experienced while living with Mother. At the time of trial, such a recommendation had not been made. Additionally, Mother willfully violated a no contact order prohibiting the Children from having any contact with Keene, who physically abused the Children. Mother's testimony does not reflect that she has learned from this experience.

Consequently, the second prong of section 36-1-113(g)(14) was proven by clear and convincing evidence. We affirm the trial court's determination as to this ground for termination.

D. Persistence of Conditions

Finally, the trial court terminated Mother's parental rights pursuant to Tennessee Code Annotated section 36-1-113(g)(3). Section (g)(3) provides that termination may occur when:

> The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:
>
> (i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
>
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
>
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3).

As we have previously explained:

> "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 A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (citing *In re T.S. & M.S.*, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *7 (Tenn. Ct. App. July 13, 2000)). The failure to remedy the conditions which led to the removal need not be willful. *In re T.S. & M.S.*, 2000 WL 964775, at *6 (citing *State Dep't of Human Servs. v. Smith*, 785 S.W.2d 336, 338 (Tenn. 1990)). "Where . . . efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion

> [ ] that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." *Id.* The purpose behind the "persistence of conditions" ground for terminating parental rights 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.*, 2008 WL 4613576, at *20 (quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)).

In re Navada N., 498 S.W.3d 579, 605–06 (Tenn. Ct. App. 2016). Additionally,

> this ground for termination may be met when either the conditions that led to the removal persist 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[.]" 36-1-113(g)(3)(A)(i). Thus, even if the initial reasons that the children were placed in DCS custody have been remedied, if other conditions continue to persist that make the home unsafe, this ground may still be shown.

In re Daylan D., No. M2020-01647-COA-R3-PT, 2021 WL 5183087, at *9 (Tenn. Ct. App. Nov. 8, 2021).

In the present case, the Children were removed from Parents' custody by a court order entered in a dependency and neglect action, and the Children have been in DCS custody since March 18, 2020. Accordingly, we must determine whether conditions persist that prevent the safe return of the Children, whether the conditions are likely to be remedied at an early date, and whether a continued relationship with Mother prevents early integration of the Children into a stable, permanent home. Tenn. Code Ann. § 36-1-113(g)(3).

The trial court determined that the conditions underlying the Children's removal persist and that there is little likelihood that the Children can be safely returned to Mother. In pertinent part, the trial court found:

> [T]he children have been removed from [Mother's] home because, in an emergency protective custody order, the court in the dependency and neglect matter found that Mother had willfully violated a no contact order between the children and a former paramour, Ms. Keene. The Court finds that this ground is substantially the same as Failure to Provide a Suitable Home in this instance. It is clear that Mother has an ongoing relationship with Ms. Keene which presents a clear and present danger to the children were they to be placed back in her life.

> The Court has no confidence that Mother is going to rid herself of Ms. Keene at any time in the near future such that reunification would be safe for the children. Even at the hearing, Mother's defense seemed to be that her relationship with Ms. Keene is not problematic or illegal, thus they can continue to be friends. Naturally, that is Mother's prerogative, as it is this Court's prerogative to protect the children from future harm from Ms. Keene.

The record does not preponderate against the above findings. While the Children were removed from Mother due in large part to abuse by Keene, Mother continues to maintain contact with her. After the Children were removed due to Mother's willful violation of the no contact order against Keene, Mother continued to inquire with DCS as to whether and how the no contact order could be dropped. Following removal, the Children's grandmother, who owns the removal home, testified that Keene was able to come and go from the home as she pleased. Around Christmas, after DCS filed the termination petition, Keene delivered Christmas cards to DCS for the Children from Mother. Further, Mother admitted at trial that she continues to speak with Keene at least once or twice per week. While Mother also testified at trial that she would be willing to take the keys from Keene or change the locks, her failure to do so despite fourteen months passing since the issuance of the no contact order between Keene and the Children evidences the unlikelihood that Mother will ever take steps to prevent Keene from maintaining contact with the Children. Finally, the trial testimony indicates that the Children are making significant strides in their current foster placements and in therapy, which would be hindered should the Children be placed back in Mother's care. We affirm the trial court's decision that this ground was proven by clear and convincing evidence.

II. Best Interests

In addition to proving at least one statutory ground for termination, a party seeking to terminate a parent's rights must prove by clear and convincing evidence that termination is in the child's best interest. Tenn. Code Ann. § 36-1-113(c). Indeed, "a finding of unfitness does not necessarily require that the parent's rights be terminated." *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005) (citing *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004)). Rather, our termination statutes recognize that "not all parental conduct is irredeemable[,]" and that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* As such, the focus of the best interest analysis is not the parent but rather the child. *Id.*; *see also White*, 171 S.W.3d at 194 ("[A] child's best interest must be viewed from the child's, rather than the parent's, perspective.").

We consider nine statutory factors when analyzing best interests:

> (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) (Supp. 2020).

This list is non-exhaustive.[11] *In re Marr*, 194 S.W.3d at 499. "Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent." *Id.* "The relevancy and weight to be given each factor

[11] The Tennessee General Assembly recently amended the statutory best interest factors provided in Tennessee Code Annotated section 36-1-113(i). *See* 2021 Tenn. Pub. Acts, ch. 190 § 1. This amendment does not affect the instant case because we apply the version of the statute in effect at the time the petition for termination was filed. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

depends on the unique facts of each case." *Id.* "Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis." *Id.* (citing *In re Audrey S.*, 182 S.W.3d at 877).

In the present case, the trial court made detailed findings of fact and conclusions of law regarding the Children's best interests, ultimately concluding that termination of Mother's rights was warranted. We have no hesitation affirming the trial court's decision in this case. Turning to the factors, the trial court found that:

> (1) Mother has consistently chosen people for her life, even dating back to the children's father, her husband, if she is to be believed that he has been violent with her during their relationship. Mother has most recently, to this Court's knowledge, associated with Ms. Keene, who is not allowed to be around her children. She has made no changes in choosing better people to have in her life and around her children.
>
> (2) DCS made reasonable efforts by placing the children in therapy, but unfortunately their level of trauma [has not] been reduced enough to allow visitation. DCS also provided funding for Mother's assessments, which she did utilize.
>
> (3) There was no visitation because initially this Court put down a no contact order for Mother's unwillingness to accept responsibility for the danger in which she placed the children when she willfully violated the no contact order. Later, another no contact order was entered because a therapist recommended that the children have no contact until they progressed further in therapy; unfortunately, the level of trauma through which the children were attempting to work in therapy was never addressed in a manner that would have allowed the parents to visit again. The court does not find that this factor weighs particularly heavy in the decision due to the no contact [order].
>
> (4) Testimony from Mrs. Smith and CM Wetzel indicate that there is no positive relationship between Mother and the Children. To the contrary, Mrs. Smith's testimony was that the Children were afraid of Mother finding out where they lived.
>
> (5) The Children have been moved a few times in order to find stable placement, which eventually led to the siblings living in different homes. The children are reportedly doing much better in their new environments and should be left to continue to prosper there as much as possible. Placing the children back in the same environment from which they came would in no way serve their best interest and would likely hinder any and

all progress that they have made so far.

(6) The Court finds that this factor weighs particularly heavy in this case given the long history of domestic violence between Mother and Father, the history of sexual and physical abuse against the boys from others allowed to live in the home, and the fact that one of the disclosures that the children made to Mrs. Smith was that they would have their finger and toe nails cut until they bled. This last allegation is particularly troubling to the court.

(7) Mother's physical environment has not changed since the removal and Mother still lives in the location in which Mother's mother previously testified that Ms. Keene could "come and go as she pleases." Mother has made no attempt to separate herself from Ms. Keene nor to provide a safe home environment for her children that would be free from the physical and sexual violence that they knew when in Mother's custody.

(8) The Court notes that Mother is going to therapy and applauds Mother's attempts to better herself and her mental status.

(9) There has been no consistent support, despite some recent payments. Mother has not been paying according to the guidelines, either.

Mother argues that the trial court erred in finding that termination of her rights was in the best interests of the children because Mother has made an adjustment to her circumstances and the conditions that led to the Children's removal, and that DCS has failed to make reasonable efforts to assist Mother in reuniting with Children. Mother focuses on the various assessments that she completed under the parenting plan, her consistent employment since December 2020, and her child support payments from November 2020 through March 2021. Despite these improvements in Mother's life, which the trial court applauded Mother for making, Mother failed to make the most important change of all. Mother continues to live in the removal home, where Keene is free to "come and go as she pleases," and, at the time of trial, Mother still had not taken steps to ensure that Keene no longer had access to the home. Further, Mother's continued involvement with Keene is evidenced by Keene bringing Christmas cards for the Children to DCS on Mother's behalf.

While Mother made some adjustments to her conduct and circumstances, ultimately, she remains in a home that is unsafe for the Children. This factor favors termination. In the same vein, DCS made reasonable efforts to assist Mother. Tenn. Code Ann. § 36-1-113(i)(2). DCS communicated with Mother and provided her with access to other various housing and transportation resources. Additionally, DCS assisted Mother in gathering the necessary records for her various assessments under the parenting plan. Nonetheless,

Mother's trial testimony does not reflect that a meaningful change is possible. *Id.*

Furthermore, despite the changes that Mother has made, the level of trauma which the Children are working through in therapy has not been reduced to a point that the therapist is prepared to recommend visitation. Moreover, testimony from trial indicates that there is no positive relationship between Mother and the Children, and the Children are afraid of Mother. The Children, particularly W.H., are continuing to make improvements in their current foster home placements. We agree with the trial court's finding that placing the children back in the same environment from which they came would in no way serve their best interest and would likely hinder any and all progress that they have made so far. *Id.* § 36-1-113(i)(5).

Mother also argues, with respect to the third factor, that the trial court erred in finding the factor not relevant because Mother was prohibited from having contact with the Children. First, we note that Mother's framing of the trial court's consideration of the factor is an inaccurate reflection of the record. The record shows that the trial court did find the fact that Mother was prohibited from having contact with the Children to be relevant in its best interests analysis, but merely found that it did not weigh heavily in favor termination because Mother was not able to visit the Children. As previously noted, "[t]he relevancy and weight to be given each factor depends on the unique facts of each case." *In re Marr*, 194 S.W.3d at 499. Thus, the trial court properly considered this factor.

We conclude the trial court correctly found that the factors in Section 36-1-113(i) weigh in favor of termination.

CONCLUSION

The judgment of the Cocke County Juvenile Court finding that DCS proved the ground of abandonment by failure to support is hereby reversed. The judgment of the trial court terminating Mother's parental rights is affirmed. Costs of this appeal are taxed to the Appellant, Polly H., for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE