IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 17, 2023 Session

IN RE ROBERT H. ET AL.

Appeal from the Juvenile Court for Sevier County
No. 21-000843, 21-000844 Jeffrey D. Rader, Judge

No. E2022-00809-COA-R3-PT

The Tennessee Department of Children's Services filed a petition to terminate a father's parental rights as to two children, based on abandonment by failure to provide a suitable home, substantial noncompliance with permanency plans, failure to remedy persistent conditions, and failure to manifest an ability and willingness to assume custody of the child. The trial court granted the petition, finding that the Department proved all alleged grounds by clear and convincing evidence and that terminating the father's parental rights was in the best interests of the children. We affirm.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

Gregory E. Bennett, Seymour, Tennessee, for the appellant, Robert H.

Jonathan Skrmetti, Attorney General and Reporter, and Clifton W. Barnett, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Robert H., Jr. and Austin H. (the "Children"), born in June 2008 and October 2009, respectively, are the biological children of Robert H. ("Father") and Tina W. ("Mother").[1] Father and Children traveled from Philadelphia, Pennsylvania, to Pigeon Forge, Tennessee,

[1] In actions involving minors, 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 and witnesses, as appropriate.

during Christmas 2018 and began living with Father's uncle. Mother, however, remained in Pennsylvania.[2]

On July 18, 2019, the Tennessee Department of Children's Services ("DCS" or the "Department") responded to a referral alleging drug exposure and environmental neglect with respect to the Children. During the visit, Father submitted to a urine drug screen and tested positive for methamphetamine and suboxone; he had a prescription for the latter. Father became upset, made suicidal threats, and punched the walls and front door when DCS began discussing removal of the Children due to his positive drug screen. Law enforcement officers were called to de-escalate the situation. DCS removed the Children from Father's custody that day on an emergency basis. The next day, on July 19, 2019, DCS filed a petition for temporary legal custody of the Children in the Sevier County Juvenile Court (the "Juvenile Court") due to Father's drug use, Father's mental health issues, the condition of the home, and Mother's unavailability. The Juvenile Court entered a protective custody order on the same date, finding probable cause that the Children were dependent and neglected. The Children have remained continuously in DCS custody since that time.

On October 2, 2019, the Children were adjudicated dependent and neglected, based on Father's stipulation to "a clear and convincing finding of dependency and neglect based upon his substance abuse issues." At the same hearing, the Juvenile Court ratified the Department's initial family permanency plan, which was dated August 9, 2019, and had the permanency goal of returning the Children to parental custody. The plan required Father to have supervised visits with the Children twice a month; to complete an alcohol and drug assessment, comply with its recommendations, and sign releases for DCS to obtain copies of reports related to the assessment; to maintain sobriety on a consistent basis and respond to DCS's requests for random drug screens; to complete a mental health assessment, comply with its recommendations, and sign releases for DCS to obtain copies of reports relate to the assessment; to have a reliable transportation plan and to provide DCS with proof of a valid driver's license, registration, and insurance; to obtain and maintain clean, safe, and appropriate housing; to pay the amount of court-ordered child support; to provide DCS with proof of a legal source of income; and to complete parenting classes and be able to demonstrate his new knowledge and skills during visitation. DCS updated the permanency plan twice, on May 15, 2020, and on January 11, 2021, but Father's requirements did not change. The Juvenile Court ratified both subsequent permanency plans.

DCS filed a petition to terminate both parents' parental rights on July 27, 2021 (the "Petition"), contending that (1) both parents abandoned the Children by their failure to provide a suitable home, (2) both parents failed to manifest an ability and willingness to

[2] Mother did not appear in the proceedings below and is not a party to this appeal. Accordingly, this opinion will reference Mother only as necessary to provide context.

assume legal and physical custody of the Children, (3) the conditions that led to the Children's removal persisted, and (4) Father was substantially noncompliant with the permanency plans. DCS also asserted that terminating both parents' parental rights is in the Children's best interests. Father answered the Petition, denying its allegations and asserting that, even if proven, they would not constitute grounds for termination of his parental rights and that so doing would not be in the best interests of the Children.

The Juvenile Court heard the Petition on April 20, 2022. Father testified on his own behalf and had no other witnesses. DCS offered the testimony of Kaylee Vineyard, the family service worker assigned to the Children since April 2021. The Juvenile Court entered a final order terminating Father's parental rights on May 25, 2022, concluding that DCS had proven by clear and convincing evidence each of the four grounds for termination alleged in the Petition and that terminating Father's parental rights is in the best interests of the Children. Father timely appealed to this Court.

ISSUES

We summarize the issues raised by Father as follows.

1. Whether the trial court erred in concluding that DCS proved by clear and convincing evidence each of the four statutory grounds for termination alleged in the Petition.

2. Whether the trial court erred in concluding that terminating Father's parental rights is in the best interests of the Children.

DCS did not raise additional issues in its posture as appellee.

STANDARD OF REVIEW

Our Supreme Court has explained that:

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

> child." *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also Santosky v. Kramer*, 455 U.S. 745, 747, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982); *In re Angela E.*, 303 S.W.3d at 250.

In re Carrington H., 483 S.W.3d 507, 522–23 (Tenn. 2016). Tennessee Code Annotated section 36-1-113 provides the various grounds for termination of parental rights. *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013); *see also* 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." *Id.* (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.

We give considerable deference to a trial court's findings about witness credibility and the weight of oral testimony, as the trial court had the opportunity to see and hear the witnesses. *State Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 288 (Tenn. Ct. App. 2006). Where an issue "hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings." *Id.* (citing *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)); *see also Franklin Cnty. Bd. of Educ. v. Crabtree*, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010) ("If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary.").

ANALYSIS

In order to terminate parental rights, a trial court must find by clear and convincing evidence that: (1) statutory grounds for termination of parental and guardianship rights have been established, and (2) termination is in the best interests of the child. *See* Tenn. Code Ann. § 36-1-113(c) (2021). We begin our analysis by reviewing whether the proof presented at trial constitutes clear and convincing evidence of each ground for termination listed in the Juvenile Court's Final Order.

I. Grounds for termination

A. Abandonment – Failure to Provide a Suitable Home

Tennessee Code Annotated section 36-1-113(g) lists abandonment, as defined in section 36-1-102, as a ground for terminating parental rights. Tenn. Code Ann. § 36-1-113(g)(1) (2021). Section 36-1-102 provides that abandonment occurs, among other instances, when

> (a) The child has been removed from the home or the physical or legal custody of a parent or parents . . . 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 . . . that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and
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> (c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents

> . . . to establish a suitable home for the child, but that the parent or parents 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 . . . 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 . . . toward the same goal, when the parent . . . is aware that the child is in the custody of the department[.]

Id. § 36-1-102(1)(A)(ii)(a)-(c). The statutory four-month period during which DCS must make reasonable efforts and the parent reciprocate them is not limited to the four months immediately following removal. *In re Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016) (stating that "the proof necessary to support termination under this ground need not be limited to any particular four-month period after removal").

To terminate parental rights under this ground, the trial court must find "that a parent failed to provide a suitable home for his or her child even after DCS assisted that parent in his or her attempt to establish a suitable home." *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015). A suitable home requires "'more than a proper physical living location.'" *In re Daniel B.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Tenn. Dep't of Children's Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that "[a]ppropriate care and attention 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.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014).

DCS must make "reasonable efforts" to assist the parent by doing more than simply providing a list of service providers. *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016). The Department should utilize its superior resources in assisting a parent to establish a suitable home, but "[its] efforts do not need to be 'Herculean.'" *In re Hannah H.*, 2014 WL 2587397, at *9 (citing *Dep't of Children's Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015)); s*ee also In re Matthew T.*, 2016 WL 1621076, at *7. Although the parent is required to make "reasonable efforts" to establish a suitable home, "successful results" are not required. *In re D.P.M.*, No. M2005-02183-COA-R3-PT, 2006 WL 2589938, at *10 (Tenn. Ct. App. Sept. 8, 2006).

Here, the Juvenile Court placed the Children in DCS custody on July 19, 2019, pursuant to the Department's petition for temporary legal custody of the Children due to

Father's drug use, his mental health issues, and the condition of the home. On October 2, 2019, the court adjudicated the Children dependent and neglected, on Father's stipulation to "a clear and convincing finding of dependency and neglect based upon his substance abuse issues." The Juvenile Court also found that DCS made reasonable efforts to prevent the Children's removal from the home, and the record supports this finding. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(b). The Department's sworn petition to adjudicate dependency and neglect states that a DCS case manager present on the date of removal "attempted to make a non-custodial placement but Father would not provide any names" and that Mother could not be located. Father does not dispute these allegations.

Although Father's mental health issues and the condition of the home played a role in the Children's removal, establishing a suitable home for the Children depended largely on Father addressing his drug use. The Juvenile Court found that Father, "having made some efforts early, has failed to address drug issues and continues to avoid cooperation with the Department." *See id.* § 36-1-102(1)(A)(ii)(c). The record supports this finding. Father testified that he underwent alcohol and drug and mental health assessments with Helen Ross McNabb and that staff from the Youth Villages pilot program "used to come to his house" as part of the steps to regain custody of the Children. All of these efforts were outlined in the three family permanency plans developed by DCS. However, according to Ms. Vineyard, Father failed to show up for multiple drug screens and was discharged from the pilot program due to noncompliance. We see no reason to disturb the Juvenile Court's conclusion that, in light of Father's nonreciprocal actions, the Department's efforts to assist Father in establishing a suitable home were reasonable.

In concluding that DCS proved by clear and convincing evidence that Father failed to establish a suitable home for the Children, the Juvenile Court made no findings of fact concerning Father's mental health. As to the condition of the home, the court stated:

> The parent[s'] actions clearly indicate that they have no desire to provide a suitable home for the children and the Court clearly believes that this condition, currently existing will continue in the near future. Neither parent has done anything to establish a suitable home and both continue to disregard the best interest of the children by their failure to remedy any of the conditions listed herein.

However, the court did not reference any facts in support of these conclusions. We acknowledge that the record does contain photographs of a cluttered computer room and that testimony from trial shows that Father owns a pet rat. Without more, however, these circumstances do not establish the presence of health or safety risks to the Children if they were to be returned. On this record, we are unable to conclude that the *physical* condition of Father's home was unsuitable for the Children's return. Termination on this ground, therefore, turns on whether the evidence clearly and convincingly establishes that Father's drug use rendered his home unsuitable.

Establishing a suitable home involves more than providing a safe physical space. Here, the Children were removed largely on the basis of Father's drug use, and he was specifically required under the permanency plans to make reciprocal reasonable efforts to provide appropriate care and a drug-free home for the Children. *See In re Matthew T.*, 2016 WL 1621076, at *7; *In re Hannah H.*, 2014 WL 2587397, at *9. The record supports the Juvenile Court's finding that Father "has had numerous issues with drugs including failures for suboxone and methamphetamine which have continued to plague [him] in numerous occasions." The Children were removed from Father's home in July 2019 and later adjudicated to be dependent and neglected primarily because of Father's drug use. At trial, Ms. Vineyard testified that Father had only one clean drug screen out of the eleven to which he submitted. In addition, laboratory reports in the record indicate that Father tested positive for amphetamine and methamphetamine both before and after the Petition was filed—in June 2020, August 2020, April 2021, and March 2022.[3] The Juvenile Court explicitly rejected Father's contention that the positive results for amphetamine were a result of taking allergy medication, finding no evidence in the record to substantiate Father's theory. Our own review of the record has found no support for Father's theory. The court also expressed concern regarding Father's ability to provide a suitable home for the Children considering his unwillingness to recognize his drug use. We will not second guess the Juvenile Court's credibility determination regarding Father's testimony. *See Franklin Cnty. Bd. of Educ.*, 337 S.W.3d at 811. We affirm the Juvenile Court's conclusions that Father "failed to address drug issues" and that, therefore, DCS proved by clear and convincing evidence that Father failed to provide a suitable, drug-free home to which the Children may safely return.

B. Substantial Noncompliance with Permanency Plan

Tennessee Code Annotated section 36-1-113(g) provides that parental rights may also be terminated on the ground of "substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan." Tenn. Code Ann. § 36-1-113(g)(2) (2021). Making 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 cannot be 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

[3]We note that at trial, Father's counsel objected to the introduction of the laboratory reports on the basis of his consistent denial of methamphetamine use, but the Juvenile Court overruled the objection. Father did not raise this evidentiary ruling as an issue on appeal and, thus, we do not address it. *See* Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review."); *see also Watson v. Watson*, 309 S.W.3d 483, 497 (Tenn. Ct. App. 2009) ("The appellate court may treat issues that are not raised on appeal as being waived.").

plan's requirements will not be deemed to amount to substantial noncompliance." *In re M.J.B.*, 140 S.W.3d at 656.

DCS bears the burden of showing "that the requirements of the permanency plan are 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)); *accord* Tenn. Code Ann. § 37-2-403(a)(2)(C) ("Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights . . . if the court finds the parent was informed of its contents, and that the requirements of the statement are reasonable and are related to remedying the conditions that necessitate foster care placement."). DCS must also 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). If the trial court does not make a finding with respect to the reasonableness of the parent's responsibilities under the permanency plan, the reviewing court must review this issue de novo. *See In re Valentine*, 79 S.W.3d at 547.

Here, the Juvenile Court ratified an initial permanency plan in October 2019, finding the plan's requirements reasonable and in the best interests of the Children. The court later ratified two updated permanency plans in July 2020 and April 2021, respectively. The plans required Father, *inter alia*, to visit the Children twice a month; to complete alcohol and drug and mental health assessments and follow their recommendations; to obtain and maintain clean, safe, and appropriate housing; to provide DCS with proof of a legal source of income; and to complete parenting classes and demonstrate his new knowledge and skills during visitation. We agree with the Juvenile Court that all of these requirements are reasonably related to the conditions that resulted in the Children's removal—Father's drug use and mental health issues, an unsafe home, and environmental neglect.

DCS proved by clear and convincing evidence that Father's noncompliance with his obligations under the permanency plan was substantial. Ms. Vineyard testified that DCS offered Father supervised visitation with the Children two times per month, but that he only visited with the Children twice between October 2021 and April 2022. One of these visits was in person; the other one by video call. Father did not visit the Children at all for more than six months, between September 30, 2021 and March 8, 2022. Further, according to Ms. Vineyard, Father was late to the visits he did attend, on one occasion showing up nearly one hour after the scheduled time. By the time of the March 2022 visit, "they all had to warm back up to each other," and by April 2022, "the oldest child, [Robert], would not even participate in the visit." As to the home's condition, DCS attempted an unannounced visit in December 2021 but was denied access to the home. At that time, however, Ms. Vineyard observed "a mom and dad and a young child come out of the home" and, upon inquiry, learned that the woman's driver's license listed the home's address. The Juvenile Court thus found that "numerous people have been living in the home who were not subject

to drug screens and/or background checks." Additionally, Father never produced proof of steady income as required under the permanency plans. These circumstances taken together are well beyond "[t]rivial, minor, or technical" shortcomings. Rather, they demonstrate a substantial degree of noncompliance with the requirements of the permanency plans critical for addressing safety in the home and maintaining Father's relationship with the Children.

Even more significant, the record establishes Father's substantial noncompliance with the requirements aimed at addressing Father's drug use. As discussed, Father continuously tested positive for drugs, and Ms. Vineyard testified that Father repeatedly ignored random drug screens requested by the Department. The Juvenile Court rejected Father's explanation that allergy medication was responsible for his positive drug screens, and we find no evidence in the record to contravene this finding. We acknowledge that Father testified he completed an alcohol and drug assessment and a mental health assessment in accordance with the permanency plans. Yet, in light of his failure to visit the Children and address his drug use, we find Father's noncompliance with the permanency plans substantial. We affirm the trial court's conclusion that DCS proved this ground for termination by clear and convincing evidence.

C. Failure to Remedy Persistent Conditions

Tennessee Code Annotated section 36-1-113(g) explains that a person's parental rights can be terminated when:

> 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 . . . ;
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> (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) (2021). The purpose of the persistence of conditions ground "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 Navada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016). Consequently, "[t]he failure to remedy the conditions which led to the removal need not be willful." *Id.* (citing *In re T.S. and M.S.*, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *6 (Tenn. Ct. App. July 13, 2000)). Even if not willful, "[a] parent's continued inability to provide fundamental care to a child . . . constitutes a condition which prevents the safe return of the child to the parent's care." *Id.* (citing *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008)).

In the instant case, the Children were removed from Father's custody in July 2019, more than two years before DCS filed the petition to terminate Father's parental rights in July 2021. The removal was based upon concerns of Father's drug use and mental health issues, an unsafe home, and environmental neglect. As we have explained, Father's drug use did not abate and, therefore, his home remained unsuitable for the Children. Father tested positive for amphetamine and methamphetamine as recently as March 2022, some forty-two months after the Children were removed from his custody. Given the number of years that transpired between the Children's removal and the hearing below, we agree with the Juvenile Court that there is no indication that these conditions will be remedied any time soon. Further, we find that that these conditions hamper the Children's stability. As Ms. Vineyard summarized: "[T]hese boys love their father, but I think they have started to realize that it's been almost three years and nothing has changed. The father doesn't participate in all the visits, and they're still just wondering why they're still in foster care because the father has not completed everything." Robert's refusal to participate in the April 2022 video call with Father provides insight into the unstable nature of Children's relationship with Father. Under these circumstances, we conclude that the the trial court correctly determined that this ground for termination was proven by clear and convincing evidence.

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

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

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

This ground requires clear and convincing proof of two elements. *In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018). 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. Tenn. Code Ann. § 36-1-113(g)(14). 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.*

As to the first element, our Supreme Court has held that 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. *See In re Neveah M.*, 614 S.W.3d 659, 677-78 (Tenn. 2020) (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280 at *13 (Tenn. Ct. App. June 20, 2018)). 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 element of this ground, whether placing the children in the person's custody would "pose a risk of substantial harm to the physical or psychological welfare" of the children, we have previously explained:

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

In re Greyson D., No. E2020-00988-COA-R3-PT, 2021 WL 1292412, at *8 (Tenn. Ct. App. Apr. 7, 2021) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)) (footnotes omitted).

Here, the proof establishes that Father failed to manifest both an ability and a willingness to assume custody and financial responsibility of the Children. Significantly, when given the opportunity to visit with the Children twice per month and thus maintain a relationship with them, Father did not visit at all for a period of six months. Moreover, Father's unsupported assertions that his positive drug screens were incorrect cast doubt on his willingness to take responsibility for his actions, including parenting the Children. Nor are we persuaded that Father has the ability to assume custody of the Children. Father continued to test positive for drug use during the custodial period and failed to provide proof of a legal source of income. Indeed, he provided financial support for both Children only three times, totaling $820, in the nearly three years they have been in DCS custody.

We must consider whether Father has manifested an ability through his actions (or omissions) prior to termination to assume custody and financial responsibility of the

Children. We find he has not. Based on the aforementioned circumstances, we also conclude that returning the Children to Father's custody would place them at risk of substantial harm to their physical or psychological welfare inasmuch as Father's drug use remains unabated and he has not procured—for several years since removal—a steady source of income to provide for the Children's needs. We affirm the Juvenile Court's determinations that DCS proved this ground by clear and convincing evidence.

II. Best interests of the children

In addition to proving at least one statutory ground for termination, a party seeking to terminate a parent's rights must prove by clear and convincing evidence that termination is in the child's best interests. *See* Tenn. Code Ann. § 36-1-113(c) (2021). 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 interests analysis is not the parent but 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 statutory factors when determining whether termination of parental rights is in a child's best interests. *See* Tenn. Code Ann. § 36-1-113(i)(1)(A)-(T). In its final order, the Juvenile Court addressed in detail the factors applicable in this case and concluded that terminating Father's parental rights was in the Children's best interests.[4] We agree.

The Juvenile Court found that the first factor weighs heavily in favor of termination. *See id.* § 36-1-113(i)(1)(A) ("The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement . . . ."). The court reasoned that "it would be difficult to even consider returning the children to the father as he fails to acknowledge issues concerning drugs and drug dependency" and that "father has had almost three years to address his methamphetamine use but continues to use drugs such that his custody with the children would be impossible." Accordingly, we find that even

[4] The Juvenile Court determined that the following five factors were not applicable: (B) ("The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition"); (F) ("Whether the child is fearful of living in the parent's home"); (G) ("Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms"); (H) ("Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent"); and (I) ("Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage"). Our review of the record reveals a dearth of evidence concerning these factors, so we agree with the Juvenile Court's determination.

though the Children were not in a pre-adoptive home at the time of the hearing, terminating Father's parental rights will facilitate integration into a more permanent, stable placement for the handful of years remaining before they reach the age of majority. Likewise, Father's continued struggle with drug use, along with his failure to provide proof of a legal source of income, establish that the third and tenth factors favor termination. *See id.* § 36-1-113(i)(1)(C) ("Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs[.]"); § 36-1-113(i)(1)(J) ("Whether 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 . . . [.]").

The fourth factor, "[w]hether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment," though not as straightforward, still favors termination. *See id.* § 36-1-113(i)(1)(D). Ms. Vineyard testified that the Children "love their father" but also that "they have started to realize that it's been almost three years and nothing has changed." After removal, Father was permitted to visit with the Children twice per month but did not take advantage of the opportunity. Indeed, he failed to visit the Children for more than six consecutive months, so much so that when they finally saw each other on March 8, 2022, "they all had to warm back up to each other." Tellingly, the following month, "the oldest child, [Robert], would not even participate in the visit." Under these circumstances, we agree with the Juvenile Court that Father's relationship with the Children is neither secure nor healthy. For these same reasons, the following factor weighs in favor of termination. *See id.* § 36-1-113(i)(1)(E) ("Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child[.]").

The next two applicable factors are "[w]hether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions," and "[w]hether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department[.]" *See id.* § 36-1-113(i)(1)(K)-(L). DCS developed three family permanency plans, which included, *inter alia*, supervised visitation, drug and alcohol assessments, drug screens, and access to a parenting program at Youth Villages. As noted previously, Ms. Vineyard testified that Father did not show up for multiple drug screens or take advantage of the opportunity for supervised visitation with the Children twice per month. While Father testified that he completed the Youth Villages program, Ms. Vineyard stated that Father was discharged for noncompliance. Ultimately, documents in the record establish that Father did not complete the program. Although Father did complete an alcohol and drug assessment, his failure to avail himself of other opportunities offered by DCS to make a lasting change in his circumstances weigh in favor of termination. For these same reasons, especially the prolonged and unexplained lack of visitation, we agree with the Juvenile Court that the next two factors also favor termination.

See id. § 36-1-113(i)(1)(M) ("Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest[.]"); *id.* § 36-1-113(i)(1)(N) ("Whether the parent . . . has shown . . . psychological abuse or neglect toward the child or any other child or adult[.]").

Father's sustained drug use during the Department's custodial period militates against concluding that he is able and committed to provide the Children with a safe home. *See id.* § 36-1-113(i)(1)(Q) ("Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive."); *id.* § 36-1-113(i)(1)(R) ("Whether the physical environment of the parent's home is healthy and safe for the child."); *see also In re Hannah H.*, 2014 WL 2587397, at *9 (stating that a home suitable for a child "requires that the home be free of drugs and domestic violence"). In addition, Father's fitness to parent is questionable at best, based on the testimony at trial. *See id.* § 36-1-113(i)(1)(P) ("Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive[.]"); *id.* § 36-1-113(i)(1)(T) ("Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child."). As the Juvenile Court noted, Father did not know the Children's clothing sizes and appeared confused as to their ages. He could not recall visiting with the Children within two weeks before trial. Ms. Vineyard summarized it this way: "The father would ask the children questions about sports and asked them if they were playing baseball, and Austin stated that he hates baseball. He just doesn't know anything about them." We affirm the Juvenile Court's determination that these factors also weigh in favor of termination.

Last, the Juvenile Court concluded that the financial support provided by Father to the Children "has been token at best." The record supports this conclusion. Since the Children were removed from him in July 2019, Father made three child support payments for both Children totaling $820. Father admitted at trial that he had not bought clothes for the Children. Moreover, he never gave the Children the birthday and Christmas present he claimed to have bought for them; he retained them at his home. This factor weighs in favor of termination. Based on the analysis above, we affirm the Juvenile Court's ruling that terminating Father's parental rights is in the Children's best interests.

CONCLUSION

We affirm the judgment of the Sevier County Juvenile Court and tax the costs of this appeal to the Appellant, Robert H., for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE