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IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 1, 2022

IN RE BENTLEY J.[1] ET AL.

Appeal from the Juvenile Court for Greene County
No. 21-J29739 Kenneth N. Bailey, Jr., Judge

No. E2022-00622-COA-R3-PT

The two minor children of the appellant, Ashlyn C. ("Mother"), came into the custody of the Tennessee Department of Children's Services ("DCS") in December of 2020. The children remained there until DCS filed a petition to terminate Mother's parental rights in October of 2021. Following a bench trial, the trial court determined that DCS proved, by clear and convincing evidence, six grounds for termination: 1) abandonment by an incarcerated parent; 2) abandonment by failure to establish a suitable home; 3) substantial noncompliance with the permanency plan; 4) severe abuse; 5) persistence of conditions; and 6) failure to manifest an ability and willingness to assume custody of and financial responsibility for the children. The trial court also found that termination of Mother's parental rights was in the children's best interests. We affirm the trial court's ruling as to five of the six statutory grounds, and we affirm the trial court's ruling as to best interests. Consequently, we affirm the trial court's overall ruling that Mother's parental rights must be terminated.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Megan A. Swain and Luke A. Shipley, Knoxville, Tennessee, for the appellant, Ashlyn[2] C.

Jonathan Skrmetti, Attorney General and Reporter, and Kathryn A. Baker, Senior Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

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[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.

[2] At different points in the record, Mother's name is spelled "Ashlynn." We defer to "Ashlyn" because this is how Mother's name is spelled on her children's birth certificates.

OPINION

FACTS

The children at issue, Bentley J. and Dylan J. (together, "the Children"), entered DCS custody on December 22, 2020, when a friend of Mother's dropped the Children off at the local DCS office. The friend told DCS that Mother left the Children with him several days prior and that he was running out of food and diapers for them. DCS was initially unable to locate Mother. In its petition for temporary legal custody filed December 23, 2020, DCS claimed that it eventually reached Mother via phone and that she seemed intoxicated. The trial court granted DCS's petition on December 23, 2020. Mother connected with DCS and was given a drug screen on December 24, 2020. The test was positive for amphetamines and methamphetamine. The trial court held a preliminary hearing on December 28, 2020, and Mother did not appear. The trial court's order provided that Mother could not have visitation with the Children before presenting herself to the Court.

A hearing was held on January 27, 2021, at which Mother appeared and stipulated that the Children were dependent and neglected due to her inability to provide care for them while in her custody. The trial court ordered that Mother could have no visitation with the Children until she passed two consecutive drug screens at least seven days apart. Following hair follicle screens, the Children also tested positive for amphetamines, methamphetamine, and THC on February 2, 2021. Accordingly, DCS filed a motion for a severe abuse finding. This motion was granted, the trial court citing the undisputed fact that "the [C]hildren tested positive for methamphetamines while in [Mother's] primary custody[.]"[3]

DCS developed its first permanency plan with Mother on January 6, 2021. This was a six-month plan, the goal of which was return to parent. Mother's permanency plan requirements were to undergo regular drug screens, a mental health assessment, and an alcohol and drug assessment, complete parenting and domestic violence courses, establish a legal means of income, establish DCS-approved housing, and maintain weekly contact with the DCS case worker.

Mother completed essentially no aspects of the permanency plan. Mother's case worker, Sydney Barnett, testified at trial that she had substantial difficulty maintaining contact with Mother and frequently did not know where Mother was living. Mother would sometimes message Ms. Barnett on Facebook, however. At one point, Mother claimed to be living with the father's sister,[4] and at another point DCS believed Mother was living in

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[3] The Children's father never meaningfully participated in the case and did not appear at trial. Although his parental rights were also terminated by the trial court, the father does not appeal.

[4] As discussed *infra*, Mother was arrested while with the father's sister on drug-related charges

a hotel. Mother never gained visitation with the Children because she did not pass any drug screens during the custodial period. Ms. Barnett testified that at times, Mother would not show up to scheduled drug screens. However, Mother was screened on December 24, 2020, March 16, 2021, March 23, 2021, and September 13, 2021. Mother tested positive for methamphetamine on all screens. Further, on April 18, 2021, Mother was arrested in Greene County and charged with possession of unlawful drug paraphernalia. At the time of this arrest, Mother was in a McDonald's parking lot with the Children's aunt (the father's sister) and another friend. The arresting officer found marijuana and methamphetamine in the friend's car, as well as a metal pipe with "residue" in it. Mother told the arresting officer the pipe was hers. Mother pled guilty to possession of unlawful paraphernalia and received a sentence of eleven months and twenty-nine days, suspended to probation after serving four days in jail. Mother did not appear at the next status hearing in the DCS case, which was held April 27, 2021.

Given Mother's lack of progress, DCS developed a second permanency plan with Mother on June 28, 2021. The terms of the plan remained largely the same. Although the details are not entirely clear from the record, Ms. Barnett testified at trial that Mother was re-incarcerated from early June through June 23, 2021, and then again on September 29, 2021.[5] Mother confirmed that she was arrested several times during the custodial period for "violations and FTA's."[6] At some point during July of 2021, Mother was released to attend rehabilitation at Buffalo Valley. Mother did not finish the program, however, and was discharged for a "non-therapeutic attitude" and for using drugs while in the facility. Mother testified at trial, however, that she did not bring the drugs into Buffalo Valley.

DCS filed its petition to terminate Mother's parental rights on October 21, 2021. DCS alleged six statutory grounds for termination as to Mother: 1) abandonment by failure to establish a suitable home; 2) abandonment by an incarcerated parent; 3) substantial noncompliance with the permanency plan; 4) persistence of conditions; 5) severe abuse; and 6) failure to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the children. DCS also alleged that termination would be in the Children's best interests. Mother never filed an answer to the petition.

The trial court held a bench trial on April 26, 2022. Mother, Ms. Barnett, and another DCS case worker all testified. Additionally, Mother called the director of Recovering Hearts, a new rehabilitation program, to testify. The director testified, generally, that Mother began Recovering Hearts two weeks before trial and that she was doing well in the program. The director specifically testified that Mother had taken two drug screens thus far and both were negative for all substances.

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during the Children's custodial period.

[5] Mother explains in her brief that she was incarcerated from June 7, 2021 through June 23, 2021, and again from September 29, 2021 through April 8, 2022.

[6] The broader context of Mother's testimony reveals that "violations" refers to violations of Mother's probation conditions, and "FTA's" refers to failure to appear.

Following the hearing, the trial court ruled orally and found that DCS proved, by clear and convincing evidence, all alleged statutory grounds for termination. The trial court also concluded that termination of Mother's parental rights was in the Children's best interests. The final order was entered on May 6, 2022.[7] Mother timely appealed to this Court.

ISSUES

Mother raises several issues on appeal, which we have restated slightly:

1. Whether the trial court erred in finding that DCS proved any statutory grounds for termination by clear and convincing evidence.

2. Whether the trial court's final order is insufficient.

3. Whether the trial court erred in denying Mother's motion to continue trial, which was lodged orally at the beginning of trial.

4. Whether the trial court erred in finding that termination of Mother's parental rights is in the Children's best interests.

5. Whether the cumulative effect of the trial court's errors warrants reversal.

DCS raises no additional issues in its posture as appellee.

STANDARD OF REVIEW

> 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,

[7] An amended order was entered June 10, 2022, correcting the misspelling of Mother's name throughout the previous order.

> 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 507, 522–23 (Tenn. 2016). 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

Mother challenges the trial court's findings as to all six statutory grounds, as well as the conclusion that termination of her parental rights is in the Children's best interests. Before we address those arguments, however, we must address Mother's threshold procedural issues.

Sufficiency of the trial court's order

Mother contends that the final order is insufficient and not born of the trial court's independent judgment. Mother points out that the order was drafted by DCS, which is undisputed, and that a significant portion of the order appears to be an almost verbatim reproduction of DCS's petition for termination.

A trial court is required to enter written findings of fact and conclusions of law following a termination trial. *See* Tenn. Code Ann. § 36-1-113(k) (providing that "[t]he court shall enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing"); *see also* Tenn. R. Civ. P. 52.01 ("In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.").

Our Supreme Court has held that "findings of fact, conclusions of law, opinions, and orders prepared by trial judges themselves are preferable to those prepared by counsel." *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 314 (Tenn. 2014). The *Smith* Court also opined that "judges must arrive at their decisions by applying the relevant law to the facts of the case. . . . Because making these decisions is a high judicial function, a court's decisions must be, and must appear to be, the result of the exercise of the trial court's own judgment." *Id.* at 312 (internal citations and quotations omitted). While *Smith* dealt with trial court rulings under Tenn. R. Civ. P. 56.04, this Court also applies *Smith* in the context of parental rights termination. *See, e.g.*, *In re Nathan C.*, No. E2019-01197-COA-R3-PT, 2020 WL 730623, at *4 (Tenn. Ct. App. Feb. 12, 2020) (collecting cases); *In re Colton B.*, No. M2017-00997-COA-R3-PT, 2017 WL 6550620, at *5 (Tenn. Ct. App. Dec. 22, 2017) ("Given the nearly identical recitation of facts contained in the petition and the final order, coupled with the trial court's sparse oral ruling, we must conclude that the record 'casts doubt' as to whether the trial court exercised its independent judgment in this case." (quoting *Smith*, 439 S.W.3d at 316)).

Smith does not provide, however, nor has this Court held in a parental rights termination case, that party-prepared orders are prohibited. Rather, "[w]hen a trial court accepts party-prepared findings of fact and conclusions of law, it must take care that two conditions are met[.]" *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *5 (Tenn. Ct. App. Apr. 16, 2020) (citing *Smith*, 439 S.W.3d at 315–16). "First, the findings and conclusions must accurately reflect the decision of the trial court.

Second, the record must not create doubt that the decision represents the trial court's own deliberations and decision." *Id.*; *see also In re Nathan C.*, 2020 WL 730623, at *7 (vacating and remanding order terminating parental rights where "[r]ather than engaging in the required independent analysis, the trial court simply adopted [one party's] findings and conclusions"). The "ultimate concern is the fairness and independence of the trial court's judgment." *In re Matthew T.*, 2016 WL 1621076, at *5 (quoting *Smith*, 439 S.W.3d at 316).

Bearing this framework in mind, we have previously expounded on the problems with DCS drafting a final order that is, essentially, a verbatim recitation of its own petition. This was squarely at issue in *In re Colton B.* In that case, the trial court made "sparse" oral rulings following the final hearing:

> THE COURT: It is the finding of this court by clear and convincing evidence that the grounds for termination of the parental rights of [the mother] in this matter. . . . I find that the evidence is there for the parental rights to be terminated. I further find that the termination of the parental rights of Mother in this matter . . ., I find that the termination of her rights are in the best interest of the child. Anything else?
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> Attorney for Mother: No, Your Honor.
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> Attorney for DCS: Your Honor, if you could specify as to which grounds? The state has alleged four grounds. Are you finding that all four grounds have been proven by clear and convincing evidence?
>
> COURT: Yes.

2017 WL 6550620, at *3–4, *5 (some internal bracketing omitted). "The following day, the trial court entered a fifteen page order detailing the four grounds for termination and facts supporting each ground and citing the applicable factors in determining the child's best interest as well as facts supporting each factor." *Id.* at *4. The order, however, appeared

> virtually identical to DCS's termination petition. Indeed, of the sixty factual allegations contained in DCS's termination petition, fifty-three appear to have been both identically numbered and recited in the final order. Only the introductions and conclusions of the two documents contain any material differences. Our conclusion that the final order was largely lifted from DCS's petition is buttressed by the fact that the final order contains not a single mention of any of the proof presented at the termination hearing, such as the testimony of the witnesses or the depositions submitted as exhibits.

Id. at *4 (footnotes omitted). In light of the foregoing, we concluded that the record "'cast[] doubt'" on "whether the trial court exercised its independent judgment in [that] case." *Id.* at *5 (quoting *Smith*, 439 S.W.3d at 316). The trial court's order was vacated and remanded for entry of an order that was "a product of [the trial court's] own judgment." *Id.*

Mother argues on appeal that the trial court's final order is akin to the one at issue in *In re Colton B.* In this case, the trial court made detailed oral findings of fact and conclusions of law and ruled on the petition at the close of the trial. In the final order, the trial court's oral findings are re-produced nearly verbatim under the heading "Findings of Fact." Mother is correct, however, that the rest of the final order appears to be, like in *In re Colton B.*, "largely lifted from" DCS's petition. *Id.* at *5. Stated differently, DCS used the trial transcript to draft the findings of fact, and then used its own petition to draft the conclusions of law.

We agree with Mother that a final order which is virtually identical to DCS's petition is not the best practice, as it cuts against the spirit of *Smith* and this Court's holding in *In re Colton B.* Such an order generally does not suggest that the trial court exercised its independent judgment. *See id.*

Nonetheless, the case at bar is distinguishable from *In re Colton B.* for important reasons. Here, the trial court's oral rulings were far from "sparse" and contained clear references to the proof at trial. Those oral findings are accurately presented in the final order. Whereas in *In re Colton B.*, "the final order contain[ed] not a single mention of any of the proof presented at the termination hearing[,]" the same cannot be said here. Further, any differences in the trial court's oral ruling and the findings of fact laid out in the final order are minimal and insignificant. By way of example, the trial court's oral ruling as to the third ground for termination, substantial noncompliance with the permanency plan, was as follows:

> Ground 3, on the substantial non-compliance with the Permanency Plan. A Permanency Plan was established in this case for the goal of return to parent. And through the testimony of the Department, neither parent met any of the goals or any of the steps on the Permanency Plan. And there were two Permanency Plans in this case, and those steps were not met. And you know, I'm, once the Department got the drug test results as to the children with the methamphetamine, . . . they did continue to work even though the Magistrate made the severe abuse finding, which would have permitted the Department to stop working with the [M]other. They continued to work. But, they provided services and tried to assist the [M]other and the father and, again, the Court will note the father's just had no contact at all. I appreciate the [M]other showing up today and making an effort to try to get her life in order.

In the final order prepared by DCS, the trial court's finding on this ground provides:

> The Court finds as to ground 3 substantial non-compliance with the permanency plan that DCS met the burden of proof by clear and convincing evidence. DCS established two permanency plans in this case and the initial goal was return to parent. The testimony showed that neither parent met any of the goals or steps on the permanency plans. There were two plans, and the steps were not completed. Once DCS received the hair follicles and the Court found that the children were victims of severe abuse on November 9, 2021 DCS continued to work with the mother and to attempt to engage the father. DCS continued to attempt to assist the mother and the father and the Court notes that the father has not remained in contact with DCS or the children. The Court finds by clear and convincing evidence that the burden of proof is met with regard to this ground.

The conclusion of law as to this ground then provides that Mother "[has] not completed any of the requirements on the permanency plans[,]" and that "DCS has proven, by clear and convincing evidence, the ground of substantial noncompliance with the permanency plan against [Mother] and [the father]."

Accordingly, unlike in *In re Colton B.*, here, the record indicates that the trial court weighed all of the proof and made an individualized determination. The trial court's oral findings were far from sparse and are accurately reflected in the final order. The findings of fact clearly did not stem from DCS's petition, but from the trial court's independent assessment of the evidence.

In that vein, this case is more analogous to *In re Matthew T.*, 2016 WL 1621076, at *6. In that case, two parents appealed the termination of their parental rights. *Id.* at *1. Like the present case, the trial court ruled orally and then signed a written order prepared by DCS. The parents argued "that the written order was drafted and submitted unilaterally by counsel for [DCS] and contend that it does not reflect the trial court's own ruling." *Id.* at *6. Applying *Smith*, we disagreed:

> [W]e focus on the trial court's written order, which we have determined satisfies the statutory requirements. The record indicates that the trial court deliberated and made its own decision. At the end of the termination hearing, the trial court examined the petition for termination and made oral findings that several of the grounds alleged in the petition had been proven by clear and convincing evidence and that termination of parental rights was in the best interest of the child. The court then signed and entered a written order containing more specific findings of fact and conclusions of law about the grounds for termination and the best-interest factors. Having reviewed the court's oral findings and those set forth in the final order, we find the

> differences minor and no basis for reversal. *See In re Adoption of M.P.J.*, [No. W2007-00379-COA-R3-PT], 2007 WL 4181413, at *9 n.8 [(Tenn. Ct. App. Nov. 28, 2007)] (rejecting the parent's argument that the trial court failed to make findings of fact because the order at issue was drafted by the attorney for another party).
>
> Based on the foregoing, we have concluded that the trial court complied with the requirements of Tenn. Code Ann. § 36-1-113(k).

Id.

Here, we reach the same conclusion as the *In re Matthew T.* court. The differences in the trial court's oral ruling and the final order are "minor and no basis for reversal." *Id.* Notwithstanding the final order's similarities to DCS's petition, the similarities are not so pervasive as to cause doubt that "the trial court exercised its independent judgment in this case." *In re Colton B.*, 2017 WL 6550620, at *5 (citing *Smith*, 439 S.W.3d at 316). Indeed, the conclusions of law taken from the petition are congruent with the trial court's findings of fact, which were clearly born of the trial court's independent judgment. Consequently, the findings of fact and conclusions of law "accurately reflect the decision of the trial court[,]" and the record does not cause us "doubt that the decision represents the trial court's own deliberations and decision." *In re Matthew T.*, 2016 WL 1621076, at *5 (citing *Smith*, 439 S.W.3d at 315–16).

Our "ultimate concern is the fairness and independence of the trial court's judgment." *Smith*, 439 S.W.3d at 316 (footnote omitted). Under the particular circumstances of this case, those principles are not offended, and the trial court's order is sufficient.

Mother's motion to continue

Mother also argues on appeal that the trial court erred in refusing to continue the trial. Whether to grant or deny a motion for continuance is within the discretion of the trial court. *In re Anna W.*, No. W2022-00657-COA-R3-PT, 2022 WL 17820763, at *3 (Tenn. Ct. App. Dec. 20, 2022) (citing *State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 317 (Tenn. Ct. App. 2008)). "The ruling on the motion will not be disturbed unless the record clearly shows abuse of discretion and prejudice to the party seeking a continuance." *Id.* The party seeking the continuance has the burden of "establishing the circumstances that justify the continuance." *In re Rhyder C.*, No. E2021-01051-COA-R3-PT, 2022 WL 2837923, at *5 (Tenn. Ct. App. July 21, 2022) (citing *Osagie v. Peakload Temp Servs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002)). The factors the court considers include "(1) the length of time the proceeding has been pending, (2) the reason for the continuance, (3) the diligence of the party seeking the continuance, and (4) the prejudice to the requesting party

if the continuance is not granted." *Id.* (quoting *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003)).

Here, Mother's counsel orally moved for a continuance the day of trial, citing Mother's recent move to a new rehabilitation program, Recovering Hearts. Mother's counsel asked for a "quick reset[,]" noting that "[Mother] has been making substantial progress where she is currently[.]" The trial court denied Mother's motion, concluding that "if there's not a basis for the termination, then [Mother] would get more time." On appeal, Mother argues that "denying [her] continuance was a 'Catch-22': the trial court refused to give Mother additional time to establish herself at the sober living community and then discounted her progress because she had not adequately established her participation in that community for long enough."

Respectfully, this does not amount to an abuse of discretion. By the time of trial, the Children had been in DCS custody for more than a year, and the petition for termination had been pending for approximately six months. Nonetheless, Mother began Recovering Hearts, at least her second rehabilitation program, only two weeks prior to trial and only sought a continuance the day of trial. Mother's request for more time to work on her sobriety was simply too late. She exercised almost no diligence in participating in this case at all, much less in seeking a continuance.

Moreover, the record does not show that the trial court's refusal to continue the matter prejudiced Mother. On appeal Mother argues that "[w]ithin four (4) months, [Mother] would have safe, stable housing for her children available in her sober living community." This is speculative at best. The Recovering Hearts director testified that because the program is so new, integrating children is done on a case by case basis. He testified that he could consider the possibility of the Children joining Mother in four to six months if Mother continued succeeding in the program.

Further, Mother conceded most of DCS's allegations at trial, and it is undisputed that both Children tested positive for methamphetamine in February of 2021. When DCS filed a motion for a severe abuse finding based on same, Mother did not respond to or contest that motion, nor did she appeal the trial court's ruling that the Children were severely abused. As discussed *infra*, a finding of severe abuse during the dependency and neglect stage is *res judicata* in a later termination proceeding. And severe abuse is a statutory ground for termination. Tenn. Code Ann. § 36-1-113(g)(4). Consequently, it is unlikely that a few more weeks of success in a new rehabilitation program, which is not even guaranteed, could have changed the ultimate outcome of the trial. *See In re C.T.S.*, 156 S.W.3d 18, 23 (Tenn. Ct. App. 2004) (affirming denial of a motion for continuance, noting that "it is undisputed that [the father] was sentenced to 15 years incarceration when C.T.S. was under eight years of age. No length of continuation would have changed this fact or eliminated the grounds on which [the father's] rights were terminated").

We affirm the trial court's denial of Mother's motion for continuance.

Grounds for termination[8]

a. Abandonment – Failure to provide a suitable home

Abandonment occurs 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;
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> (*b*) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and
>
> (*c*) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians have not made reciprocal reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department.

Tenn. Code Ann. § 36-1-102(1)(A)(ii)(*a*)-(*c*). With this ground, 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). 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

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[8] With all statutory grounds for termination, we apply the version of Tennessee Code Annotated § 36-1-113 in effect on the day the petition for termination was filed, in this case, October 21, 2021. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017).

*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, and "must be free from drugs." *In re Matthew T.*, 2016 WL 1621076, at *7 (citing *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. *Id.* DCS should utilize its superior resources in assisting with the establishment of a suitable home, but "[its] efforts do not need to be 'Herculean.'" *In re Jamarcus K.*, No. M2021-01171-COA-R3-PT, 2022 WL 3755383, at *8 (Tenn. Ct. App. Aug. 30, 2022) (quoting *In re Hannah H.*, 2014 WL 2587397, at *9). 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." *Id.*

In her appellate brief, Mother does not dispute that the children were legally and physically removed from her care. Nor does she dispute that they were "dependent and neglected due to her inability to provide care for them at the time of removal." However, "Mother respectfully submits that the Department did not make reasonable efforts to assist her in any meaningful way, including in securing suitable housing." In ruling on this particular ground, the trial court found:

> The Court must look at the fact that DCS tried to work with the family and the [M]other. The [M]other declined assistance and at one point was residing in a hotel and at other times she was incarcerated. The children have been in foster care for 15 months and their life goes on. The youngest child essentially knows the foster parents as his caregivers due to his age. The parents' drug use prevented them from obtaining safe and stable housing and therefore the Court finds that DCS has met its burden of proof by clear and convincing evidence.
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> *　　*　　*
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> The Court finds that, during the relevant four-month period of December 23, 2020 to April 22, 2021 which followed the physical removal of the children from the home, [Mother] made no reasonable efforts to provide a suitable home. Instead, she refused to avail herself of the services offered by DCS and failed to locate suitable housing.
>
> [Mother's] failure to make even minimal efforts to improve her home and personal condition demonstrates a lack of concern for the children to such a degree that it appears unlikely that she will be able to provide a suitable home for the children at an early date.

> The efforts of the Department to assist [Mother] in establishing a suitable home for the children were reasonable, in that they are equal to, or exceed, the efforts of the [Mother] toward the establishing a suitable home, and [Mother was] aware that the children were in DCS custody.

The record does not preponderate against these findings. Ms. Barnett testified that in the four months following the Children's removal, she offered to assist Mother with finding housing, and Mother declined. Ms. Barnett also testified that Mother reported living with the father's sister, who was with Mother when Mother was arrested for unlawful possession of drug paraphernalia in April of 2021. At no point in her testimony did Mother dispute this; rather, her testimony centered on her recent progress in Recovering Hearts and the possibility that the Children could eventually join her there. Accordingly, while Mother now argues on appeal that DCS failed to engage in reasonable efforts to assist Mother with housing, there is simply no proof countervailing Ms. Barnett's claims that she offered assistance with housing and Mother declined.

Moreover, a suitable home entails more than a physical space. *In re Daniel B.*, 2020 WL 3955703, at *4. Indeed, "[a] home in which children are likely to be exposed to drugs is not a suitable home for purposes of this ground, notwithstanding the physical aspects of the home itself." *In re Jamarcus K.*, 2022 WL 3755383, at *10. The record clearly establishes that Mother abused methamphetamine during the four-month period following the Children's removal, insofar as she failed multiple drug screens during that period. She was also arrested on drug related charges and continued to cycle in and out of jail throughout the rest of the custodial period.[9] Physical housing aside, Mother was unable to offer the Children a suitable home for other reasons, namely, her methamphetamine addiction.

We also agree that Mother "demonstrated a lack of concern for the [Children] to such a degree that it appears unlikely that [she] will be able to provide a suitable home" for them at an early date. *Id.* Mother exposed the Children to drugs to such a degree that they tested positive for methamphetamine and THC more than a month following their removal from Mother. Further, Mother continued using methamphetamine and engaging in illegal activity throughout the custodial period. While there was testimony at trial that Mother might be able to keep the Children with her at Recovering Hearts, the details were speculative. And Mother only joined Recovering Hearts two weeks prior to trial. Under

[9] This Court has previously recognized that efforts to establish a suitable home are naturally hampered when a parent is incarcerated. *See, e.g.*, *In re James W.*, No. E2020-01440-COA-R3-PT, 2021 WL 2800523, at *8 n.8 (Tenn. Ct. App. July 6, 2021); *In re Eli S.*, No. M2019-00974-COA-R3-PT, 2020 WL 1814895, at *11 (Tenn. Ct. App. Apr. 9, 2021); *In re Allyson P.*, No. E2019-01606-COA-R3-PT, 2020 WL 3317318, at *8 (Tenn. Ct. App. June 17, 2020). In this case, however, Mother was not incarcerated for the vast majority of the four-month period following the Children's removal, which ran from December 23, 2020 through April 23, 2021. Mother was arrested on April 18, 2021 and, as best we can discern, only spent four days in jail.

all of the circumstances, it was unlikely as of the date of trial that Mother would be able to establish a suitable home at any early date.

DCS proved this ground for termination by clear and convincing evidence.

b. Abandonment by incarcerated parent – failure to visit, failure to support, and wanton disregard

Abandonment can also occur when

> (iv) A parent or guardian is incarcerated at the time of the filing of a proceeding, pleading, petition, or amended petition to terminate the parental rights of the parent or guardian of the child who is the subject of the petition for termination of parental rights or adoption, or a parent or guardian has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action and has:
>
> (*a*) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding the parent's or guardian's incarceration;
>
> (*b*) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of nonincarceration immediately preceding the filing of the action; or
>
> (*c*) Has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

Tenn. Code Ann. § 36-1-102(1)(A)(iv)(*a*)-(*c*). The above subsection "'contains multiple ways of abandonment for termination of parental rights[,]'" *In re Trenton B.*, No. M2022-00422-COA-R3-PT, 2023 WL 569385, at *3 (Tenn. Ct. App. Jan. 27, 2023) (quoting *In re Navada N.*, 498 S.W.3d 579, 598 (Tenn. Ct. App. 2016)), and "incarceration is a condition precedent for this definition of abandonment[.]" *Id.*

i. Failure to visit and failure to support[10]

[10] Mother argues on appeal that DCS failed to sufficiently plead abandonment by incarcerated parent for failure to visit and failure to support. Her argument is based on the fact that in the petition, the heading for this ground provides "Abandonment by incarcerated parent /wanton disregard." According to Mother, only the wanton disregard ground is sufficiently pled. Having reviewed the petition, we disagree. Among other allegations, the petition provides that

Here, it is undisputed that Mother was incarcerated when the petition for termination of her parental rights was filed. This ground therefore applies. *See id.* Looking first at the appropriate time frame for Mother's failure to visit and failure to support, section 36-1-102(1)(A)(iv)(*a*) does not apply because there is no proof of any consecutive four-month span during the custodial period in which Mother was not incarcerated. To reiterate, the Children came into DCS custody, per the trial court's order, on December 23, 2020. Mother was arrested on April 18, 2021, and was in jail for four days. Mother was then re-incarcerated from June 7, 2021 through June 23, 2021, and again from September 29, 2021 through April 8, 2022. Consequently, the trial court, in its final order, looked at the aggregated 120 days from May 14, 2021 through June 6, 2021, and June 24, 2021 through September 28, 2021. *See id.* § 36-1-102(1)(A)(iv)(*b*) (providing that with regard to incarcerated parents, failure to visit and failure to support can be established by looking to "an aggregation of the first one hundred twenty (120) days of nonincarceration immediately preceding the filing of the action").

It is undisputed that Mother neither visited the Children nor paid child support within the above noted time frame. From the initiation of the dependency and neglect action, the trial court required Mother to take and pass two consecutive drug screens, at least seven days apart, before she would be allowed visitation. Mother never accomplished this. She therefore never visited the Children during the custodial period, much less the pertinent time frame. Nor did Mother pay any child support, despite being present at the January 27, 2021 hearing during which Mother was ordered to pay $100.00 per month in child support. This was undisputed at trial, and Mother did not assert that her failure to visit or failure to support was not willful. In fact, Mother held at least one job during the custodial period.

Accordingly, Tenn. Code Ann. section 36-1-102(1)(A)(iv)(*b*) applies here because Mother was incarcerated at the time the petition for termination of her parental rights was filed. There is no dispute that Mother failed to visit the Children and failed to pay any child support during the salient time frame. Nor did Mother argue at trial that either failure was not willful. Under the circumstances, DCS proved these grounds for termination by clear and convincing evidence.

> [i]n the four months before they went to jail, [Mother and the father] failed to visit the children, although they were able to visit, they knew the children were in DCS custody, and there was no court order or any other impediment to visitation other than the requirement in this Court's order that they complete two negative drug screens at least seven days apart. . . . Respondents [ ] have not visited. The last visit was prior to the children coming in to DCS custody. . . . Respondents [ ] have not paid child support . . . Respondents [ ] knew or should have known that they had to pay child support because they attended the Court hearing on January 27, 2021 wherein this Court ordered them to pay child support.

ii. Wanton disregard

Incarcerated parents are also subject to termination of their parental rights when the parent "[h]as engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child." *Id.* § 36-1-102(1)(A)(iv)(*c*). Here, the trial court found in relevant part that "mother [was] incarcerated continuously during this case and [she] failed to stay in contact with DCS, failed to complete drug screen[s] . . . Ms. Barnett is a good case manager and she tried to stay in touch, but the parents continued to fail drug screens and engage in criminal activities." The trial court further found that "[b]oth parents have continued to engage in behaviors which result in their incarceration rendering them unable to provide care for the children."

The record does not preponderate against the trial court's findings, and we agree that Mother abandoned the Children through wanton disregard. Indeed, the Children first arrived in DCS custody because Mother abandoned the Children with a friend, leaving them there for several days without food or diapers. Mother was using methamphetamine while the Children were with her friend. Shortly thereafter, DCS determined that the Children had been exposed to drugs, and the younger child was unable to hold his head up appropriately. Despite DCS's efforts, Mother continued to exhibit wanton disregard for the Children throughout the custodial period by undisputedly continuing to use methamphetamine and failing to take advantage of resources offered by DCS.

This ground for termination was proven by clear and convincing evidence.

c. Substantial noncompliance with permanency plan

The next ground found by the trial court was substantial noncompliance with the permanency plan. Parental rights may be terminated for "substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan." Tenn. Code Ann. § 36-1-113(g)(2). This determination entails "more than merely counting up the tasks in the plan to determine whether a certain number have been completed." *In re Carrington H.*, 483 S.W.3d at 537 (citing *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002)). This ground is not established simply by showing "that a parent has not complied with every jot and tittle of the permanency plan." *In re Ronon G.*, No. M2019-01086-COA-R3-PT, 2020 WL 249220, at *8 (Tenn. Ct. App. Jan. 16, 2020) (quoting *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004)). "Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance." *In re M.J.B.*, 140 S.W.3d at 656.

The requirements of a permanency plan must be "reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place." *In re M.J.B.*, 140 S.W.3d at 656 (citing *In re Valentine*, 79 S.W.3d at 547; *In re L.J.C.*, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003)). DCS must establish "that the

parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met." *In re M.J.B.*, 140 S.W.3d at 656 (citations omitted).

Here, the trial court found that no aspects of the permanency plan were completed, and the record does not preponderate against this. DCS entered into two permanency plans with Mother. The requirements were generally meant to address Mother's substance abuse. The steps included regular drug screens, a mental health assessment and an alcohol and drug assessment, parenting and domestic violence courses, establishing a legal means of income, establishing DCS-approved housing, and maintaining weekly contact with the DCS case worker.

Mother either failed or failed to take her drug screens and did not maintain regular contact with her DCS case worker. While she testified that she is now completing therapy and parenting classes as part of the Recovering Hearts program, Mother did not deny at trial that she largely failed to take any of the permanency plans steps. When asked why, Mother stated: "I was, I was just dealing with a lot of things, and it became overwhelming. And I was just facing addiction really bad."[11]

It is undisputed that the Children were removed from Mother's custody primarily because of her methamphetamine abuse. The permanency plans were clearly related to remedying that condition. Mother continued to use methamphetamine throughout the custodial period and was incarcerated for drug-related offenses until only two weeks before trial. Accordingly, Mother's degree of noncompliance is substantial. Further, addressing her addiction was perhaps the most important aspect of the permanency plan. *See In re M.J.B.*, 140 S.W.3d at 656 (explaining that a "parent's noncompliance [must be] substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met").

Consequently, DCS proved this ground for termination by clear and convincing evidence.

d. Persistence of conditions

Next, 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 can occur when

> [t]he 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

[11] Mother briefly mentioned at trial that she took "childhood development" classes at Buffalo Valley before being discharged from the program early.

> 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 at 605–06.

In this case, the conditions underpinning the Children's removal were Mother's

substance abuse and her resultant inability to care for the Children. Mother's lack of stable housing also prevented her from safely parenting. Indeed, the Children first came into DCS custody when a friend of Mother's dropped the Children at the DCS office and explained that the Children were left with him for several days. The friend did not have any food or diapers for the Children. When DCS spoke to Mother shortly thereafter, she presented as under the influence. And the next day, December 24, 2020, Mother was given a mouth swab drug screen and tested positive for methamphetamine.

The trial court found that by the time of trial, "[t]he mother has housing and is making progress but she will not be able to have the children live with her for four to six months. . . . The mother has been in the Recovering Hearts program for two weeks which is a positive but does not show lasting change and the Court cannot rely on the changes over the past two weeks for the mother."

The record does not preponderate against these findings, and we agree that DCS proved this ground for termination by clear and convincing evidence. It is undisputed that the Children were adjudicated dependent and neglected and were in DCS custody for more than six months prior to the petition for termination being filed. Tenn. Code Ann. § 36-1-113(g)(3). We also agree with the trial court that the most problematic conditions persist and, in all reasonable probability, prevent the Children's safe return to Mother. *Id.* § 36-1-113(g)(3)(i). Although we applaud Mother's most recent efforts towards sobriety, she was in Recovering Hearts for only two weeks prior to trial. Before that, her pattern of methamphetamine use and incarceration undisputedly persisted throughout the custodial period. Mother's argument regarding her more recent success in rehab is also undercut by the fact that Mother had an earlier opportunity to complete a program but admits to being discharged for using drugs at the facility. In light of the overwhelming evidence that the conditions at issue persisted until at least two weeks before the final hearing, Mother's argument is unavailing.

For the same reasons, we are unconvinced that these conditions will be remedied at an early date. Indeed, Mother's proof at trial established that it would be several months before Mother would be offered even the opportunity to have the Children with her at Recovering Hearts. And this opportunity would only arise if Mother continued passing her drug screens. In the meantime, the Children are in a pre-adoptive home and were doing well at the time of trial. Consequently, continuation of the relationship with Mother provides no certainties for the Children and diminishes the Children's opportunity for integration into a stable, permanent home.

We conclude that this ground for termination was proven by clear and convincing evidence.

e. Severe abuse

Parental rights may be terminated when "[t]he parent or guardian has been found to have committed severe child abuse, as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights . . . to have committed severe child abuse against any child[.]" Tenn. Code Ann. § 36-1-113(g)(4). Severe abuse is, among other things, "[k]nowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen[.]" Tenn. Code Ann. § 37-1-102(27)(E).

"A prior finding of severe child abuse is subject to the doctrine of *res judicata*[12] in a termination of parental rights proceeding, 'prevent[ing] a parent from re-litigating whether he or she committed severe child abuse when such a finding has been made in a previous dependency and neglect action.'" *In re Jamarcus K.*, 2022 WL 3755383, at *6 (footnote in original) (quoting *In re S.S.*, No. E2021-00761-COA-R3-PT, 2022 WL 1151424, at *6 (Tenn. Ct. App. Apr. 19, 2022)); *see also In re Raylan W.*, No. M2020-00102-COA-R3-PT, 2020 WL 4919797, at *12 (Tenn. Ct. App. Aug. 20, 2020) (holding severe abuse *res judicata* in termination proceeding where mother and DCS were parties to previous dependency and neglect action in which severe abuse was found).

Here, the Children were adjudicated dependent and neglected by the trial court in January of 2021. In February of 2021, DCS determined through hair follicle tests that the Children had been exposed to methamphetamine and THC. Consequently, the trial court later entered an order concluding that Mother severely abused the Children. *See In re Sophia S.*, No. E2020-01031-COA-R3-PT, 2021 WL 3236347, at *6 (Tenn. Ct. App. July 30, 2021) ("Generally,'[c]lear and convincing evidence of severe child abuse is present when a child is exposed to methamphetamine.'" (quoting *In re Caydan T.*, No. W2019-01436-COA-R3-PT, 2020 WL 1692300, at *5 (Tenn. Ct. App. Apr. 7, 2020))). That ruling was never appealed. Whether Mother committed severe abuse against the Children is, therefore, *res judicata*, and we affirm the trial court's decision as to this ground.[13]

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[12] *Res judicata* applies when "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *In re Raylan W.*, No. M2020-00102-COA-R3-PT, 2020 WL 4919797, at *12 (Tenn. Ct. App. Aug. 20, 2020) (quoting *In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010)).

[13] On appeal, Mother takes issue with the procedural manner in which DCS sought the severe abuse finding. The Children were already adjudicated dependent and neglected when DCS filed its motion for a finding of severe abuse based on the Children's drug screens, which Mother now claims was procedurally improper. Nonetheless, this issue is being raised for the first time on appeal. The record does not show that Mother filed a response to the motion for a severe abuse finding, nor did she appeal that ruling. Nor did Mother ever mention this issue at trial. Because Mother raises this issue for the very first time on appeal, it is waived. *See Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009) (explaining that parties are not permitted to raise issues on appeal that they did not first raise in the trial court). And in any event, this

f. Failure to manifest an ability and willingness to assume custody and/or financial responsibility.

The final ground for termination found by the trial court was failure to manifest an ability and willingness to assume custody of the Children. This ground applies when:

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

Tenn. Code Ann. § 36-1-113(g)(14). 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.*

Regarding the second prong of section 36-1-113(g)(14),

> [t]he 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 Jamarcus K., 2022 WL 3755383, at *14 (quoting *In re Virgil W.*, No. E2018-00091-COA-R3-PT, 2018 WL 4931470, at *8 (Tenn. Ct. App. Oct. 11, 2018)).

Here, the trial court found as follows:

Court has previously held that procedural issues in the dependency and neglect phase are distinct from the issues in a termination trial. *See In re John A.*, No. E2020-00449-COA-R3-PT, 2021 WL 32001, at *4–5 (Tenn. Ct. App. Jan. 4, 2021) ("[A]lleged violations in an earlier dependency and neglect action do not invalidate a trial court's order in a termination action."). We also note that Mother is not represented by the same attorneys on appeal that she was in the proceedings below.

> The Court finds as to ground 6 that the mother and father have failed to manifest an ability and willingness to assume custody and financial responsibility for the children. The Court finds that in the four months prior to filing the Petition that the mother and father were incarcerated but the times when they were not incarcerated they were not working with DCS and were in active addition. The mother and father were not taking steps to assume custody and placing the children in the care of the mother or father at this time would pose a substantial risk of harm to the children. The Court finds that DCS has met its burden of proof for this ground by clear and convincing evidence.
>
> *   *   *
>
> The Respondents have failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the children. The Respondents have failed to pay child support, resolve their criminal charges, complete alcohol and drug treatment or take any steps for the children to be safely returned to their home.

As a threshold matter, we are troubled by the fact that the trial court appears to have limited its analysis of this ground to the four months immediately preceding the filing of the termination petition. In a recent case, we explained why this is inappropriate:

> [T]he four-month period [at issue in abandonment] is inapposite for purposes of termination under section 36-1-113(g)(14). Although the trial court relied on the perceived "orchestration" of the four-month period in ruling on this ground, section (g)(14) does not mention any particular four-month period. The analysis of a parent's failure to manifest an ability and willingness to assume custody or financial responsibility focuses on the parent's actions throughout the life of the Child. *In re Neveah M.*, 614 S.W.3d at 677 (internal quotations omitted) (explaining that the legislative intent of section 36-1-113(g)(14) is to allow termination of parental rights "upon proof of a parent's or guardian's *long term* either inability or unwillingness to provide for a child that is biologically or legally yours, and such conduct leads to harm to a child") (emphasis added).

In re Isabella G., No. M2022-00246-COA-R3-PT, 2023 WL 1131230, at *12 (Tenn. Ct. App. Jan. 31, 2023).

The trial court's findings and conclusions suggest that it exclusively considered, without statutory basis, the four months preceding the filing of the petition in considering this ground. The appropriate analysis is whether the parent has, on a long-term basis, failed

to manifest an ability and willingness to assume custody of or financial responsibility for the child. Under the circumstances, the trial court's ruling as to this ground should be vacated. Because there are multiple other statutory grounds for termination that have been proven, however, remand is not warranted. *See In re Navada N.*, 498 S.W.3d at 594–95 (explaining that error as to one ground for termination did not warrant remand due to "another valid ground for termination"); *In re Jamarcus K.*, 2022 WL 3755383, at *11 (collecting cases noting same).

Best interests

Next, we must address whether termination of Mother's parental rights is in the Children's best interests. In addition to proving at least one statutory ground for termination, a petitioning party 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 look at twenty non-exhaustive factors when determining whether termination is in a child's best interests. *See* Tenn. Code Ann. § 36-1-113(i)(1)(A)-(T). In this case, the trial court made detailed findings of fact and conclusions of law regarding the relevant best interest factors, ultimately concluding that the weight of the factors favored termination. We agree.

For example, the trial court found that Mother failed to demonstrate "continuity and stability in meeting the [C]hildren's basic material, educational, housing, and safety needs[;]" that Mother failed to maintain "contact with the children during this custody episode[;]" and that Mother "continue[s] to use alcohol and controlled substances which render[s] [her] consistently unable to provide safe and stable care for the children." *See* Tenn. Code Ann. § 36-1-113(i)(1)(C),(D), (E), & (J). The trial court further noted that Mother failed to make any significant changes in her overall circumstances, other than in the two weeks just prior to trial, during the custodial period and continued using methamphetamine and incurring criminal charges. *See id.* § 36-1-113(i)(1)(J),(O). Mother's instability continued despite assistance offered by DCS, which Mother rebuffed. *See id.* § 36-1-113(i)(1)(K),(L). As discussed at length above, all of these findings are supported by the record.

The trial court further noted, and we agree, that the Children were subject to abuse by Mother and were in poor condition when placed in DCS custody. *Id.* § 36-1-113(i)(1)(N),(P), & (Q). As the trial court found, the Children were "behind in meeting their milestones[,]" a finding that is supported by the record. Upon entering DCS custody, the younger child had a soft spot on his head and could not hold his head up properly. Both Children needed occupational therapy. According to Ms. Barnett, the older child hoarded food, and both Children were aggressive around food. *See id.* Finally, the trial court found that Mother paid no support for the Children. *Id.* § 36-1-113(i)(1)(S).

While no one factor is dispositive, we agree with the trial court that the ultimate weight of the best interest factors favors termination. The Children were in extremely poor condition upon entering DCS custody and have improved with therapy and appropriate medical care. By the time of trial, they were in a pre-adoptive home, and Mother still struggled with housing instability and substance abuse. Because of the younger child's tender age, the foster home is essentially the only home he has ever known. Bearing all of this in mind, we agree that the Children's best interests are served through termination of Mother's parental rights. We affirm the trial court's ruling.

Cumulative error

Finally, Mother asserts that the combined weight of the trial court's purported errors amounts to a violation of her right to Due Process. This issue lacks merit. First, several of the errors Mother alleges were not actually error. Second, Mother's argument rests on the cumulative error doctrine, which Mother concedes "has been largely examined in the context of criminal cases[.]" Mother cites to no cases in which the cumulative error doctrine has applied to a termination appeal. And on at least two occasions, this Court has rejected similar arguments. *See In re Kaycee M.*, No. M2017-02160-COA-R3-PT, 2018 WL 4778018, at *8 n.8 (Tenn. Ct. App. Oct. 3, 2018) ("DCS responds that no Tennessee court has applied the [cumulative error] doctrine in a civil case and that Father failed to articulate how the failure to present proof constituted error. We agree with DCS."); *In re Abbigail C.*, No. E2015-00964-COA-R3-PT, 2015 WL 6164956, at *25 (Tenn. Ct. App. Oct. 21, 2015) (rejecting the father's cumulative error argument, noting that "we cannot conclude that the minor errors that may have been committed by the trial court outweigh the interest in finality that must be a cornerstone of all termination of parental rights proceedings").

Consequently, the trial court's ultimate conclusion that Mother's parental rights should be terminated is affirmed.

CONCLUSION

The ruling of the trial court is affirmed in part and vacated in part. The ultimate holding that Mother's parental rights are terminated as to both children is affirmed. Costs of this appeal are assessed to the appellant, Ashlyn C.

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KRISTI M. DAVIS, JUDGE