IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 1, 2023

IN RE ZAKARY O.

Appeal from the Circuit Court for Hamblen County
No. 20CV009 Beth Boniface, Judge

No. E2022-01062-COA-R3-PT

Mother appeals the termination of her parental rights to her eldest child on a number of grounds. We reverse the trial court's finding that Mother engaged in only token visitation with the child during the relevant time period. We vacate the trial court's finding that Mother failed to manifest an ability and willingness to parent because the trial court failed to make findings as to whether the return of the child would pose a risk of substantial harm. We affirm the trial court's findings as to the remaining grounds, as well as the trial court's finding that termination is in the child's best interest.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and JEFFREY USMAN, J., joined.

Gerald T. Eidson, Rogersville, Tennessee, for the appellant, Michelle K.

Jonathan Skrmetti, Attorney General and Reporter; Amber L. Barker, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This case began in January 2019, when Petitioner/Appellee the Tennessee Department of Children's Services ("DCS") filed a petition for temporary custody of Zakary O., based on allegations of drug use by the child's mother, Michelle K. ("Mother").[1]

[1] In cases involving termination of parental rights, it is this Court's policy to remove the full names of children and other parties to protect the minor children's identities.

The petition alleged that the child was dependent and neglected and asked that DCS be granted temporary custody of the child. The same day, the Hamblen County Juvenile Court ("the juvenile court") entered a protective custody order placing the child in DCS custody. Following a hair follicle drug screening on the child that allegedly indicated that the child was exposed to methamphetamine, amphetamine, and tetrahydrocannabinol ("THC"),[2] DCS moved to amend its petition to allege severe abuse. The motion was granted by the juvenile court. Eventually, the child was adjudicated dependent and neglected and the victim of severe abuse. Mother appealed that order to the Hamblen County Circuit Court ("the trial court") in May 2019.

While the appeal of the dependency and neglect action was pending, on January 29, 2020, DCS filed a petition in the trial court to terminate Mother's parental rights on the following grounds: (1) abandonment by failure to visit and support; (2) abandonment by failure to establish a suitable home; (3) substantial noncompliance with the permanency plan; (4) persistence of conditions; (5) severe abuse; and (6) failure to manifest a willingness or ability to take physical custody or financial responsibility of the child.[3]

Trial on the termination petition occurred on March 4, 2022. At the time of trial, the child was seven years old. Mother participated in the hearing via videoconference on her phone. At the outset of trial, DCS voluntarily dismissed the ground of severe abuse due to the pending dependency and neglect appeal. Five witnesses testified: (1) Jessica Drinnon, a DCS supervisor; (2) January Hillman, a DCS caseworker; (3) the child's foster father ("Foster Father"); (4) Cynthia Ledbetter, the program director of Mother's rehabilitation program; and (5) Mother.

Ms. Drinnon first discussed Mother's visitation. Mother was permitted supervised visitation but was required to submit clean drug screens in order to exercise the visitation. According to Ms. Drinnon, no visitation that was requested by Mother was refused by DCS prior to the filing of the termination petition. Mother admitted that she voluntarily chose not to have contact with the child when she was using drugs. As a result, Mother had some in-person visits with the child in 2019, but her last in-person visit prior to the filing of the petition was in July 2019. As such, there was no dispute that Mother had not visited with the child in person in the four months prior to the filing of the termination petition, even though Mother professed to be sober during this time. Mother testified, however, that she used Facebook to video chat with the child at least three times per month during this period. No testimony was elicited as to the duration or content of these calls; Mother explained that she was avoiding the town where the child was residing in order to maintain her sobriety due to her pregnancy. Mother had at least two visits in 2020 after the termination

[2] "THC is a marijuana metabolite that is stored in fat cells and can be detected in the body up to thirty days after smoking marijuana." ***Interstate Mech. Contractors, Inc. v. McIntosh***, 229 S.W.3d 674, 677 (Tenn. 2007).

[3] The petition also sought to terminate the parental rights of the child's father. He did not participate in the case, and his rights were terminated. He is not a party to this appeal.

petition was filed, the last being in early March 2020, two years prior to trial. These visits generally went well. Mother admitted, though, that by June or July of 2020 she had relapsed into drug use and no longer had any contact with the child, including, apparently, via video chat.

Ms. Drinnon also discussed the permanency plan that was created in this case, DCS efforts to help Mother complete the tasks required by the plans, and Mother's efforts to do so. DCS created a permanency plan for Mother in 2019; it was ratified in July 2019. Mother also signed the Criteria for Termination of Parental Rights in February 2019. The permanency plan generally required that Mother complete tasks related to becoming and staying sober, finding stable housing and employment, paying child support, and visiting the child. According to Ms. Drinnon, Mother completed some tasks, but was largely noncompliant with the plans. For example, the proof was somewhat conflicting as to what assessments Mother completed. Ms. Drinnon testified that Mother completed her first alcohol and drug and mental health assessments in January 2020, around the time of the filing of the termination petition. The exhibits in the record, however, contend that Mother completed these assessments in June 2019 as part of an intensive outpatient treatment program. But the records further show that Mother failed to complete the outpatient treatment that was recommended by the assessments and thereafter failed a drug test in September 2019. Mother then failed to appear for a number of scheduled drug tests and generally lost contact with DCS. According to Ms. Drinnon, Mother made no contact with DCS from July 2019 until around the time the termination petition was filed. Mother claimed that she had attended some alcohol and drug classes at some unspecified time, but that she stopped attending the classes because they were a "trigger" for her. Mother also claimed that she had completed a parenting class three times. Mother claimed that at least one of which occurred at her current program and one in February 2020 with another provider; Mother provided no documentation to support her testimony as to the completion of any classes.

Mother admitted that she used methamphetamines on-and-off following the removal of the child. Mother also continued to live with her grandmother for much of the custodial period, which was a location where Mother admitted drug use occurred. Specifically, Mother testified that she lived elsewhere during her second pregnancy to avoid using drugs, but that she began using drugs again when she moved back into the home. Indeed, Mother admitted that her second child was removed from her custody when she again tested positive for drugs following his birth. Around this time, Mother was also arrested for driving under the influence ("DUI"). Mother conceded that DCS gave her information to obtain public housing; although Mother was accepted into the housing, she testified that she did not move because she could not pay the deposit. But Mother admitted that she was only sporadically employed following the removal, for no other reason than that her grandmother essentially supported her. And Ms. Drinnon testified that when Mother was employed, she never provided DCS with proof of income. Mother also did not pay child support consistently until after the termination petition was filed.

Mother's circumstances significantly changed when she checked herself into a rehabilitation program in West Virginia around May 2021. There was no dispute that at the time of trial, Mother had been sober for ten months as a result of her participation in this program. Mother was pregnant with her third child when she began this program; this child did not test positive for in utero drug exposure at his birth. While in the program, Mother lives on-campus with her infant child and a staff member who supervises Mother "twenty-four/seven" and helps her to care for her baby.

At the time of trial, Mother had at least two more months before she could graduate the program, but it may take additional time. Once Mother completes this phase of the program, she is required to return to Hamblen County to serve a thirty-day sentence related to her DUI conviction. The plan was then for Mother to return to the West Virginia rehabilitation program for "Phase 2" of the program, where Mother would still live on campus, but have less supervision. This phase would last ninety days. On-campus living at the rehabilitation center is only for patients and their children who are five years old or younger. However, Ms. Ledbetter testified that it may be possible to make an exception for Mother. Once this second phase is completed, the program would then help Mother seek off-campus housing with financial assistance.

Mother is currently employed by the rehabilitation program earning $90.00 per week, but her housing, food, and necessities are provided. Once Mother completes the current phase of her program and the ninety-day probationary period, her pay will increase to $300.00 per week. Although Mother did not pay support during the four months prior to the filing of the termination petition, she testified without dispute that she paid the arrearage and now owes only $5.00 in back child support.

Foster Father and Ms. Hillman testified about the child's current circumstances. The child was placed with his current foster family at the time of removal and has remained continuously in their care. After Mother's middle child was removed, he was also placed with the foster family. The testimony shows that the child loves and is bonded to the foster family. The proof was undisputed that child was thriving in the care of his foster family. Foster Father testified that he and his wife wanted to adopt both the child and his brother should that be an option.

While Ms. Hillman testified that the child "never really talked about his mom very much," she conceded that he still refers to Mother as his mom.[4] Foster Father testified that the child does talk about both his mother and his father and he loves them. Although the child does not want to live with Mother, he has stated that he would like to visit her. Foster Father also testified that the child regularly talks with his grandmother on the phone.[5]

[4] The child refers to the foster parents by their first names.

[5] It is not clear whether this is the same person who owns the home where Mother lived while doing

According to Foster Father, he and his wife would facilitate a relationship with the child's birth family even if the termination petition were granted.

The trial court issued a written order terminating Mother's parental rights on April 28, 2022. Therein, the trial court found that DCS met its burden as to the following grounds: (1) abandonment by failure to visit the child; (2) abandonment by failure to financially support the child; (3) substantial noncompliance with the permanency plan; (4) persistence of conditions; and (5) failure to manifest an ability and willingness to care for the child. The trial court found, however, that DCS did not clearly and convincingly prove abandonment by failure to establish a suitable home because DCS failed to show that it exerted reasonable efforts "[d]uring the period of removal and four months thereafter[.]" The trial court further found that termination was in the child's best interest. Mother thereafter appealed to this Court.

II. ISSUES PRESENTED

As we perceive it, this appeal involves two issues:

1. Whether the trial court erred in finding clear and convincing evidence of grounds to terminate Mother's parental rights?
2. Whether the trial court erred in finding clear and convincing evidence that termination was in the child's best interests?

III. STANDARD OF REVIEW

Parental rights are "among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re Carrington H.***, 483 S.W.3d 507, 521 (Tenn. 2016) (collecting cases). Therefore, "parents are constitutionally entitled to fundamentally fair procedures in parental termination proceedings." ***Id.*** at 511. These procedures include "a heightened standard of proof—clear and convincing evidence." ***Id.*** at 522 (quotation marks and citations omitted). "Clear and convincing evidence is evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (quotation marks and citation omitted).

In Tennessee, termination of parental rights is governed by statute, which identifies "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.***, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL

drugs. From what we can glean from the limited testimony on this issue, that person is Mother's grandmother, while the person the child speaks with appears to be the child's grandmother.

1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g))). Thus, a party seeking to terminate a parent's rights must prove by clear and convincing evidence (1) the existence of at least one of the statutory grounds in section 36-1-113(g), and (2) that termination is in the child's best interest. *See* ***In re Valentine***, 79 S.W.3d at 546. "Considering the fundamental nature of a parent's rights, and the serious consequences that stem from termination of those rights, a higher standard of proof is required in determining termination cases." ***In re Addalyne S.***, 556 S.W.3d 774, 782 (Tenn. Ct. App. 2018). The clear and convincing evidence standard applicable here is "more exacting than the 'preponderance of the evidence' standard, although it does not demand the certainty required by the 'beyond a reasonable doubt' standard. To be clear and convincing, the evidence must eliminate any substantial doubt and produce in the fact-finder's mind a firm conviction as to the truth." ***In re S.R.C.***, 156 S.W.3d 26, 29 (Tenn. Ct. App. 2004) (internal citation omitted).

In termination cases, appellate courts review a trial court's factual findings de novo and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d); ***In re Carrington H.***, 483 S.W.3d at 523–24 (citations omitted). "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 Carrington H.***, 483 S.W.3d at 524 (citation omitted).

IV. ANALYSIS

A. Grounds for Termination

The trial court found clear and convincing evidence of the following five grounds for termination: (1) abandonment by failure to visit the child; (2) abandonment by failure to financially support the child; (3) substantial noncompliance with the permanency plan; (4) persistence of conditions; and (5) failure to manifest an ability and willingness to care for the child. Mother does not contest the sufficiency of the evidence as to any ground. We will nevertheless briefly but thoroughly analyze each ground. *See* ***In re Carrington H.***, 483 S.W.3d at 535.

1. Abandonment

DCS first relies on the ground of abandonment under Tennessee Code Annotated section 36-1-113(g)(1). Abandonment has various definitions, one of which is relevant to this appeal:

> For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the

> child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child . . . .

Tenn. Code Ann. § 36-1-102(1)(A)(i).[6] So, under this definition, abandonment occurs when a parent has either failed to visit or failed to support his or her child in the four months preceding the filing of the termination petition. A parent fails to visit when he or she fails, "for a period of four (4) consecutive months, to visit or engage in more than token visitation." Tenn. Code Ann. § 36-1-102(1)(E). A parent fails to support when he or she fails "for a period of four (4) consecutive months, to provide monetary support or [fails] to provide more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). The termination petition in this case was filed on January 29, 2020. As such, the relevant period for determining abandonment in this appeal is September 29, 2019, to January 28, 2020.

We begin with the question of whether Mother abandoned the child by failing to visit him during the relevant time frame. Here, there is no dispute that Mother did not visit with the child in person during the relevant four-month period. Instead, Mother's last in-person visit prior to the filing of the termination petition occurred on July 24, 2019. She claimed, however, that she had spoken to the child via video chat at least three times per month during the relevant period. Yet the trial court found that even if this visitation occurred, it was token.

"Token visitation" means "visitation, under the circumstances of the individual case, constitut[ing] nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child[.]" Tenn. Code Ann. § 36-1-102(1)(C). "Whether visitation is 'token' under this definition is a fact-intensive inquiry to be decided on a case-by-case basis." ***In re Keri C.***, 384 S.W.3d 731, 748 (Tenn. Ct. App. 2010). We must therefore determine whether the evidence in the record preponderates against the trial court's finding that DCS met this burden. *See* ***In re Aubrie W.***, No. E2019-00862-COA-R3-PT, 2020 WL 360504, at *4 (Tenn. Ct. App. Jan. 21, 2020) (affirming the ground of abandonment by failure to visit when "the evidence [did] not preponderate against the trial court's finding of fact that the visits were merely token").

As DCS points out in its brief, this Court has previously questioned whether "telephonic" visitation with a child can be considered as a substitute for in-person visitation for purposes of this ground. *See, e.g.*, ***In re Candace J.***, No. M2015-01406-COA-R3-PT, 2016 WL 944268, at *7 (Tenn. Ct. App. Mar. 11, 2016) ("[W]e conclude that Mother's

[6] Throughout this Opinion, we cite to the statutes that were in place at the time the termination petition was filed in January 2020.

phone conversations with S.D.J. were not a sufficient substitute for the in-person visitation that Mother could have exercised if she had appropriately prioritized the need to do so."); ***In re Kaiden T.***, No. M2014-00423-COA-R3-PT, 2014 WL 7149215, at *6 (Tenn. Ct. App. Dec. 15, 2014) ("[T]elephone calls are not generally a substitute for in-person visitation for the purposes of determining whether a parent has willfully abandoned a child."); ***In re Amelia M.***, No. E2012-02022-COA-R3-PT, 2013 WL 4715043, at *9 (Tenn. Ct. App. Aug. 30, 2013) ("We find no precedent in which Tennessee appellate courts have held that telephone calls may function as visitation for purposes of determining whether a parent has willfully abandoned a child."). This line of thinking has apparently been extended even to video chats of the type that Mother alleges occurred in this case. *See* ***In re Camdon H.***, No. E2017-02311-COA-R3-PT, 2018 WL 6131547, at *8 (Tenn. Ct. App. Nov. 21, 2018) ("The Parents alleged that they maintained contact through telephone calls and video chats. Such contact is not a substitute for in-person visitation as required by statute.").

We have held, however, that telephone calls may be sufficient under circumstances where the parent cannot feasibly exercise in-person visitation. *See, e.g.*, ***In re Caira D.***, No. M2014-01229-COA-R3-PT, 2014 WL 6680696, at *7 (Tenn. Ct. App. Nov. 25, 2014) (holding that the parent's every other week phone calls where he spoke with the children "at length" was not token because the parent lived seven hours away from the children, was of limited means, and did not have a driver's license). Indeed, it appears that during the COVID-19 Pandemic, video-conference visitation was the norm. *Cf.* ***In re Bonnie E.***, No. E2021-00919-COA-R3-PT, 2022 WL 1572945, at *5 (Tenn. Ct. App. May 19, 2022) (stating that the testimony "gave the impression that DCS primarily offered Mother visits via video or telephone calls due to the Covid-19 pandemic"). But the trial court in this case found that Mother gave "no reason" for her failure to exercise in-person visitation during the relevant period as she was sober during this time frame while pregnant with her second child. Respectfully, the record preponderates against this finding.

Specifically, Mother testified that she utilized video chats "because . . . I was pregnant and about to have a baby and everything. . . . But that's when I was avoiding being in Morristown." Thus, Mother clearly, though perhaps inartfully, testified that it was in fact her sobriety and pregnancy that kept her away from Morristown during this time frame. And Mother's fears were valid, as when she moved back to Morristown, she relapsed. As such, it appears that Mother was placed between two difficult positions. Either she could stay away from Morristown and remain sober or she could return to Morristown to see her older child, but put her sobriety at risk. We cannot conclude that Mother provided no reason for her inability to have in-person visitation during this time frame. The trial court, as a result of its contrary conclusion, failed to consider how Mother's reason fit within the context of existing case law.

Ultimately the trial court ruled that the visitation was token because there was no testimony as to its duration or content. We note, however, that "the burden to prove that

support is token remains on DCS as the petitioner." ***In re Jayda J.***, No. M2020-01309-COA-R3-PT, 2021 WL 3076770, at *18 (Tenn. Ct. App. July 21, 2021) (citations omitted); *see also* ***In re Rosylyn W.***, No. E2019-01838-COA-R3-PT, 2020 WL 6053523, at *9 (Tenn. Ct. App. Oct. 13, 2020) ("The burden of proof was with Petitioners to prove that Mother had failed to engage in more than token visitation with the Child during the four months prior to the petition's filing."); ***In re Josiah T.***, No. E2019-00043-COA-R3-PT, 2019 WL 4862197, at *7 (Tenn. Ct. App. Oct. 2, 2019) (holding in a case following the amendment to section 36-1-102(1)(A) that "[t]he burden f[alls] on DCS to prove that Mother's payments were 'token support' within the meaning of the statute"). Here, the trial court improperly shifted the burden to Mother to show that the visits were not perfunctory or of such short duration as to not maintain a relationship with the child. That burden, though, remained with DCS. Thus, in the absence of evidence showing that the calls were short or otherwise perfunctory, we must conclude that DCS failed to meet its burden to show that these calls merely constituted token contact. As such, this ground for termination is reversed.

The question of Mother's failure to support is less difficult to answer. Here, there is no dispute that Mother did not provide any support to the child during the four-month period. Mother also did not provide any gifts or other support to the child during this period. Nor did Mother raise as a defense that her failure to provide support lacked willfulness. *See* Tenn. Code Ann. § 36-1-102(1)(I). Even so, Mother admitted that she sporadically worked following removal of the child and that when she did not work it was only because her grandmother "spoiled" her. And although Mother later largely paid her arrearage on child support following the filing of the termination petition, this late payment does not absolve Mother of her failure to pay during the relevant time period. *See* Tenn. Code Ann. § 36-1-102(1)(F) ("Abandonment may not be repented of by resuming . . . support subsequent to the filing of any petition seeking to terminate parental . . . rights[.]"). As such, the trial court correctly ruled that Mother's failure to support was a proper ground for termination.

2. Substantial Noncompliance with the Permanency Plan

The trial court also found that Mother substantially failed to comply with the permanency plan under Tennessee Code Annotated section 36-1-113(g)(2). According to the Tennessee Supreme Court:

> Substantial noncompliance is a question of law which we review de novo with no presumption of correctness. Substantial noncompliance is not defined in the termination statute. The statute is clear, however, that noncompliance is not enough to justify termination of parental rights; the noncompliance must be substantial. *Black's Law Dictionary* defines "substantial" as "[o]f real worth and importance." *Black's Law Dictionary* 1428 (6th ed. 1990).

In re Valentine, 79 S.W.3d at 548. As discussed by this Court in ***In re M.J.B.***, 140 S.W.3d 643 (Tenn. Ct. App. 2004):

> Terminating parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) requires more proof than that a parent has not complied with every jot and tittle of the permanency plan. To succeed under Tenn. Code Ann. § 36-1-113(g)(2), [DCS] must demonstrate first 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 Valentine***, 79 S.W.3d at 547; ***In re L.J.C.***, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003), and second 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 Valentine***, 79 S.W.3d at 548–49; ***In re Z.J.S.***, [No. M2002-02235-COA-R3-JV,] 2003 WL 21266854, at *12 [(Tenn. Ct. App. June 3, 2003)]. Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance. ***In re Valentine***, 79 S.W.3d at 548; ***Department of Children's Servs. v. C.L.***, No. M2001-02729-COA-R3-JV, 2003 WL 22037399, at *18 (Tenn. Ct. App. Aug. 29, 2003) (No Tenn. R. App. P. 11 application filed).

Id. at 656–57.

The sole permanency plan in the record required the following of Mother: (1) provide DCS with her prescriptions, take medications as prescribed, and submit to pill counts; (2) provide DCS with a copy of her work schedule; (3) pass random drug screens; (4) complete an alcohol and drug assessment and follow any recommendations; (5) seek therapy if self-managing her depression becomes too much; (6) sign releases for a mental health assessment and provide DCS with copies of any recommendations and certificates of completion; (7) provide documentation of legal income and stable housing; (8) submit a transportation plan; (9) live in a safe and stable home that is free of substance use; (10) ensure anyone in the home submits to background checks and drug screens; (11) follow court-ordered visitation requirements; (12) and complete a parenting assessment and follow any recommendations.

There can be no rational dispute that these requirements were reasonable and related to remedying the conditions that necessitated foster care—namely, Mother's drug abuse and lack of housing that was free from drugs. Mother made some efforts under the plan, but she never fully committed to her efforts until years after the removal of the child. For example, Mother completed an alcohol and drug assessment in June 2019, but then failed to complete the recommended treatment and failed a drug test for methamphetamine in September 2019. She then missed a large number of drug tests and lost most contact with

DCS. The testimony was that Mother may have completed another assessment around January 2020, but then relapsed again.

Mother also lived off-and-on in an admittedly inappropriate home for years after the removal. Mother sometimes engaged in visitation with the child, but sometimes admittedly chose to do drugs rather than have any contact with the child. Mother also did not have stable employment for no other reason than that her grandmother "spoiled" her, and Mother did not consistently pay child support until after the termination petition was filed. Finally, while Mother testified that she completed parenting classes, it appears that the trial court did not credit this testimony.

We recognize that "[i]mprovement toward compliance should be considered in a parent's favor." ***In re Valentine***, 79 S.W.3d at 549. Mother does appear to be on the correct path now. But this progress only began approximately twenty-eight months after the removal of the child and fifteen months after the filing of the termination petition. At the time of the termination petition, Mother had successfully completed few, if any, of the plan's requirements. Thus, while we commend Mother on her more recent sustained efforts toward sobriety and stability, Mother's efforts to complete the plan's requirements were simply too little, too late, to avoid this ground for termination. *See* ***In re James W.***, No. E2020-01440-COA-R3-PT, 2021 WL 2800523, at *12 (Tenn. Ct. App. July 6, 2021) ("Mother had not completed any of the requirements prior to the termination petition being filed. Although Mother has recently begun to make progress on the requirements, Mother's efforts are 'too little, too late.'"); ***In re Maya R.***, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *6 (Tenn. Ct. App. Apr. 4, 2018) ("[A]lthough Mother completed some of the requirements of the permanency plan by the time of trial, the proof showed that she made no real effort at compliance until after DCS filed the petition to terminate."); ***In re Emily N.I.***, No. E2011-01439-COA-R3-PT, 2012 WL 1940810, at *16 ("We believe that the [p]arents' refusal to complete a number of the requirements until after the termination petition was filed . . . was simply '[t]oo little, too late.'" (citing ***In re A.W.***, 114 S.W.3d 541, 546–47 (Tenn. Ct. App. 2003))).

3. Persistence of Conditions

DCS also relies on the ground of persistence of conditions. This ground may be found in the following circumstances:

> (A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:
>
> > (i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian,

> or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
>
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home;
>
> (B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard[.]

Tenn. Code Ann. § 36-1-113(g)(3).

Here, the child was removed from Mother's legal custody by an order of protective custody entered pursuant to the filing of a petition alleging the child was dependent and neglected. The child had also been in DCS custody for well over six months by the time of trial. Thus, the dispositive questions are whether conditions persist that prevent the safe return of the child, whether the conditions will likely be remedied at an early date, and whether the continued relationship prevents early integration of the child into a safe, stable, permanent home. As we have previously explained,

> "A parent's continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent's care." ***In re A.R.***, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (citing ***In re T.S. & M.S.***, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *7 (Tenn. Ct. App. July 13, 2000)). The failure to remedy the conditions which led to the removal need not be willful. ***In re T.S. & M.S.***, 2000 WL 964775, at *6 (citing ***State Dep't of Human Servs. v. Smith***, 785 S.W.2d 336, 338 (Tenn. 1990)). "Where . . . efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion [] that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." ***Id.*** The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." ***In re A.R.***, 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)).

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

The removal of the child largely stemmed from Mother's drug abuse. Mother admitted that she was unable to stop using drugs while she lived with her grandmother. Yet Mother continued to live in a home with her grandmother, which was an admitted and known place for drug use. Mother has certainly made progress on her sobriety, as there is no dispute that she remained drug-free and had stable housing for the ten months prior to the termination trial. This stability and sobriety, however, is the result of Mother's residence at a drug treatment facility where she is supervised "twenty-four/seven[.]" Under these circumstances, we have questioned whether progress would be lasting outside of the "controlled environment" of the rehabilitation program. ***In re James W.***, 2021 WL 2800523, at *13; *see also* ***In re Raylan W.***, No. M2020-00102-COA-R3-PT, 2020 WL 4919797, at *15 (Tenn. Ct. App. Aug. 20, 2020) ("Mother's sobriety has not been tested outside the controlled environment of the rehabilitation center. Unfortunately, Mother's current sobriety under these conditions does little to persuade us that she will continue her efforts in the future, in light of her previous treatment and relapse.").

Moreover, there is considerable doubt that Mother would be able to take physical custody of her child at an early date. First, the testimony shows that even once Mother completes her current program, still at least a few months away at the time of trial, Mother is required to return to Tennessee to serve a thirty-day sentence for DUI. Of course, this delays permanency for the child, and returns Mother to the area that she was required to leave in order to maintain her sobriety, putting her at risk of a relapse. The testimony was that Mother would return to her current rehabilitation program following her incarceration to work with the program as a "Phase 2." She would be required to live on campus for at least ninety days during this period. But children older than five-years old are not typically allowed to live with their parents at the facility. Although the testimony was that an exception could perhaps be made, nothing is certain. Only after this ninety-day probation period would the rehabilitation program help to secure Mother off-campus housing. And of course, the testimony was undisputed that due to Mother's absence from the child's life, any change in custody to Mother would require a transition period to reduce harm to the child. So then Mother's ability to actually parent the child unfortunately rests on a "slew of contingencies" that prevent reunification at an early date. ***In re Raylan W.***, 2020 WL 4919797, at *14 (holding that conditions persisted even though the mother was likely to soon graduate from a rehabilitation program, where the mother was then required to return to her home county for a jail sentence, and then hoped to return to the rehabilitation program and obtain a job and move to housing that could take the child, all the while maintaining sobriety outside of the controlled environment of the treatment facility). Under these circumstances, we conclude that conditions exist that have a reasonable probability of placing the child at risk of harm and that these conditions will not be remedied at an early date. The child's current circumstances, however, show that his foster family can provide the permanency that Mother unfortunately cannot provide at this time. As such, we affirm this ground for termination.

4. Willingness and Ability

DCS next contends that Mother failed to manifest a willingness and ability, whether by act or omission, to personally assume legal and physical custody or financial responsibility of the child and that placing the child in her legal and physical custody would create a risk of substantial harm to the child's physical or psychological welfare. *See* Tenn. Code Ann. § 36-1-113(g)(14). Essentially, the statutory ground has two distinct elements which must be proven by clear and convincing evidence:

> First, DCS 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." DCS must then prove that placing the child[] in [the parent's] "legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child."

In re Maya R., 2018 WL 1629930, at *7 (quoting Tenn. Code Ann. § 36-1-113(g)(14)) (some alterations of the original text removed). As for the first element, the petitioner must "prove[] by clear and convincing proof that a parent or guardian has failed to manifest either [an] ability or willingness" to parent the child. ***In re Neveah M.***, 614 S.W.3d 659, 677 (Tenn. 2020).

We begin with the willingness and ability prong. "Ability focuses on the parent's lifestyle and circumstances." ***In re Cynthia P.***, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019) (citing ***In re Maya R.***, 2018 WL 1629930, at *7). "When evaluating willingness, we look for more than mere words." ***Id.*** (citing ***In re Keilyn O.***, No. M2017-02386-COA-R3-PT, 2018 WL 3208151, at *8 (Tenn. Ct. App. June 28, 2018)). "Parents demonstrate willingness by attempting to overcome the obstacles that prevent them from assuming custody. . . ." ***Id.*** "Although we may consider evidence both before and after the petition was filed, a parent's ability and willingness may be measured as of the time the petition is filed." ***In re Jayda J.***, 2021 WL 3076770, at *14 (internal citations and quotation marks omitted).

Here, Mother's actions for the nearly two years following the removal of the child demonstrate that she manifested neither an ability nor a willingness to either physically parent her child or take financial responsibility for him. Mother continued to abuse drugs during this time period, failed to pay child support, and often failed to maintain contact with the child or DCS. Under these circumstances, we have little difficulty concluding that DCS met its burden under the first element of this ground.

We cannot, however, reach the same conclusion as to the second element of this ground for termination, which asks whether returning the child to the parent's custody would place him or her at risk of substantial harm. Tenn. Code Ann. § 36-1-113(g)(14).

Indeed, the trial court does not mention this portion of the willingness and ability ground in its order. This Court has repeatedly held that a trial court's failure to make findings in support of the second element of the willingness and ability prong mandates that we vacate that ground:

> The absence of this specific finding is not without consequence. With respect to termination cases, the trial court is specifically directed by the statute to "enter an order that makes specific findings of fact and conclusions of law." Tenn. Code Ann. § 36-1-113(k). Furthermore, neither the trial court nor this Court may proceed to termination absent clear and convincing evidence of each necessary element of a ground for termination. ***In re R.L.M.***, No. E2013-02723-COA-R3-PT, 2015 WL 389635, at *4 (Tenn. Ct. App. Jan. 29, 2015). Because the trial court did not make specific findings regarding each of the elements applicable to the failure to manifest ground, we are compelled to vacate the termination order with respect to this ground for termination as to the Father and remand for the preparation of appropriate findings of facts and conclusions of law as is required by the statute. *See* ***In re Mickeal Z.***, No. E2018-01069-COA-R3-PT, 2019 WL 337038, at *14 (Tenn. Ct. App. Jan. 25, 2019) (vacating termination order as to the Father's rights because of a failure to make proper findings to each element as required under Tennessee Code Annotated section 36-1-113(g)(14)); ***In re Brianna B.***, No. M2017-02436-COA-R3-PT, 2018 WL 6719851, at *8 (Tenn. Ct. App. Dec. 19, 2018) (noting that the trial court failed to issue any specific findings of fact concerning the *substantial harm* element of the statute).

In re Nevaeh B., No. E2020-00315-COA-R3-PT, 2020 WL 4920020, at *3 (Tenn. Ct. App. Aug. 20, 2020); *see also* ***In re Autumn D.***, No. E2020-00560-COA-R3-PT, 2020 WL 6306056, at *5 (Tenn. Ct. App. Oct. 28, 2020) (relying on ***In re Nevaeh B.*** to vacate this ground for termination). We conclude that it is unnecessary to remand this ground to the trial court, however, because we have already determined that other grounds were properly found to support termination of Mother's parental rights. *See* ***In re Kamyiah H.***, No. M2021-00834-COA-R3-PT, 2022 WL 16634404, at *7 (Tenn. Ct. App. Nov. 2, 2022) (vacating the ground of failure to manifest an ability and willingness to parent due to a lack of sufficient findings but concluding it was not necessary to remand the case for additional findings because other grounds existed to support termination of the mother's parental rights); ***In re Ralph M.***, No. E2021-01460-COA-R3-PT, 2022 WL 3971633, at *16–17 (Tenn. Ct. App. Sept. 1, 2022) (vacating the persistence of conditions ground due to insufficient findings of fact but declining to remand for additional findings because "other grounds exist[ed]").

B. Best Interest

Because we have determined that at least one statutory ground has been proven for terminating Mother's parental rights, we must now decide if DCS has proven, by clear and convincing evidence, that termination of Mother's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); ***White v. Moody***, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). If "the interests of the parent and the child conflict, courts are to resolve the conflict in favor of the rights and best interest of the child." ***In re Navada N.***, 498 S.W.3d at 607.

According to the version of the statute in place when the termination petition was filed, the trial court was directed to consider the following best interest factors:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). "This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that

terminating a parent's rights is in the best interest of a child." ***In re M.A.R.***, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005) (citations omitted).

The bulk of Mother's argument on appeal surrounds factor (2): "[w]hether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible[.]" Mother specifically takes issue with the trial court's failure to find that DCS made reasonable efforts to assist Mother, pointing out that the trial court did not find sufficient proof of DCS's reasonable efforts in the four months following the removal of the child as required to prove the ground of abandonment by failure to establish a suitable home.[7]

Here, the evidence shows that DCS did make reasonable efforts over the life of this case. The testimony was that DCS offered Mother help in obtaining a June 2019 assessment, parenting classes, mental health counseling, and drug treatment. DCS also conducted home visits, arranged visits with the child, and administered drug screens to Mother. Despite these efforts, Mother made no reciprocal efforts until two years following the removal of the child, and after the removal of a second child who was removed due to drug exposure. Although Mother has made significant progress during her rehabilitation, as previously discussed, due to Mother's relapses, her sobriety has not been tested outside the controlled environment of her rehabilitation program such that we can say that it would be in the child's best interest to be returned to her custody. As such, the first two factors weigh in favor of termination. *See* Tenn. Code Ann. § 36-1-113(i)(1) (involving whether the parent has made an adjustment of circumstances); (2) (involving whether the parent utilized services provided to make lasting changes); *see also* ***In re James W.***, 2021 WL 2800523, at *17 (holding that factors (1) and (2) weigh in favor of termination where mother was currently sober but "the majority of her efforts took place after DCS filed its termination petition" and "Mother continues to be unable to assume custody of the children").

Mother has also not maintained consistent visitation with the child. Although the child knows Mother is his parent and wishes to visit with her, the trial court found, and the record supports, that the child's most meaningful relationship is with his foster family. And the child appears to be thriving in his foster family, with even Mother recognizing that it would be detrimental to the child to remove him from his foster home. *See* Tenn. Code Ann. § 36-1-113(i)(3) (involving visitation with the child), (4) (involving the parent's relationship with the child), (5) (involving the effect on the child of a change in caretakers). As such, factors (3), (4), and (5) favor termination.

[7] This ground may be proven by showing reasonable efforts in any four-month period. *See* ***In re Jakob O.***, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016) ("[T]he proof necessary to support termination under this ground need not be limited to any particular four-month period after removal."). DCS does not appeal the trial court's dismissal of this ground for termination.

Other factors lean less heavily toward termination. For example, Mother's current residence may not accept children and her only prior residence was known for facilitating Mother's drug use. *See* Tenn. Code Ann. § 36-1-113(i)(7) (involving the parent's physical environment and the people living there). In addition, although there were no allegations of physical abuse, it is clear that Mother was abusing drugs while the child was in her custody. Indeed, the child's younger sibling was removed after being exposed to drugs. *See* Tenn. Code Ann. § 36-1-113(i)(6) (involving whether the child or others "in the family" were victims of abuse or neglect).

Some factors actually favor Mother, at least somewhat. Mother is now mostly current on her child support obligation, although the trial court took issue with the small amount that Mother was ordered to pay as being insufficient to actually support the child. There was also no evidence that she has any mental health concerns that she is not treating. Instead, it appears that Mother is currently properly treating her drug addiction. *See* Tenn. Code Ann. § 36-1-113(i)(8) (involving whether the parent's mental and emotional health would be detrimental to the child), (9) (involving child support).

Nevertheless, on the whole, the best interest factors clearly and convincingly establish that termination is in the child's best interest. Mother has made substantial progress in her sobriety in the ten months prior to trial. Unfortunately, however, this progress has come too late to be of much benefit to the child at issue, as it occurred well after the filing of the termination petition. And in order for Mother to be a proper placement for the child, her sobriety must be tested outside of her controlled environment, an eventuality months in the future. The child, however, deserves, and can achieve, permanence now. *See* ***In re Da'Vante M.***, No. M2017-00989-COA-R3-PT, 2017 WL 6346056, at *15 (Tenn. Ct. App. Dec. 12, 2017) ("Children deserve stability and an opportunity to move on from their present limbo."). In contrast, refusing to terminate Mother's parental rights at this point would leave the child lingering "with the instability and insecurity inherent" in a long-term foster care situation, a situation that this Court has recognized is often not in a child's best interest. ***In re C.B.W.***, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *8 (Tenn. Ct. App. June 26, 2006). As a result, the trial court did not err in finding that the child's best interest is best served by terminating Mother's parental rights.

V. CONCLUSION

The judgment of the Hamblen County Circuit Court is reversed in part, vacated in part, and affirmed in part. The termination of Appellant Michelle K.'s parental rights is affirmed, and this cause is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant, Michelle K., for all of which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE