

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 3, 2023

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IN RE CIARA O., ET AL.

**Appeal from the Juvenile Court for Scott County
No. 2021-JV-54 James Cotton, Judge**

No. E2022-01179-COA-R3-PT

This is an appeal involving the termination of parental rights. The trial court terminated the parental rights of the mother and the fathers of the children on the following grounds: (1) abandonment by failure to support; (2) substantial noncompliance with a permanency plan; (3) persistent conditions; and (4) failure to manifest an ability and willingness to assume custody. The trial court also found that termination was in the best interest of the children. Only the mother appeals. We affirm.

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

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and W. NEAL MCBRAYER, JJ., joined.

Tracey Vought Williams, Wartburg, Tennessee, for the appellant, Erica O.

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

OPINION

I. FACTS & PROCEDURAL HISTORY

This matter involves the termination of the parental rights of Erica O. (“Mother”) to her two children, Ciara and Landon. Ciara was born in May 2010, and Landon was born in December 2015. Steven O. (“Steven”), who was Mother’s husband, was listed as the father of Ciara and Landon on their birth certificates. After subsequent DNA testing, it was confirmed that Steven was the father of Ciara. However, it was discovered that Derrick

O. (“Derrick”), who was Steven’s brother, was the father of Landon.¹ Although the trial court terminated the parental rights of both Mother and the fathers of the children, this appeal only involves the termination of Mother’s parental rights. Therefore, we focus on the facts and procedural history pertaining to Mother.

In March 2020, the Tennessee Department of Children’s Services (“DCS”) became involved with this family after it received a referral regarding allegations of domestic violence. According to the referral, Mother was heard screaming for help, and someone called 911. Upon the arrival of law enforcement, it was observed that there was a situation occurring between Mother and Steven and that Mother had black eyes and bruises on her body. The referral alleged that four-year-old Landon had witnessed severe domestic violence between Mother and Steven and that Landon thought it was okay to hit Mother because Steven told him so. Additionally, the referral alleged that the home was filthy and that Landon stated there were guns hidden in the home. It was noted that Mother had allowed Steven back into the home after seeking an order of protection against him in February 2020. Just days later, law enforcement executed a search warrant of the home and found a loaded 9mm handgun within reach of the children.

The matter was assigned to a Child Protective Services Agent (“the CPSA”). The CPSA began her investigation by gathering records relevant to the allegations in the referral. She received a copy of the order of protection and discovered that the children were included in the order. She received complaint cards from dispatch and discovered that law enforcement had been to the home a total of ten times since January 2020 with seven of those being for domestic violence or welfare checks. She also obtained photographs of Mother and observed that Mother had two black eyes which appeared to be in the stages of healing. The CPSA then spoke with Steven, Ciara, and Mother. Upon speaking with Steven, he reported that Mother had issues and would not get medicated for those issues. He explained that she had “fits,” had been “acting crazy,” and had “episodes” in front of the children. Upon speaking with Ciara, she reported that she had observed Mother and Steven hit each other. After speaking with Mother, Mother submitted to a drug screen and was positive for methamphetamine, THC, and buprenorphine. The CPSA also spoke with the maternal grandmother. The maternal grandmother reported that she had spoken with Mother, who disclosed to her that Steven was abusive and mean to the children.

Thereafter, DCS filed a petition for temporary legal custody and for an ex parte order alleging that the children were dependent and neglected. The trial court entered an attachment pro corpus and an ex parte protective custody order finding probable cause to believe the children were dependent and neglected and awarding temporary legal custody to DCS. As such, the children entered DCS custody in March 2020, and they have

¹ The record refers to Derrick as “Derek” and “Derrick.” However, upon close examination of his signature contained in Exhibit 13, we determine that the correct spelling of his name is “Derrick.”

remained in DCS custody since that time. The trial court subsequently entered an adjudicatory order in November 2020, finding that the children were dependent and neglected based on Mother's stipulation to substance abuse at the time of the children's removal.

DCS developed a permanency plan in April 2020, which was ratified by the trial court in May 2020. The permanency plan included Mother's responsibilities, which are summarized as the following:

1. Complete an alcohol and drug ("A&D") assessment and follow all recommendations;
2. Complete domestic violence treatment and follow all recommendations;
3. Complete parenting classes and follow all recommendations;
4. Complete a mental health assessment and follow all recommendations;
5. Maintain reliable transportation;
6. Obtain a home that was separate from the other parent due to domestic violence;
7. Remain in contact with the family service worker ("the FSW") and attend all meetings and court hearings; and
8. Submit to random drug screens when requested by DCS or the court.

According to this permanency plan, Mother was also required to pay child support in the amount of \$100 per child per month. Additionally, the permanency plan noted that Mother would have 4.3 hours of supervised visitation per month, which would occur via video due to the COVID-19 pandemic. DCS revised the permanency plan in July 2020, which was ratified by the trial court in November 2020. In addition to her previous responsibilities, Mother was required to submit to a nail bed test. DCS revised the permanency plan again in January 2021, which reiterated the requirements from the previous plans and extended the date for Mother to satisfy the requirements.² DCS revised the permanency plan a final time in June 2021, which was ratified by the trial court in July 2021. In addition to her previous responsibilities, Mother was required to obtain a legal source of income and provide proof of income to DCS.

In April 2021, DCS filed a petition to terminate the parental rights of Mother alleging the following grounds: (1) abandonment by failure to support; (2) substantial noncompliance with a permanency plan; (3) persistent conditions; and (4) failure to manifest an ability and willingness to assume custody. It also alleged that termination was in the best interest of the children. Following the filing of the petition, Mother was arrested for numerous drug-related offenses on several different occasions. In May 2021, Mother was arrested and charged with possession of Schedule II drugs, possession of Schedule IV drugs, possession of Schedule V drugs, possession of Schedule VI drugs, and possession of drug paraphernalia. According to the affidavit of the arresting officer, Mother was found

² The record does not contain this permanency plan.

sleeping in the driver's seat of her parked car. In April 2022, Mother was arrested for a second time and charged with methamphetamine possession or casual exchange, possession of Schedule II drugs, possession of Schedule V drugs, simple possession or casual exchange, and possession of drug paraphernalia. In May 2022, she was arrested for a third time and charged with simple possession or casual exchange and possession of drug paraphernalia. In June 2022, she was arrested for a fourth time and charged with methamphetamine possession or casual exchange, simple possession or casual exchange, and possession of drug paraphernalia.

The trial court ultimately held a trial in July 2022. Mother testified at trial, but she was incarcerated at the time due to her arrests and charges mentioned above. In August 2022, the trial court entered an order terminating parental rights and a final decree of full guardianship. The trial court found that DCS had proven the following grounds against Mother: (1) abandonment by failure to support; (2) substantial noncompliance with a permanency plan; (3) persistent conditions; and (4) failure to manifest an ability and willingness to assume custody. The trial court also found that termination of Mother's parental rights was in the best interest of the children. Thereafter, Mother timely filed an appeal.³

II. ISSUES PRESENTED

Mother presents the following issues for review on appeal, which we have slightly restated:

1. Whether the trial court erred in finding grounds existed for the termination of Mother's parental rights; and
2. Whether the trial court erred in finding that termination of Mother's parental rights was in the best interest of the children.

For the following reasons, we affirm the decision of the trial court.

III. STANDARD OF REVIEW

One of the most serious decisions courts are called upon to make is the termination of a parent's rights to his or her child. *In re Mariah K.D.*, No. M2011-02655-COA-R3-PT, 2012 WL 3090313, at *6 (Tenn. Ct. App. July 30, 2012). Such a decision "has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent . . . of the child." *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016) (citing Tenn. Code Ann. § 36-1-113(l)(1)). Thus, "[n]o

³ Steven, who was Ciara's father, also filed an appeal of the trial court's order terminating his parental rights. On appeal, however, he failed to file an appellate brief or respond to this Court's order to show cause. Accordingly, this Court dismissed his appeal.

civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever.” *In re Kaliyah S.*, 455 S.W.3d 533, 556 (Tenn. 2015) (citing Tenn. Code Ann. § 36-1-113(l)). It is well established that “[a] parent’s right to the care and custody of [his or] 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.” *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020) (quoting *In re Carrington H.*, 483 S.W.3d at 521). “Parental rights have been described as ‘far more precious than any property right.’” *Id.* (quoting *In re Carrington H.*, 483 S.W.3d at 522). Despite being fundamental and constitutionally protected, however, parental rights are not absolute. *In re Carrington H.*, 483 S.W.3d at 522 (citing *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010)).

Tennessee Code Annotated section 36-1-113 “sets forth the grounds and procedures for terminating the parental rights of a biological parent.” *In re Kaliyah S.*, 455 S.W.3d at 546. Pursuant to this statute, the petitioner seeking termination of parental rights must prove two elements. *Id.* at 552. First, the petitioner must prove the existence of at least one of the statutory grounds for termination set forth in section 36-1-113(g). *Id.* Second, the petitioner must prove that termination of parental rights is in the best interests of the child under the factors set forth in section 36-1-113(i). *Id.* Due to the constitutional dimension of the rights at stake, the petitioner seeking termination must prove both elements by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); see Tenn. Code Ann. § 36-1-113(c). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts[.]” *Id.* (citing *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005)). It also “eliminates any serious or substantial doubt about the correctness of these factual findings.” *Id.* (citing *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *State, Dep’t of Children’s Servs. v. Mims (In re N.B.)*, 285 S.W.3d 435, 447 (Tenn. Ct. App. 2008)).

Because of the heightened burden of proof applicable in parental termination cases, we adapt our customary standard of review on appeal. *In re Audrey S.*, 182 S.W.3d at 861. We review the trial court’s factual findings de novo in accordance with Rule 13(d) of the Tennessee Rules of Appellate Procedure, presuming each factual finding to be correct unless the evidence preponderates otherwise. *In re Carrington H.*, 483 S.W.3d at 524. We then make our own determination regarding “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.” *Id.* (citing *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.” *Id.* (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)).

IV. DISCUSSION

A. Grounds for Termination

Mother's first issue on appeal is whether the trial court erred in finding grounds existed for the termination of her parental rights. We will address each of the applicable grounds for termination separately. However, we note that the grounds "are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground[.]" Tenn. Code Ann. § 36-1-113(g).

1. Abandonment by Failure to Support

The first ground at issue on appeal is abandonment by failure to support. The trial court found that there was clear and convincing evidence for this ground supporting termination of Mother's parental rights. This ground exists based on a parent's abandonment of his or her child, as defined in Tennessee Code Annotated section 36-1-102(1)(A). *Id.* § 36-1-113(g)(1). In section 36-1-102(1)(A), there are "five alternative definitions for abandonment as a ground for the termination of parental rights." *In re Audrey S.*, 182 S.W.3d at 863 (citing Tenn. Code Ann. § 36-1-102(1)(A)(i)-(v)). The relevant definition of abandonment in this case is defined as follows:

(i) 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 . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents . . . 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). Furthermore, the terms "failed to support" or "failed to make reasonable payments toward such child's support" are defined as "the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child[.]" *Id.* § 36-1-102(1)(D).

Mother concedes on appeal that there was sufficient proof she failed to provide support for her children during the four-month period prior to the filing of the petition for termination. We also agree that there was sufficient proof demonstrating Mother failed to provide support for her children during the four-month period prior to the petition being filed. Mother was ordered to pay child support in the amount of \$100 per child per month. DCS filed its petition to terminate Mother's parental rights in April 2021. The FSW testified that Mother paid no child support during the four months preceding the filing of the petition for termination, much less any child support at all. Mother admitted that she was aware of the requirement to pay child support and that she failed to pay any child support. The payment summaries entered into evidence as Exhibits 2 and 3 showed that Mother had failed to pay any child support.

Despite this concession, Mother argues that DCS failed to prove her failure to support was willful. In response, DCS asserts that Mother’s argument and caselaw are inapplicable because both rely on an outdated statutory definition. Indeed, Mother cites to *In re Terry S.C.*, No. M2013-02381-COA-R3-PT, 2014 WL 3808911, at *8 (Tenn. Ct. App. July 31, 2014), which applied the statutory language of section 36-1-102(1)(A)(i) prior to its amendment in 2018. This Court has explained:

Prior to 2018, the statutory definition of abandonment placed the burden of proof on the petitioner to show that a parent’s failure to visit or failure to support was “willful.” In 2018, the General Assembly amended the statute to shift the burden of proof to the parent to show the failure to support or visit was not willful.

In re Alyssa A., No. M2022-00582-COA-R3-PT, 2023 WL 2358453, at *3 (Tenn. Ct. App. Mar. 6, 2023) (quoting *In re Kolton C.*, No. E2019-00736-COA-R3-PT, 2019 WL 6341042, at *5 (Tenn. Ct. App. Nov. 26, 2019)). Given that the petition for termination in this case was filed after the 2018 amendment to the statute, the amended statute applies here. See *In re Arianna B.*, 618 S.W.3d 47, 62 (Tenn. Ct. App. 2020) (finding that the amended statute applied because the petition was filed after the amended statute became effective). The amended statute removed the word “willfully” from section 36-1-102(1)(A)(i) and added the following provision:

For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent[’s] . . . failure to visit or support was not willful. The parent . . . shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure[.]

Tenn. Code Ann. § 36-1-102(1)(I). Therefore, contrary to Mother’s argument, it is she who bore the burden of proving her failure to support was not willful. *In re Alyssa A.*, 2023 WL 2358453, at *4.

DCS further asserts that Mother has waived such argument as she did not assert the affirmative defense at the trial court level. Mother “was required to assert the absence of willfulness as an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure.” *Id.* She never raised this affirmative defense in a pleading or at trial.⁴ *In re Avery W.*, No. M2022-01057-COA-R3-PT, 2023 WL 2700650, at *4 n.2 (Tenn. Ct. App. Mar. 30, 2023). Accordingly, we determine that she has waived this particular issue. *In re L.F.*, No. M2020-01663-COA-R3-PT, 2021 WL 3782130, at *7 (Tenn. Ct. App. Aug.

⁴ Mother did not file an answer or response to the petition for termination at all.

26, 2021); *see Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 735 (Tenn. 2013) (citing Tenn. R. Civ. P. 12.08) (stating that “[a]s a general rule, a party waives an affirmative defense if it does not include the defense in an answer or responsive pleading”); *In re Emerald W.*, No. W2019-00490-COA-R3-PT, 2020 WL 504991, at *4 n.5 (Tenn. Ct. App. Jan. 31, 2020) (stating that a parent waives a lack of willfulness as an affirmative defense when the parent fails to raise the defense at trial).

It is undisputed that Mother failed to support her children in the four-month period preceding the filing of the petition for termination in this case. Additionally, Mother waived the absence of willfulness as an affirmative defense to this ground. As such, we conclude that the trial court did not err in finding DCS had proven the ground of abandonment by failure to support.

2. Substantial Noncompliance with a Permanency Plan

The second ground at issue on appeal is substantial noncompliance with a permanency plan. The trial court found that there was clear and convincing evidence for this ground supporting termination of Mother’s parental rights. This ground exists when there has been substantial noncompliance by the parent with the statement of responsibilities in a permanency plan. Tenn. Code Ann. § 36-1-113(g)(2). For this ground, the petitioner “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 Nevada N.*, 498 S.W.3d 579, 603 (Tenn. Ct. App. 2016) (quoting *In re M.J.B.*, 140 S.W.3d 643, 656-57 (Tenn. Ct. App. 2004)). Second, the petitioner “must show 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.’” *Id.* (quoting *In re M.J.B.*, 140 S.W.3d at 657).

The conditions that led to the children’s removal in March 2020 were drug use and domestic violence. There were multiple permanency plans in this case, which included responsibilities intended to remedy those conditions. We reiterate all of Mother’s responsibilities by summarizing them as follows:

1. Complete an A&D assessment and follow all recommendations;
2. Complete domestic violence treatment and follow all recommendations;
3. Complete parenting classes and follow all recommendations;
4. Complete a mental health assessment and follow all recommendations;
5. Maintain reliable transportation;
6. Obtain a home that was separate from the other parent due to domestic violence;
7. Remain in contact with the FSW and attend all meetings and court hearings;
8. Submit to random drug screens when requested by DCS or the court;
9. Submit to a nail bed test; and
10. Obtain a legal source of income and provide proof of income to DCS.

Mother was also required to pay child support in the amount of \$100 per child per month. However, this requirement was never listed in the statement of responsibilities in any of the permanency plans. This Court has explained that this ground for termination requires substantial noncompliance with the permanency plan's *statement of responsibilities*. *Id.* at 603-04 (quoting *In re Abigail F.K.*, No. E2012-00016-COA-R3-JV, 2012 WL 4038526, at *13 (Tenn. Ct. App. Sept. 14, 2012)). Additionally, the permanency plans noted in Mother's statement of responsibilities that she would have 4.3 hours of supervised visitation per month, which would occur via video due to the COVID-19 pandemic. However, this was merely a statement concerning Mother's visitation and was not framed as a concrete obligation that had to be accomplished. *Id.* at 605. If DCS intended for this to be a responsibility, it should have framed it as requiring Mother to attend or participate in visitation. *See In re Abigail F.K.*, 2012 WL 4038526, at *13 ("If the parent is required to comply with the permanency plan, then the permanency plan should clearly communicate to the parent: this is what you must do to regain custody of your child."). As such, for purposes of this ground, we only consider the ten responsibilities summarized above. Regardless, we find that all of these responsibilities were reasonable and related to remedying the conditions that led to the children's removal.

We now consider Mother's noncompliance with her responsibilities. Throughout this matter, the trial court found Mother was not in substantial compliance with the permanency plans after holding permanency hearings in November 2020, January 2021, and July 2021. The FSW attempted to help Mother by providing information regarding places where Mother could receive services. She also scheduled a mental health assessment and an A&D assessment for Mother. Additionally, she communicated with Mother via text message about drug screens but did not always receive a response from Mother. Despite these efforts, she testified that Mother failed to provide anything as far as proof of completion at the time the petition for termination was filed in April 2021. She noted that the trial in this matter had been set for an earlier date and was continued several times. One of the reasons for the continuances was Mother had voluntarily entered into a rehabilitation program in October 2021. Therefore, Mother was given an opportunity to develop and maintain sobriety. Nevertheless, the FSW testified that Mother had failed to do so.

DCS's involvement with this family began partly because Mother failed a drug screen in March 2020 for methamphetamine, THC, and buprenorphine.⁵ The FSW stated that Mother failed to appear for hair follicle drug screens in February and March 2021, and that Mother failed these drug screens by default. Mother was then arrested and charged with several drug-related offenses in May 2021. As stated before, Mother voluntarily

⁵ The FSW testified that Mother specifically failed for Suboxone, which is a brand name for buprenorphine. *See State v. Davis*, No. E2012-00495-CCA-R3-CD, 2013 WL 2253963, at *1 (Tenn. Crim. App. May 22, 2013) (noting that Suboxone is a brand name for buprenorphine).

entered into a rehabilitation program in October 2021, which she successfully completed. While in the rehabilitation program, the FSW testified that Mother completed an A&D assessment, domestic violence treatment, and parenting classes. After completing the rehabilitation program, however, the FSW explained that Mother admitted to relapsing due to methamphetamine use. Therefore, she said that Mother was required to complete a new A&D assessment, which Mother failed to do. She stated that Mother then failed to appear for a hair follicle drug screen or nail bed test in April 2022 and additional drug screens in March, April, and May 2022. Additionally, Mother was arrested again in April, May, and June 2022, and charged with several drug-related offenses. As such, the FSW believed that the drug use was still occurring due to Mother's arrest record. Furthermore, she was unsure if Mother was sober at the time of trial. In sum, she testified that Mother had failed to provide proof of reliable transportation, separate and stable housing, a new A&D assessment, a mental health assessment, anger management classes, and a nail bed test. However, upon being shown Mother's certificate of completion from the rehabilitation program, she said that the certificate indicated Mother had completed anger management classes.

Mother testified that she tried the best she could to stay in constant communication with the FSW, but she claimed that the FSW was not responsive. She also testified that there had been only a couple of times the FSW had sent her anything. Therefore, she claimed that the FSW lied about some of what was sent to her. In regard to her compliance with the permanency plan, Mother stated that she did all of the classes and appointments the FSW had made for her. She said that she completed a mental health assessment, an A&D assessment, and a rehabilitation program. She said that she had been to every child and family team meeting. She also said that she had a vehicle and would have a job and separate home upon release from incarceration. As such, she stated she would have a job, a vehicle, and a safe environment to take the children to. She admitted, however, that she had not had a job for the past 28 months.

Mother described her drug addiction as "on and off" during the time prior to rehabilitation. She said that she was more stable now and that she even participated in intensive outpatient treatment for a short period of time after her rehabilitation. She admitted that she relapsed afterward because she was discouraged. However, she testified that she had been sober for a few months, was sober at the time of trial, and would be able to maintain her sobriety once she was released from incarceration. She claimed that she could not recall the FSW reaching out to her to complete a drug screen since she completed the rehabilitation program. She admitted that she was arrested and charged with several drug-related offenses in April, May, and June 2022, and that she was in possession of methamphetamine during two of those arrests. However, she claimed that her arrests did not mean she would have failed a drug screen. She further admitted that she was incarcerated at the time. As a consequence, she conceded that she was not available at the time to take care, custody, or control of her children.

Both before and after the petition for termination was filed, Mother failed to submit to drug screens when requested by DCS. Although she voluntarily entered into and completed a rehabilitation program, she did not do so until October 2021, which was approximately a year and a half after the children were removed and seven months after the petition for termination was filed. While we acknowledge Mother's efforts to achieve sobriety, for purposes of this ground "[w]e have often held under similar circumstances that such belated efforts are 'too little, too late.'" *In re K.M.K.*, No. E2014-00471-COA-R3-PT, 2015 WL 866730, at *6 (Tenn. Ct. App. Feb. 27, 2015). Moreover, although Mother completed an A&D assessment, her subsequent relapse required her to complete a new assessment which she failed to do. Her rehabilitation was only temporarily successful because she relapsed and incurred several drug-related charges from three separate arrests in 2022. Given that these responsibilities were related to addressing her drug issue, compliance with them was particularly important because her drug issue was one of the conditions that led to the removal of the children in the first place. *See In re Roger T.*, No. W2014-02184-COA-R3-PT, 2015 WL 1897696, at *9 (Tenn. Ct. App. Apr. 27, 2015) (finding it was clear that addressing the mother's drug use was of central importance to the permanency plans).

From the time the children were removed to the time of trial, Mother had 28 months to develop, maintain, and demonstrate sobriety by working toward these responsibilities, but she unfortunately failed to do so. In light of her failure to complete these particular responsibilities, her noncompliance with the permanency plans was substantial. Accordingly, we conclude that the trial court did not err in finding DCS had proven the ground of substantial noncompliance with a permanency plan.

3. Persistent Conditions

The next ground for termination at issue on appeal is persistent conditions. The trial court found that there was clear and convincing evidence for this ground supporting termination of Mother's parental rights. This ground applies when:

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

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

(ii) There is little likelihood that these conditions will be remedied at an early

date so that the child can be safely returned to the parent . . . in the near future;
and

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

(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). Each element must be proven by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 550. This Court has explained that this ground applies “when, by court order, a ‘child has been removed from the home or the physical or legal custody of a parent . . . for a period of six (6) months’ as a result of a dependency and neglect petition.” *In re Boston G.*, No. M2019-00393-COA-R3-PT, 2020 WL 2070399, at *6 (Tenn. Ct. App. Apr. 29, 2020); *see also In re D.V.*, No. E2018-01438-COA-R3-PT, 2019 WL 1058264, at *5 (Tenn. Ct. App. Mar. 6, 2019) (“The child must have been removed from the home or the physical or legal custody of a parent/guardian for a period of six (6) months by a court order entered following a petition alleging that the child is a dependent and neglected child.”). “The necessary order of removal is ‘the threshold consideration’ for this ground.” *In re Lucas S.*, No. M2019-01969-COA-R3-PT, 2021 WL 710841, at *4 (Tenn. Ct. App. Feb. 24, 2021) (quoting *In re Alleyanna C.*, No. E2014-02343-COA-R3-PT, 2015 WL 4773313, at *14 (Tenn. Ct. App. Aug. 10, 2015)).

On March 13, 2020, DCS filed a petition for temporary legal custody and for an ex parte order alleging that the children were dependent and neglected. That same day, the trial court entered an attachment pro corpus and an ex parte protective custody order finding probable cause to believe the children were dependent and neglected and awarding temporary legal custody to DCS. As such, the children were removed from Mother’s home and physical and legal custody by a court order entered after a petition had been filed alleging that the children were dependent and neglected. Tenn. Code Ann. § 36-1-113(g)(3)(A). Additionally, at the time of trial in July 2022, the children had been in DCS custody since their removal in March 2020. Therefore, the children had been removed for a period of 28 months, which well exceeded a period of six months and accrued before the petition for termination was set to be heard in July 2022. *Id.* § 36-1-113(g)(3)(A) and (B).

As previously discussed, the conditions that led to the children’s removal were drug use and domestic violence. Similar to the previous ground, we focus again on Mother’s drug issue. In March 2020, Mother submitted to a drug screen and tested positive for methamphetamine, THC, and buprenorphine. DCS requested drug screens from Mother afterward, but she failed to appear. Therefore, she failed those drug screens by default. In May 2021, she was arrested and charged with several drug-related offenses. She participated in a rehabilitation program in October 2021, where she completed an A&D

assessment. However, she relapsed and continued to fail to appear for requested drug screens. She was also arrested again on three separate occasions in 2022 and charged with several drug-related offenses. She was incarcerated at the time of trial due to these charges. Despite all of this, Mother disagreed at trial that she needed more treatment before she could provide a safe and sober home for the children. She testified that she had been sober for about three months at the time of trial, but she had no proof of any drug screens to demonstrate her sobriety. None of this suggests that Mother had resolved her drug issue. *See In re Dillon E.*, No. M2016-00880-COA-R3-PT, 2016 WL 6778186, at *14 (Tenn. Ct. App. Nov. 15, 2016) (finding that the mother did not satisfactorily attend to or even acknowledge her drug problem).

We also note that there was common theme of Mother placing blame on the FSW during her testimony. There were several times Mother referred to the FSW or the FSW's efforts as "dirty." She claimed that the FSW was a "dirty person," that the FSW did not do her job properly, and that the FSW avoided her. Placing the blame on others did not reflect well on Mother, as it was Mother who failed to provide even one clean drug screen to DCS over the span of 28 months. *See In re Roderick R.*, No. E2017-01504-COA-R3-PT, 2018 WL 1748000, at *10 (Tenn. Ct. App. Apr. 11, 2018) (noting the mother's "steadfast refusal to recognize her own shortcomings and tendency to place blame on others").

There is clear and convincing evidence supporting this ground for termination. Mother's drug issue persisted in this case, and such a condition would cause the children to be subjected to further abuse or neglect preventing their safe return to Mother's care. *Id.* § 36-1-113(g)(3)(A)(i). Furthermore, the children had been in DCS custody for 28 months at the time of trial, and Mother failed to adequately address her drug issue during that period. As previously stated, Mother refused to acknowledge that she needed further treatment before she could provide a safe and sober home for the children. Therefore, there was little likelihood that this condition would be remedied at an early date so that the children could be safely returned to Mother in the near future. *Id.* § 36-1-113(g)(3)(A)(ii). The children were doing well in their foster home, were bonded with their foster parents, and were happy and healthy. Given that the children had been in DCS custody for more than two years and that Mother's drug issue remained unaddressed, the continuation of the parent-child relationship would greatly diminish the children's chances of early integration into a safe, stable, and permanent home. *Id.* § 36-1-113(g)(3)(A)(iii). Accordingly, we conclude that the trial court did not err in finding DCS had proven the ground of persistent conditions.

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

The final ground at issue on appeal is failure to manifest an ability and willingness to assume custody. The trial court found that there was clear and convincing evidence for this ground supporting termination of Mother's parental rights.

This ground exists when “[a] parent . . . has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child[.]” *Id.* § 36-1-113(g)(14). There are two elements necessary to prove for this ground. *In re Neveah M.*, 614 S.W.3d at 674. The first element “places a conjunctive obligation on a parent . . . to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child.” *Id.* at 677. Therefore, if the petitioner “seeking to terminate parental rights proves by clear and convincing proof that a parent . . . has failed to manifest either ability or willingness, then the first prong of the statute is satisfied.” *Id.* (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13 (Tenn. Ct. App. June 20, 2018)). A parent’s ability to assume custody or financial responsibility is evaluated based “on the parent’s lifestyle and circumstances.” *In re Zaylee W.*, No. M2019-00342-COA-R3-PT, 2020 WL 1808614, at *5 (Tenn. Ct. App. Apr. 9, 2020) (citation omitted). As for willingness, it is common for parents to state that they are willing to assume custody or financial responsibility; however, “[w]hen evaluating willingness, we look for more than mere words.” *In re Jonathan M.*, No. E2018-00484-COA-R3-PT, 2018 WL 5310750, at *5 (Tenn. Ct. App. Oct. 26, 2018). The second element requires the petitioner to prove by clear and convincing evidence 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 Neveah M.*, 614 S.W.3d at 677 (quoting Tenn. Code Ann. § 36-1-113(g)(14)).

We reiterate Mother failed to adequately address her drug issue and was incarcerated at the time of trial after being arrested on three separate occasions and charged with drug-related offenses. We also reiterate Mother’s admissions at trial: she admitted that she was aware of the requirement to pay child support and that she failed to pay any child support; she admitted that she had not held a job in the past 28 months; she admitted that she was arrested on three separate occasions in 2022 and had drugs in her possession during those arrests; and she admitted that she was not available at the time to take her children due to her incarceration. Both Mother’s lifestyle and circumstances demonstrated that she did not have the ability to assume custody or financial responsibility of the children. Furthermore, Mother testified that she was willing to do whatever it took for her children. Yet, her efforts to demonstrate that willingness in this case have fallen short.

There was clear and convincing evidence that Mother failed to manifest both an ability and a willingness to assume custody or financial responsibility of the children. Tenn. Code Ann. § 36-1-113(g)(14). Additionally, based on Mother’s incarceration at the time of trial and Mother’s unaddressed drug issue, there was clear and convincing evidence that placing the children in Mother’s custody would pose a risk of substantial harm to the children’s welfare. *Id.* § 36-1-113(g)(14). Thus, we conclude that the trial court did not err in finding DCS had proven this ground.

B. Best Interest of the Children

Mother also presents an issue as to whether the trial court erred in finding that it was in the best interest of the children to terminate her parental rights. The Tennessee Supreme Court has summarized the law regarding the best interest analysis as follows:

Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” *In re Kaliyah S.*, 455 S.W.3d at 555 (citing *In re Audrey S.*, 182 S.W.3d at 861). “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interest[s].” *Id.* When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” *In re Audrey S.*, 182 S.W.3d at 878. Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. *Id.* “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child” Tenn. Code Ann. § 36-1-101(d) (2017).

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. *In re Audrey S.*, 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. *White v. Moody*, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. *See In re Audrey S.*, 182 S.W.3d at 878. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. *In re Carrington H.*, 483 S.W.3d at 523. “[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” *In re Audrey S.*, 182 S.W.3d at 878 (citing *White v. Moody*, 171 S.W.3d at 194).

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).

The trial court must consider the nine statutory factors listed in Tennessee Code Annotated section 36-1-113(i) when conducting the best interest analysis.⁶ *Id.* at 681.

⁶ As DCS points out in its appellate brief, the best-interest factors were amended effective April

Those factors are enumerated as the following:

- (1) Whether the parent . . . 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 . . . ;
- (2) Whether the parent . . . 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 . . . has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent . . . 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 other person residing with the parent . . . 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 . . . 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 . . . consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's . . . mental and/or emotional status would be detrimental to the child or prevent the parent . . . from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent . . . 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).

22, 2021, which now includes additional factors for consideration. *See* 2021 Tenn. Pub. Acts, ch. 190 § 1. However, the petition for termination in this case was filed on April 14, 2021, which was prior to the amendment. Therefore, the old best-interest factors apply here. *See In re Jackson R.*, No. M2021-01545-COA-R3-PT, 2023 WL 353420, at *9 n.8 (Tenn. Ct. App. Jan. 23, 2023) (noting that the amended statute only applies to a petition for termination filed on or after April 22, 2021).

Mother argues on appeal that the only evidence in support of any best interest factor was the “yes” or “no” testimony of the FSW. To the contrary, we note that there was evidence of Mother’s arrests and charges and Mother’s lack of child support payments. There was also evidence of Mother’s drug use and evidence that both children had observed domestic violence between Mother and Steven. The FSW testified that the children were doing well in their foster home and were bonded with their foster parents. Additionally, there was Mother’s testimony, during which she made several admissions relevant to the best interest analysis.

In considering these factors, the trial court found that Mother had not yet made changes in the conduct or circumstances of her life that would make it safe for the children to go home to her. *Id.* § 36-1-113(i)(1). The court found that DCS had made reasonable efforts and that lasting change in this case did not appear possible. *Id.* § 36-1-113(i)(2). The court found that there was not a strong bond between Mother and the children and that, due to numerous issues, there had been constant interrupters whereby Mother was unable to establish a meaningful parent-child relationship between herself and the children. *Id.* § 36-1-113(i)(4). The court found that changing caregivers at this point in the children’s lives would have a severe and detrimental effect on them. *Id.* § 36-1-113(i)(5). The record supported these findings.

The trial court found that there was a mixture of issues, such as domestic violence, incarceration, mental health struggles, rehabilitation, criminal prosecution, and trauma, which would be an unsafe environment for the children to be in. *Id.* § 36-1-113(i)(6) and (8). The court found that Mother was not out of this destructive cycle of dysfunctionality and was not a safe and proper custodian to assume custody of the children. The court also found that, due to Mother’s substance abuse, domestic violence, and incarceration, these issues had rendered her unable to consistently care for the children in a safe and stable manner. Therefore, the court found that her inability to refrain from criminal activity again showed that it was in the best interest of the children that termination take place. *Id.* § 36-1-113(i)(7). Lastly, the trial court found that no child support was paid in the four months immediately preceding the petition for termination. *Id.* § 36-1-113(i)(9). The record supported these findings.

The court did not make a finding as to whether Mother had maintained regular visitation with the children. *Id.* § 36-1-113(i)(3). However, after our review, we find that the record supported this factor weighing in favor of Mother. The FSW testified that Mother maintained regular visitation with the children via video visits. Mother also testified that she participated in the video visits and maintained regular contact with the children other than when she was in incarcerated.

In light of all of these statutory factors, there was clear and convincing to support the trial court’s conclusion that termination of Mother’s parental rights was in the best interest of the children. Therefore, we conclude that the trial court did not err in finding

termination of Mother's parental rights was in the best interest of the children.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the trial court. Costs of this appeal are taxed to the appellant, Erica O., for which execution may issue if necessary.

CARMA DENNIS MCGEE, JUDGE