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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs November 1, 2022

**IN RE SERENITY M.**

**Appeal from the Juvenile Court for Sevier County**  
**No. 21-000498      Jeffrey D. Rader, Judge**

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**No. E2022-00682-COA-R3-PT**

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A mother appeals a trial court’s decision to terminate her parental rights based on the grounds of (1) abandonment by failure to provide a suitable home, (2) persistence of conditions, (3) severe child abuse, and (4) failure to manifest an ability and willingness to personally assume custody or financial responsibility of the child. She further challenges the trial court’s finding by clear and convincing evidence that termination of her parental rights was in the best interest of the child. Discerning no error, we affirm the trial court’s termination of the mother’s parental rights.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and KENNY W. ARMSTRONG, JJ., joined.

Vicki Tucci Krusel, Seymour, Tennessee, for the appellant, Jennifer M.

Jonathan Skrmetti, Attorney General and Reporter, and Erica M. Haber, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

Robert L. Huddleston, III, Maryville, Tennessee, guardian ad litem.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

This case involves the termination of a mother’s parental rights to one of her children. Serenity M. was born to Jennifer M. (“Mother”) and Calvin M., Jr. (“Father”) in June 2020. Shortly after the child’s birth, the Tennessee Department of Children’s Services (“DCS” or “the Department”) received a referral alleging that the child was a drug-exposed infant. The Department investigated the matter and learned that, at birth, the child

exhibited withdrawal symptoms and was diagnosed with neonatal abstinence syndrome (“NAS”) due to intrauterine drug exposure. The child required hospitalization for several weeks before she was successfully weaned off of the narcotics in her system.

Both parents reported to DCS that they had been abusing drugs since they were teenagers and were both in medical assisted treatment for opioid addiction. Mother admitted that she used morphine while pregnant with the child despite knowing she was pregnant and despite knowing that it posed a risk of endangering the child. Records gathered during DCS’s investigation, however, showed that Mother used numerous other drugs while pregnant with the child, including cocaine, fentanyl, heroin, THC, BUP, and Flexeril. Initially, Mother claimed she was married to Father, but DCS later learned that Mother and Father had never been married to each other. Instead, they share the same last name because they are half-siblings.

On July 2, 2020, DCS filed a petition for temporary custody of the child alleging that the child was dependent and neglected and severely abused. The trial court entered a protective custody order that same day awarding DCS temporary custody of the child because probable cause existed to believe that the child was dependent and neglected due to “the parents’ drug use while they knew the mother was pregnant with the child.” The Department placed the child with Teresa M. (“Foster Mother”) in August 2020, and she has remained in that foster placement continuously since that time.

In an order entered on March 3, 2021, the trial court adjudicated the child dependent and neglected based on Mother’s and Father’s substance abuse issues and found that both parents committed severe child abuse as defined in Tenn. Code Ann. § 37-1-102(b)(27) because “[b]oth parents used illicit drugs at least 2-3 times after they knew the mother was pregnant and knew it could be harmful to the child. [The] child was harmed and had to stay in the NICU for several weeks undergoing morphine treatment.” The court then ordered that the child remain in DCS custody.

During the year and a half following the removal, DCS created two permanency plans that listed several responsibilities for Mother to complete. As relevant to the issues on appeal, Mother’s responsibilities included maintaining regular visitation with the child, obtaining and maintaining employment, and “refrain[ing] from using illegal drugs, honestly participat[ing] in drug assessments and follow[ing] all recommendations, and complet[ing] random drug screens, pill counts, and a hair follicle test.” Mother signed two criteria and procedures for termination of parental rights documents that explained that her parental rights could be terminated if, among other things, she failed either to provide a suitable home for the child or to remedy the conditions that led to removal.

The Department filed a petition to terminate Mother’s and Father’s parental rights on April 30, 2021. Initially, the termination hearing was set for February 17, 2022. Mother and Father appeared in court that day and surrendered their parental rights. Three days

later, however, both parents revoked their surrenders. Following the revocation of their surrenders, the trial court set the termination hearing for March 15, 2022, but it was rescheduled to April 19, 2022, to ensure that both parents received adequate notice of the hearing to allow for their participation. When neither parent appeared in court on April 19, 2022, Father's attorney made an oral motion for a continuance, and Mother's attorney joined in the motion. The trial court denied the motion and proceeded with the termination hearing.

After hearing the matter, the trial court entered an order terminating Mother's parental rights.<sup>1</sup> The court determined that the following grounds had been proven by clear and convincing evidence: (1) abandonment by failure to provide a suitable home, (2) persistence of conditions, (3) severe child abuse, and (4) failure to demonstrate an ability and willingness to assume custody or financial responsibility. The court further determined that there was clear and convincing evidence that termination of Mother's parental rights was in the best interest of the child.

Mother appealed and presents the following issues for our review: (1) whether the trial court abused its discretion in denying the motion for a continuance, (2) whether the trial court erred in finding by clear and convincing evidence that grounds existed to terminate her parental rights, and (3) whether the trial court erred in determining that termination of her parental rights was in the best interest of the child.

#### STANDARD OF REVIEW

Under both the federal and state constitutions, a parent has a fundamental right to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 249-50 (Tenn. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996) (citing *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Although this right is fundamental, it is not absolute and may be terminated in certain situations. *In re Angela E.*, 303 S.W.3d at 250. Our legislature has identified "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B., IV.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at \*7 (Tenn. Ct. App. Apr. 29, 2005)).

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

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<sup>1</sup> The trial court also terminated Father's parental rights. He did not appeal that decision.

parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

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

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

We review the trial court’s findings of fact de novo with a presumption of correctness unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *In re Serenity B.*, 2014 WL 2168553, at \*2. In light of the heightened standard of proof, we must then make our own determination “as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)).

## ANALYSIS

### I. Motion for continuance

As an initial matter, Mother asserts that the trial court abused its discretion in not granting her a continuance of the termination trial. Regarding continuances, this Court has previously stated as follows:

A decision to grant or deny a motion to continue falls within the sound discretion of the trial court. *In re Trinity P.*, No. E2019-01251-COA-R3-PT, 2020 WL 995788, at \*4 (Tenn. Ct. App. Mar. 2, 2020). “The court retains that discretion, even when the question before it is one of termination of

parental rights.” *State, Dep’t of Children’s Servs. v. Fineout*, No. 01A01-9710-JV-00582, 1998 WL 792052, at \*2 (Tenn. Ct. App. Nov. 16, 1998) (citing *State, Dep’t of Human Servs. v. Hauck*, 872 S.W.2d 916 (Tenn. Ct. App. 1993)). Thus, appellate courts decline to disturb a trial court’s ruling on a motion to continue absent an abuse of discretion. *In re A’Mari B.*, 358 S.W.3d 204, 213 (Tenn. Ct. App. 2011). A trial court abuses its discretion “only when it ‘applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.’” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). “Appellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness.” *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999); *see also In re Kandace D.*, No. E2017-00830-COA-R3-PT, 2018 WL 324452, at \*10 (Tenn. Ct. App. Jan. 8, 2018). When examining a trial court’s discretionary decision, the appellate court reviews “the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d)” and the “legal determinations de novo without any presumption of correctness.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010) (citing *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002)).

*In re Ashanti P.*, No. M2021-00039-COA-R3-PT, 2021 WL 5549590, at \*7 (Tenn. Ct. App. Nov. 29, 2021).

As the party seeking a continuance, Mother bore the burden of demonstrating circumstances that justified the continuance. *In re Paetyn M.*, No. W2017-02444-COA-R3-PT, 2019 WL 630124, at \*5 (Tenn. Ct. App. Feb. 14, 2019) (citing *Osagie v. Peakload Temp. Servs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002)). We have observed:

Decisions regarding the grant or denial of a continuance are fact-specific and “should be viewed in the context of all the circumstances existing” at the time of the request. *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003). The circumstances 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.* (footnotes omitted).

*Id.*; *see also In re Ashanti P.*, 2021 WL 5549590, at \*8.

Mother argues that the trial court erred when it failed to inform her attorney that it would entertain a motion to set aside the judgment if Mother provided documentary proof to substantiate an excuse for missing the termination hearing. *See In re Zacharias T.M.*,

403 S.W.3d 212, 225 (Tenn. Ct. App. 2012) (affirming trial court’s denial of continuance because the court “went so far as to tell Mother’s attorney that if Mother would provide some documentary proof to substantiate her claimed excuse, the [trial court] would entertain a motion to set aside the judgment). Specifically, she argues that, by failing to inform her attorney thusly, the trial court did not provide her with an opportunity or an avenue to prove the circumstances surrounding her absence from court. The problem with Mother’s argument is that it ignores the existence of the Tennessee Rules of Civil Procedure and their applicability to termination of parental rights proceedings. *See State ex rel. Turner v. Bryant*, No. W2006-01463-COA-R3-JV, 2008 WL 2388630, at \*3 (Tenn. Ct. App. June 12, 2008) (“Still other proceedings, such as the termination of parental rights . . ., are governed by the Tennessee Rules of Civil Procedure.”). Tennessee Rules of Civil Procedure 59.04<sup>2</sup> and 60.02<sup>3</sup> expressly provide avenues for an absent parent to set aside a judgment terminating his or her parental rights if he or she can provide evidence establishing a valid excuse for missing the termination trial. Mother was represented by an attorney who should have been aware of these rules. It should not have been necessary for the trial court to inform her attorney either of their existence or that it would entertain a motion filed pursuant to one of them if Mother produced evidence of circumstances justifying a continuance. Moreover, the trial court was under no obligation to inform Mother’s attorney of the applicability of the Rules of Civil Procedure. This argument is unavailing.

Applying the four circumstances identified in *In re Paetyn M.* to this record, we are unable to conclude that the trial court abused its discretion in denying Mother’s request for a continuance. First, the termination petition had been pending for nearly a year. “Trial courts shall, consistent with due process, expedite all contested termination of parental rights cases so as to prevent a child from languishing in foster care unnecessarily.” *In re Ashanti P.*, 2021 WL 5549590, at \*9 (citing Tenn. Code Ann. § 36-1-124). Moreover, Tenn. Code Ann. § 36-1-113(k) required that the trial court ensure that the termination hearing occur within six months from the date the filing of the termination petition.

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<sup>2</sup> Tennessee Rule of Civil Procedure 59.04 provides that “[a] motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.”

<sup>3</sup> Tennessee Rule of Civil Procedure 60.02 states, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Second, Mother offered no reason for the continuance. When moving for a continuance, counsel stated as follows:

MR. BENNETT [Father's counsel]: Your honor, on behalf of my client, and I'm sure Ms. Patrick is going to join, we would move for a continuance in that our clients are not present for the hearing.

MS. PATRICK [Mother's counsel]: That's correct, Your Honor.

THE COURT: And you're asking for what?

MR. BENNETT: A continuance based on their non—their current nonappearance.

THE COURT: You don't have any reason to think that they intended to be here, right?

MR. BENNETT: I have no reason to understand why they're not here.

THE COURT: Got it. You, either?

MS. PATRICK: Correct.

With respect to Mother's diligence in seeking a continuance—circumstance number 3—the record shows that the trial court initially set the termination hearing for February 17, 2022. Notice of the hearing was sent to Mother and her attorney. Mother appeared at the February hearing but decided to surrender her parental rights during that hearing. After Mother revoked her surrender, the court set another termination hearing for March 15, 2022, but the court rescheduled the hearing for April 19, 2022, to ensure that Mother received adequate notice of the hearing. The Department served Mother with notice of the April 19, 2022 hearing on March 15, 2022. This notice provided Mother with more than a month to make arrangements to ensure her presence in court. She has offered no evidence indicating that her nonappearance was due to something unforeseeable or due to an emergency, and yet the motion was not presented to the court until the day of trial.

Lastly, we consider whether Mother was prejudiced by the trial court not granting a continuance. After the trial court denied the continuance, Mother's attorney advised the court that she had not had any contact with Mother since revoking her surrender of her parental rights and stated that "it would be difficult to defend her in the TPR today not knowing what her position is." Nevertheless, Mother's attorney offered to stay for the hearing. The court acknowledged the difficult position Mother's attorney was in and offered her the opportunity to withdraw from the representation. The court ultimately concluded, however, to "just leave [Mother's attorney] on the case and we'll be done with it." Mother's attorney remained for the duration of the trial but presented no defense for Mother—she offered no proof on Mother's behalf, made no objections, did not cross-examine a single witness, and adopted Father's counsel's closing argument without adding additional argument. We, too, acknowledge the difficult position Mother's attorney was placed in due to Mother's failure to appear. That does not, however, neutralize the preceding circumstances supporting denial of the continuance.

In light of the foregoing, we conclude that the trial court did not abuse its discretion in denying Mother's motion for a continuance.

## II. Grounds for Termination

### A. Abandonment by failure to provide a suitable home

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

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

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

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

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

For purposes of this ground, DCS must make "reasonable efforts" to assist parents in obtaining a suitable home by using its "superior insight and training." *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at \*6 (Tenn. Ct. App. July 13, 2015)



(quoting *State, Dep't of Children's Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008)). To be considered reasonable, the Department's efforts need not be "Herculean," *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at \*9 (Tenn. Ct. App. June 10, 2014), but they must be equal to or greater than those of the parent. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c).

A suitable home requires "more than a proper physical living location." *In re Daniel B., Jr.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at \*4 (Tenn. Ct. App. July 10, 2020) (quoting *State, Dep't of Children's Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at \*3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that "[a]ppropriate care and attention must be given to the child," *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at \*7 (Tenn. Ct. App. Apr. 20, 2016), and that the home "be free of drugs and domestic violence," *In re Hannah H.*, 2014 WL 2587397, at \*9. Compliance with assessments and counseling is "directly related to the establishment and maintenance of a suitable home." *In re M.F.O.*, No. M2008-01322-COA-R3-PT, 2009 WL 1456319, at \*5 (Tenn. Ct. App. May 21, 2009).

The Department filed a petition for temporary custody of the child on July 2, 2020. In that petition, DCS alleged that the child should be removed from the parents' custody because the child was dependent and neglected. That same day, the trial court entered an order granting the petition and removing the child into DCS custody. In the order removing the child, the court expressly found that reasonable efforts to maintain the child in the home were not required due to the circumstances of the family and child but that DCS made reasonable efforts to prevent the removal. Thus, DCS established the first two requirements of this ground for termination. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a), (b).

Regarding the statute's third requirement, we have previously stated that DCS "may establish this ground by offering proof of reasonable efforts during *any four-month period* following a child's removal." *In re Roderick R.*, No. E2017-01504-COA-R3-PT, 2018 WL 1748000, at \*11 n.13 (Tenn. Ct. App. Apr. 11, 2018); *see also In re Rahjada W.*, No. E2019-01798-COA-R3-PT, 2020 WL 2893434, at \*5 (Tenn. Ct. App. June 3, 2020). Here, DCS did not expressly state which four-month period it was relying on to establish this ground, nor did the trial court refer to a four-month period in finding that this ground had been proven by clear and convincing evidence. The proof offered at trial, however, shows that DCS focused on the four-month period from June 20, 2021 to September 21, 2021. During this four-month period, DCS created a permanency plan, administered drug screens, arranged supervised visits with the child, and conducted a home visit.

By contrast, Mother made little effort to demonstrate a concern for the child during this time period. Although she had stable housing throughout the custodial episode, she continued to live with and have a romantic relationship with Father. *See* Tenn. Code Ann. § 39-15-302(a)(1), (b) (defining incest as "engag[ing] in sexual penetration . . . with a

person, knowing the person to be . . . [t]he person's brother or sister of the whole or half-blood" and stating that engaging in incest constitutes "a Class C felony"). The Department explained to Mother that neither she nor Father could smoke around the child because it would cause the child's NAS to "flare up" and "make her [skin] break out." Nonetheless, Mother continued to allow smoking in her home. Kailey Vineyard, the DCS case manager, testified that, during a visit to the home in August 2021, she observed an open carton of cigarettes and an ashtray with cigarettes in it on a side table in the living room. During that visit, Ms. Vineyard also witnessed Father light a cigarette inside the home before walking to the open front door to smoke in the doorway.

Mother also exhibited behavior indicating that she was unable to care for the child. For instance, she is not equipped to address the child's numerous medical needs. The foster mother testified that the child has had several surgeries and that Mother attended only one of them. Throughout the custodial episode, the child has regularly attended medical appointments with Tennessee Early Intervention Services ("TEIS") for developmental therapy, an ear, nose and throat doctor, and a physiatrist for her legs. At no point during this case has Mother inquired about any of the child's medical appointments. Lastly, Mother's substance abuse issues continued to be a problem. She passed drug screens administered by DCS during the early months of the custodial episode, but Mother's records from the methadone clinic she was going to during the relevant time period showed that Mother continued testing positive for drugs through September 2021. Based on the foregoing evidence, we conclude that the efforts by DCS exceeded any efforts by Mother.

In sum, although Mother established a suitable physical structure, the proof showed that she failed to establish a home free of drugs and in which the child would receive appropriate care and attention. Thus, there is clear and convincing evidence in the record that Mother demonstrated a lack of concern for the child to such a degree that there is little likelihood that she would be able to establish a suitable home in the near future. The trial court did not err in terminating Mother's parental rights based on this ground for termination.

#### B. Persistence of conditions<sup>4</sup>

The trial court also terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). This ground is often referred to as "persistence of conditions" and allows courts to terminate parental rights in situations where:

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<sup>4</sup> On appeal, Mother challenges only the trial court's determination that clear and convincing evidence existed to establish the abandonment by failure to establish a suitable home ground. Nevertheless, we must review each ground relied upon by the chancery court for terminating her parental rights. *See In re Carrington H.*, 483 S.W.3d at 525.

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

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

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

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

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

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

In the present matter, there is no dispute that the child was removed from Mother’s custody by a protective custody order and then adjudicated dependent and neglected more than six months before the termination hearing began. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)-(B). There is also no dispute that the child was removed from Mother’s custody due to Mother’s substance abuse issues. During the nearly two years following the removal, Mother did little to demonstrate that the child could ever be safely returned to

her custody. Mother completed an alcohol and drug assessment and submitted some negative drug screens in the five months following the removal, but she often refused to submit to drug screens requested by DCS during that time period. Mother also refused to submit to hair follicle tests in January, February, and March of 2021. She finally submitted to a hair follicle test in April 2021, and that test returned negative for illegal substances. However, Mother tested positive for methadone the following month. After testing positive for methadone, Mother informed DCS that she had been going to a methadone clinic. The Department then requested the Mother sign a release for her records from the methadone clinic. Ms. Vineyard testified that, when she finally received the records from the methadone clinic, she learned that Mother had been failing drug screens at the clinic. Thus, DCS recommended that Mother undergo a new alcohol and drug assessment. Mother refused claiming that she did not have any drug issues. Records from the methadone clinic, however, show that Mother continued testing positive for unprescribed substances through September 2021.

Other conditions also existed that “in all reasonable probability, would cause the child to be subjected to further abuse or neglect.” Tenn. Code Ann. § 36-1-113(g)(3)(i). Although Mother had stable housing throughout the custodial episode, she continued living in that home with Father and having a romantic relationship with him. Furthermore, Mother failed to obtain employment, income, or transportation. And most significantly, Mother displayed a complete lack of interest in and understanding of the child’s various medical needs.

Lastly, the continuation of the parent and child relationship in this case would also diminish the child’s chances of integrating into a permanent home. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). Foster Mother testified that the child is doing well and is happy in the foster home. Foster Mother is a nurse who understands the child’s various medical needs. She takes the child to the Grow With Me Clinic every three-to-four months, speech therapy and occupational therapy twice per week, and developmental therapy at TEIS twice per month. She also takes the child to an ear, nose, and throat doctor and a physiatrist every six months. If the child becomes available for adoption, Foster Mother and her husband wish to adopt her. We conclude that DCS proved the existence of this termination ground by clear and convincing evidence.

### C. Severe child abuse

In addition to the grounds above, the trial court terminated Mother’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(4), which states:

The 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 or the petition for adoption to have committed severe child abuse against any child[.]

As relevant here, Tenn. Code Ann. § 37-1-102(27) defines “severe abuse” as:

(A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death[.]

On March 3, 2021, the trial court entered an order adjudicating the child dependent and neglected and finding that she was the victim of severe child abuse perpetrated by Mother due to Mother using illicit drugs “2 to 3 times” after learning of the pregnancy and knowing that it could be harmful to the child. This order was final and never appealed, making the severe abuse finding *res judicata*. *In re Dakota C.R.*, 404 S.W.3d 484, 497 (Tenn. Ct. App. 2012). Because the severe abuse finding in the March 3, 2021 order satisfies the “under any prior order of a court” language in Tenn. Code Ann. § 36-1-113(g)(4), we conclude that the trial court properly determined that DCS proved this ground for termination by clear and convincing evidence.

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

Finally, the trial court terminated Mother’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(14). This ground requires a party to prove two elements by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1), (g)(14). First, a party must prove that the parent failed to manifest “an ability and willingness to personally assume legal and physical custody or financial responsibility of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14). Second, a party must prove that placing the children in the parent’s “legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(14).

To establish the first prong, the party seeking to terminate parental rights need only prove that a parent failed to manifest either an ability or a willingness to assume custody. *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020) (citing *In re Aymynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at \*13-14 (Tenn. Ct. App. June 20, 2018)). “Ability focuses on the parent’s lifestyle and circumstances[.]” and willingness focuses on the parent’s attempts “to overcome the obstacles that prevent [him or her] from assuming custody or financial responsibility for the child.” *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at \*6 (Tenn. Ct. App. Feb. 8, 2019). Thus, a parent’s mere desire to reunite with his or her child is insufficient to demonstrate an ability or a willingness. *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at \*17 (Tenn. Ct. App. July 15, 2019). A parent must demonstrate ability and/or willingness as of the date the termination petition was filed. *In re M.E.N.J.*, No. E2017-01074-COA-R3-PT, 2017 WL 6603658, at \*7 (Tenn. Ct. App. Dec. 27, 2017).

Here, Mother's actions failed to demonstrate an ability or a willingness to assume custody of the child. At the time the termination petition was filed, Mother's sobriety remained an issue. She submitted some negative drug screens, but she often refused to submit to DCS's requests that she take a drug screen. Shortly before the petition was filed, Mother submitted to DCS's request for a hair follicle test that returned negative for drugs. The records from the methadone clinic she was going to at that time, however, revealed that Mother had been testing positive for unprescribed drugs when she submitted to its requests for drug screens. Although DCS informed Mother that she could not smoke before or during visits with the child due to the child's NAS, Mother often smoke immediately prior to visits and allowed smoking in her home. Moreover, the evidence showed that Mother exhibited little interest in or understanding of the child's medical needs because she attended little to none of the child's many medical appointments and made no inquiry about them. Mother also lacked employment, income, and transportation.

Regarding the second prong, the evidence in the record demonstrates that placing the child in Mother's custody "would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14). "Substantial harm" requires "a real hazard or danger that is not minor, trivial, or insignificant" and, "[w]hile the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not." *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at \*8 (Tenn. Ct. App. Apr. 4, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)). The child has never lived with Mother. Although Mother regularly attended supervised visits with the child following the removal, Mother canceled some visits and then stopped visiting entirely in September 2021. Mother is therefore a near-stranger to the child. Moreover, Mother has continued to allow smoking in her home and has yet to address her substance abuse issues. We therefore agree with the trial court's finding that placing the child with Mother poses a risk of substantial harm to the child's physical and psychological welfare. We conclude that DCS proved this ground for termination by clear and convincing evidence.

### III. Best interest

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Mother's parental rights, we must next consider whether the trial court properly determined that termination of Mother's parental rights was in the best interest of the children. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Audrey S.*, 182 S.W.3d at 860. After a court finds that clear and convincing evidence exists to support a ground for termination, the child's interests diverge from those of the parent and the court focuses on the child's best interests. *In re Audrey S.*, 182 S.W.3d at 877. A court must view the child's best interest from the perspective of the child, not that of the parent. *Id.* at 878. A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent's rights be terminated. *Id.* at 877. Because some parental misconduct is redeemable, our termination of parental rights statutes recognize that

“terminating an unfit parent’s parental rights is not always in the child’s best interests.” *Id.* The facts a court considers in its best interest analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). Once a court makes the underlying factual findings, it should “consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest.” *Id.*

“The best interest analysis is a fact-intensive inquiry, and each case is unique.” *In re Kenneth D.*, No. M2021-00214-COA-R3-PT, 2022 WL 556739, at \*7 (Tenn. Ct. App. Feb. 24, 2022) (citing *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004)). A trial court must consider the factors enumerated in Tenn. Code Ann. § 36-1-113(i), but it is not required to find that each of the enumerated factors exists before concluding that it is in the best interest of the child to terminate a parent’s rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Although in some circumstances “the consideration of one factor may very well dictate the outcome of the analysis,” *In re Audrey S.*, 182 S.W.3d at 878, a court is still obligated to consider “all the factors and all the proof.” *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017). The Tennessee General Assembly amended the statutory best-interest factors in 2021. *See* 2021 TENN. PUB. ACTS ch. 190 § 1 (S.B. 205), eff. Apr. 22, 2021. Because DCS filed the termination petition after April 22, 2021, the new best interest factors apply in this case. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding the version of a termination statute “that was in force when the petition was filed governs this case”) (quoting *In re Tianna B.*, No. E2015-02189-COA-R3-PT, 2016 WL 3729386, at \*7 (Tenn. Ct. App. July 6, 2016)).

During the nearly two years following removal, Mother failed to take any significant steps to demonstrate stability and continuity so as to allow reunification with the child despite DCS’s efforts to assist her. *See* Tenn. Code Ann. § 36-1-113(i)(C), (J), (K), (L), (M), (P) (“Whether the parent has demonstrated continuity and stability in meeting the child’s basic material, educational, housing, and safety needs,” “[w]hether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent,” “[w]hether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting change of circumstances, conduct, or conditions,” “[w]hether the department has made reasonable efforts to assist the parent in make a lasting adjustment,” “[w]hether the parent has demonstrated a sense of urgency in . . . addressing the circumstance, conduct, or conditions that made an award of custody unsafe,” and “[w]hether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive[.]”). The Department developed permanency plans to address the issues necessitating removal, but Mother completed little to none of the steps on the permanency plans. Instead, she continued abusing drugs, never provided DCS with proof of income or employment, and failed to obtain a driver’s license. The Department enrolled Mother in the Youth Villages Pilot Program to assist her with completing the steps on the permanency plans, but Mother asked to terminate her involvement with that

program. Mother attended one of the child's numerous medical appointments but otherwise showed no interest in or understanding of the child's significant medical needs.

By contrast, the child has found stability and continuity in her current foster home, where she has lived since August 2020. The child identifies as a member of the family, calling Foster Mother "mom" and Foster Mother's husband "dad." Foster Mother is a nurse who understands the child's ongoing medical issues caused by abuse perpetrated on the child due to Mother's drug use during the pregnancy, and Foster Mother has attended every medical appointment with the child. Mother has never had physical custody of the child and, at the time of trial, had not visited the child in seven months. Therefore, the child has no attachment with Mother, and there is no reasonable expectation that Mother could create one. Removing the child from her current environment would place the child at risk of physical and psychological harm as shown by Mother's failure to address her substance abuse issues, the child's relationship with her foster family, and the lack of a relationship with Mother. *See id.* 36-1-113(i)(A), (B), (D), (E), (H), (I), (N) ("The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement," "[t]he effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition," "[w]hether the parent and child have a secure and healthy parental attachment," "[w]hether the parent has maintained regular visitation," "[w]hether the child has created a healthy parental attachment with another person," "[w]hether the child has emotionally significant relationships with persons other than parents and caregivers," and "[w]hether the parent . . . has shown . . . physical . . . abuse or neglect toward the child[.]").

Mother failed to demonstrate she has the ability and the commitment to establish a healthy and safe environment for the child. The child has never lived with Mother. Although Mother had stable housing throughout the case, she continued smoking before visits with the child and permitted smoking in the home despite knowing that cigarette smoke was harmful to the child due to her NAS. Furthermore, her continued drug use and lack of understanding of the child's medical needs show that the child's basic and specific needs would not be met in Mother's home. Evidence in the record shows that, in addition to never providing stable care for the child, Mother failed to do so for another of her children because she previously lost custody of the other child due to abusing drugs while pregnant with that child. *See id.* 36-1-113(i)(O), (Q), (R) ("Whether the parent has ever provided safe and stable care for the child or any other child," "[w]hether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basis and specific needs," and "[w]hether the physical environment of the parent's home is healthy and safe for the child[.]"). We acknowledge, however, that despite lacking employment and income, Mother paid \$595 in child support between November 2020 and December 2021. *See id.* 36-1-113(i)(S) ("Whether the parent has consistently provide more than token financial support."). Even considering Mother's provision of child support, we do not find this tips the scale in favor of Mother retaining her parental rights.



Based on the foregoing, we conclude that the combined weight of the proven facts amounts to clear and convincing evidence that termination of Mother's parental rights is in the best interest of the child.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, Jennifer M., for which execution may issue if necessary.

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