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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 1, 2023

IN RE AALIYAH P. ET AL.

**Appeal from the Juvenile Court for Davidson County
No. PT# 263762 Sheila Calloway, Judge**

No. M2022-01645-COA-R3-PT

A mother appeals the termination of her parental rights on the grounds of abandonment by failure to support; abandonment by failure to provide a suitable home; substantial noncompliance with the permanency plans; persistent conditions; and failure to manifest an ability and willingness to assume custody of the children. The mother also appeals the trial court's finding that termination of her parental rights was in the best interest of the children. We reverse the trial court's finding on the ground of substantial noncompliance with the permanency plans because the initial permanency plan does not appear in the record, but we affirm the trial court in all other respects.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Clayton Michael Cardwell, Nashville, Tennessee, for the appellant, Lindsey P.

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

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the trial court's termination of the parental rights of Lindsey P. ("Mother") to her children Eugene G. and Aniyah G. (collectively, "the children").¹ The Department of Children's Services ("DCS" or "the Department") initially became involved

¹ The children's father passed away in September 2018. A third child, Aaliyah P., was included in DCS's original petition for termination; however, DCS nonsuited the petition as to Aaliyah.

with Mother and the children in August 2019, when the Department received a referral alleging that the children were drug exposed and experiencing environmental neglect. Specifically, the referral alleged that Mother and maternal uncle used “heroin intravenously and smoked crack” in front of the children. The referral further alleged that the home was “filthy” with “roaches on the walls.” Based on the referral, a Child Protective Services Assessor (“CPSA”) conducted a school visit with Aniyah and Eugene to assess the children and “did not observe any imminent risk concerns” with the children at that time.

In September 2019, it was reported to the CPSA that Mother had overdosed and “was using the children’s social security checks for buying drugs.” Upon learning of this allegation, the CPSA made multiple attempts to contact Mother via home visits and phone calls without success. On October 22, 2019, DCS acquired an Investigative Order from the juvenile court and attempted to conduct a home visit with the assistance of the Metropolitan Police Department. When DCS arrived, the family did not answer the door. Instead of cooperating with DCS, the family exited out the back door of the home. Throughout October and November 2019, the family continued to avoid DCS and prevented DCS from conducting a home visit.

On November 26, 2019, DCS learned that Mother was incarcerated and was charged with unauthorized use of a vehicle, evading arrest, and unlawful use of drug paraphernalia. While Mother was in jail, DCS visited her and discussed her prior drug charges and the children’s truancy. Mother disclosed that she had a history of drug use and admitted that, in September, she had overdosed on marijuana laced with fentanyl, causing her hospitalization. The Department observed Mother’s home environment on November 27, 2019, and had concerns regarding the cleanliness of the home, but ultimately determined that the home was “livable” and did not pose “imminent risk.”

The Department set a Child and Family Team Meeting (“CFTM”) with Mother for December 2, 2019, to discuss concerns regarding drug use in the home, truancy issues, and past issues of non-compliance with DCS, but Mother failed to appear for the meeting. The CPSA was informed by the children’s maternal grandparents that they could not wake Mother up to attend the CFTM. After Mother’s failure to appear, the CPSA contacted the children’s schools and learned the children were not in attendance. The CPSA conducted a home visit on the afternoon of December 2, 2019, and found emergency medical services personnel present at the home attending to the children’s maternal uncle, who was unconscious on the floor. The CPSA found Mother asleep in the living room and, when the CPSA attempted to rouse Mother, Mother “could not focus and could not walk in a straight line or stand up straight.” Mother tested positive for opiates and oxycodone. Due to the drug use in the home, truancy issues, criminal history, and noncompliance with DCS’s investigation, DCS determined that there was no less drastic alternative than removing the children from the home.

On December 4, 2019, DCS filed a Petition for Custody with Request for Emergency Removal and Request to Set Child Support alleging, among other things, that the children were dependent and neglected. The juvenile court found probable cause to believe the children were dependent and neglected and entered an Emergency Protective Custody Order on that same day. On January 17, 2020, the juvenile court entered an Initial Permanency Plan/Plan of Care Hearing Order stating that the children were “dependent/neglected” and ratifying the permanency plan² DCS created. The juvenile court explained to Mother that termination of her rights could be a consequence of failing to visit or support the children. On December 30, 2020, DCS amended the permanency plan, and the juvenile court ratified the amended plan on January 5, 2021. Mother was required to: attend video visitation twice weekly; take and pass drug screens; maintain contact with DCS; attend individual and family counseling; and provide documentation of attendance at substance abuse counseling and Alcoholics Anonymous/Narcotics Anonymous meetings.

On May 19, 2021, the Department filed a petition to terminate Mother’s parental rights to the children. On November 8, 2021, the juvenile court entered an order for service by publication, stating that Mother’s whereabouts “are unknown and cannot be ascertained by diligent search.” The court ordered that Mother be served by publication in *The Ledger*, a newspaper of general circulation published in Nashville, Tennessee. Mother was appointed counsel. The juvenile court held a trial on the petition for termination on October 24, 2022, at which Mother and Belinda Pelicci, Youth Villages Foster Care Team Lead, testified.

By order entered on October 29, 2022, the juvenile court terminated Mother’s rights to the children on the grounds of abandonment by failure to support, abandonment by failure to establish a suitable home, substantial non-compliance with permanency plans, persistent conditions, and failure to manifest an ability and willingness to assume custody. The court further found that termination of Mother’s parental rights was in the best interest of the children. Regarding Mother’s testimony and behavior in court, the order stated:

Respondent mother was erratic and emotional during her testimony. Respondent mother asked for a brief recess to “get some air” which was granted by the Court. The mother stepped out of the courthouse for a break but did not return when the case was recalled to continue the hearing. Despite efforts by her attorney and court officers to locate the mother and advise her to return, she had left the premises and did not return. The Court chose to continue with a hearing despite the mother’s absence. Mother’s attorney represented her throughout these proceedings, even after mother left the Court during the middle of her testimony and failed to return.

² The initial permanency plan does not appear in the record.

Mother appeals and asserts that the trial court erred in finding clear and convincing evidence to support the grounds for termination and in finding clear and convincing evidence to support a finding that termination is in the child’s best interest.

STANDARD OF REVIEW

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

Tennessee Code Annotated section 36-1-113 provides the grounds and procedures for terminating parental rights. First, a petitioner seeking to terminate parental rights must prove that at least one ground for termination exists. Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d at 251. Second, a petitioner must prove that terminating parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

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

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

02685-COA-R3-PT, 2014 WL 2168553, at *2 (Tenn. Ct. App. May 21, 2014) (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004)).

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

ANALYSIS

I. Grounds for termination

A. Abandonment by failure to support

The juvenile court terminated Mother’s parental rights for abandoning her children by failing to support them. *See* Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102. As defined in the relevant version of Tenn. Code Ann. § 36-1-102(1)(A)(i), abandonment by failure to support occurs when a parent:

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[.]

The relevant version of the statute defines “failed to support” or “failed to make reasonable payments toward such child’s support” is defined as “the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token³ payments toward the support of the child.” Tenn. Code Ann. § 36-1-102(1)(D). “That the parent had only the means or ability to make small payments is not a defense to failure to support if no payments were made during the relevant four-month period.” *Id.* An adult parent is presumed to know of their legal obligation to provide monetary support to their children regardless of whether the court has ordered the parent to do so. *See* Tenn.

³ “Token support” is support that, “under the circumstances of the individual case, is insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B).

Code Ann. § 36-1-102(1)(H); *In re Braxton M.*, 531 S.W.3d 708, 724 (Tenn. Ct. App. 2017)).

Pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(i), we must focus on the four-month period immediately before the filing of the petition, which is January 19, 2021 to May 18, 2021 in this case. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (explaining that the statutory four-month period covers four months preceding the day the termination petition was filed and does not include the day the petition was filed).

On the issue of Mother’s support of the children, the trial court held:

[T]he Respondent mother did not pay any support towards the care of the children.

10. Respondent mother admitted that she has never paid any support towards the care of the children during the entire custodial episode.

11. Respondent mother was not in jail or incapacitated in any way in the four months immediately preceding the filing of the State’s termination petition, and she could have supported the children.

12. Respondent mother knew that the children were in DCS custody because the children were removed from her care, and they have previously attended Court hearings and meetings regarding the children.

13. Respondent mother knew the consequences of her failure to support the children because the Criteria and Procedures for Termination of Parental Rights were explained to her by the Davidson County Juvenile Court on January 7, 2020, and January 5, 2021, as evidenced by the Permanency Plan Ratification orders entered as exhibits in this matter.

14. DCS has proven, by clear and convincing evidence, the ground of abandonment by failure to support against Respondent mother

It is undisputed that Mother paid no child support during the relevant four-month period. Nevertheless, Mother asserts that the trial court erred in terminating her rights for failure to support because “DCS failed to provide sufficient proof of the income that Mother might have earned or her expenses” during the relevant period. We are not persuaded by this argument.

To the extent that Mother attempts to assert on appeal that her failure to support the children was not willful, such an argument is waived. Effective July 1, 2018, the General Assembly amended Tenn. Code Ann. § 36-1-102(1) to make the absence of willfulness an affirmative defense. *See In re Jude M.*, 619 S.W.3d 224, 236 (Tenn. Ct. App. 2020). Thus, DCS was not required to prove that Mother’s failure to support was “willful” in order to

establish the ground of abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(i). *See In re Archer R.*, No. M2019-01353-COA-R3-PT, 2020 WL 820973, at *5 (Tenn. Ct. App. Feb. 19, 2020) (“[A] petitioner is no longer required to prove the respondent in a termination proceeding acted ‘willfully’ in failing to . . . support his or her child[.]”). Mother was permitted to raise a lack of willfulness as an affirmative defense to abandonment, and she bore the burden to prove her failure to support was not willful. *See* Tenn. Code Ann. § 36-1-102(1)(I). However, Mother did not raise a lack of willfulness as an affirmative defense in an answer or at trial. Moreover, Mother did not present any evidence that her failure to support was not willful such that the issue could have been tried by implied consent. *See In re Lauren F.*, No. W2020-01732-COA-R3-CT, 2021 WL 5234712, at *8 (Tenn. Ct. App. Nov. 10, 2021) (finding that the issue of willful failure to support was tried by implied consent). As a result, she has waived this issue. *See Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 735 (Tenn. 2013) (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 Imerald 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).

Regarding her employment and income, Mother testified that she was employed at Nashville Web Design for two years and made \$17,000 in 2021. Mother testified that her rent was \$25 per month and was fully paid by her mother. Although the evidence regarding Mother’s expenses was sparse, the deficit in the evidence is the result of Mother’s actions in leaving the courtroom mid-testimony and failing to return to offer any further information regarding her financial situation.

In sum, the evidence shows that Mother failed to pay any support during the relevant time period (or during the entire custodial episode which spanned nearly three years), she testified that she had income, she offered no testimony of any expenses (other than her rent, which she did not pay herself), and she did not raise a lack of willfulness as an affirmative defense. Under these circumstances, we affirm the trial court’s determination that Mother abandoned the children by failing to support them within the meaning of Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i).

B. Abandonment by failure to provide a suitable home

Next, the juvenile court terminated Mother’s parental rights for abandoning her children by failing to establish a suitable home. *See* Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102. At the time the petition was filed, the relevant statute provided that, to establish abandonment by failure to provide a suitable home, the petitioner must demonstrate that:

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

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

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

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

For purposes of this ground, DCS must make “reasonable efforts” to assist parents in obtaining a suitable home by using its “superior insight and training.” *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015) (quoting *Dep’t of Children’s Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008)). To be considered reasonable, the Department’s efforts need not be “Herculean,” *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014), but they must be equal to or greater than those of the parent. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). A suitable home requires “more than a proper physical living location.” *In re Daniel B.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Dep’t of Children’s Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home also requires that “[a]ppropriate care and attention must be given to the child,” *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016), and that the home “be free of drugs and domestic violence.” *In re Hannah H.*, 2014 WL 2587397, at *9.

In its December 4, 2019 Petition for Custody with Request for Emergency Removal and Request to Set Child Support, DCS alleged that the children were dependent and neglected. The juvenile court found probable cause to believe the children were dependent and neglected and entered an Emergency Protective Custody Order placing the children in the custody of the State on that same day. Therefore, the children were removed from Mother's custody and placed in DCS custody during proceedings alleging that the children were dependent and neglected. DCS established the first requirement of this ground for termination. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(a).

Regarding Tenn. Code Ann. § 36-1-102(1)(A)(ii)(b), the juvenile court's protective custody order found that "it is contrary to the children's welfare to remain in the care, custody, or control of their parent . . . [t]here are no less drastic alternatives to removal" and, under the section regarding reasonable efforts, the trial court noted that "multiple attempts by DCS and other service agencies to engage the mother but she refused to cooperate." We find this statement satisfies Tenn. Code Ann. § 36-1-102(1)(A)(ii)(b).

Next, we consider whether the Department made reasonable efforts to assist Mother following removal of the children. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). In her brief, Mother asserts that the Department must provide reasonable efforts during the four months immediately after removal of the children and that it was "unclear from the testimony at trial when specific services were offered." Mother is mistaken about the parameters of this statute. This Court has previously stated that DCS "may establish this ground by offering proof of reasonable efforts during *any four-month period* following a child's removal." *In re Roderick R.*, No. E2017-01504-COA-R3-PT, 2018 WL 1748000, at *11 n.13 (Tenn. Ct. App. Apr. 11, 2018) (emphasis added); *see also In re Rahjada W.*, No. E2019-01798-COA-R3-PT, 2020 WL 2893434, at *5 n.8 (Tenn. Ct. App. June 3, 2020) (quoting *In re H.S.*, No. M2019-00808-COA-R3-PT, 2020 WL 1428777, at *7 n.4 (Tenn. Ct. App. Mar. 20, 2020)) ("As we have explained in other cases, the statute under present consideration 'does not limit the window during which DCS may satisfy its obligation to make reasonable efforts to the four-month period directly following statutory removal.'").

Regarding DCS's reasonable efforts, the trial court stated:

[T]he Department made reasonable efforts to assist the Respondent mother in providing a suitable home for the children, including: offering therapeutic visitation between the Respondent and children; offering to provide transportation for the mother to assist her with getting to visitation and her participation in services; regular diligent searches and clear searches to locate the mother when she was not engaged with DCS; mailing certified letters and correspondence to mother's last known address; setting up and providing funding for an alcohol and drug assessment for the mother; setting up and provid[ing] funding for a mental health assessment [of] the mother; setting up and providing funding for a parenting assessment [of] mother; regular

attempts to engage mother via telephone; regular attempts for home visits to the mother's home; and conducting regular Children and Family Team Meetings to address progress and barriers to reunification.

Our review of the record does not support each and every one of the trial court's findings, but, that fact does not end the inquiry, because DCS's efforts to assist a parent "shall be found to be reasonable if such efforts equal or exceed the efforts of the parent . . . toward the same goal" Tenn. Code. Ann. § 36-1-102(1)(A)(ii)(c); *see In re Amber R.*, No. W2019-01521-COA-R3-PT, 2020 WL 7861247, at *5 (Tenn. Ct. App. Dec. 29, 2020).

Regarding DCS's assistance to her, Mother testified:

But, you know, I need help. Help me. Y'all don't want to help me. Y'all want to take my kids and my life be nothing. I don't have no help. I don't have no support. Everything got took from me, and [I'm] just fighting to stay clean . . .

On the topic of reasonable efforts following removal, Ms. Pelicci, a representative of Youth Villages, testified:

Q. Did DCS attempt to make efforts to help her?

A. Yes.

Q. Tell me about that.

A. DCS had set up A&D assessments. It's unknown if she completed that. I don't have documentation. She reports to have gone to Nextdoor several times, but there's no documentation, and she tested positive for cocaine today.

Regarding the Department's efforts to locate Mother, Ms. Pelicci stated:

A. The last known contact in the record was 3/28/2022.

Q. 3/28/2022?

A. Yes.

Q. And tell me about that contact.

A. That contact indicated that the former worker had a phone-call and confirmed a date and time to meet at the home. The worker went to the home, and the mother was not present and did not answer her phone.

Q. From your review of the record, has that kind of been the deal with Mom? Has she been hard to reach?

A. Yes.

Q. Okay. And from your review of the record, has she been in regular contact, reaching out to DCS or anything like that?

A. No.

The evidence showed that Mother had some virtual or telephonic visits with the children during the custodial episode, but in-person visits were suspended until Mother could pass a drug test, which she never did.

While there is a dearth of evidence substantiating DCS's efforts to assist Mother with establishing a suitable home, we find that the efforts that DCS expended in attempting to contact Mother and being thwarted on nearly every occasion "equaled or exceeded" Mother's own efforts toward the goal of establishing a suitable home. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). There is essentially no evidence that Mother expended any effort to address her drug issues. Indeed, she continued to test positive for illegal substances up until the date of trial. Mother stated that she attended a drug treatment program, but she provided no proof to support her claims. Importantly, the record shows that Mother evaded DCS and did not prioritize staying in contact with her children. The record shows that Mother did not make "reciprocal reasonable efforts to provide a suitable home" and her actions and inactions are evidence that she did not demonstrate concern for the children. Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). We therefore affirm the trial court's finding that Tenn. Code Ann. § 36-1-102(1)(A)(ii) was proven by clear and convincing evidence.

C. Substantial noncompliance with permanency plans

The trial court also found by clear and convincing evidence that Mother failed to substantially comply with the statement of responsibilities set forth in her permanency plans. Tennessee Code Annotated section 36-1-113(g)(2) provides that parental rights may be terminated if: "There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to title 37, chapter 2, part 4[.]" To succeed under this ground, a petitioner must prove

(1) the terms of the plan, *Dep't of Children's Services v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 WL 1528367 (Tenn. Ct. App. E.S., June 29, 2005); (2) that the plan requirements were 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 (3) that the parent's noncompliance was substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. *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); *Dep't of Children's Servs. v. T.M.B.K.*, 197 S.W.3d 282, 293 (Tenn. Ct. App. 2006).

In re A.J.R., E2006-01140-COA-R3-PT, 2006 WL 3421284, at *4 (Tenn. Ct. App. Nov. 28, 2006). In assessing a parent's substantial noncompliance with a permanency plan, the court should measure "both the degree of noncompliance and the weight assigned to that requirement." *In re Valentine*, 79 S.W.3d at 548. "Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance." *In re M.J.B.*, 140 S.W.3d at 656.

Concerning this ground for termination, the trial court stated as follows:

23. After the children came into state custody, DCS created permanency plans for them.

24. The permanency plans listed a number of requirements that the Respondent needed to satisfy before the children could safely be returned home.

25. The initial plan required Respondent mother to complete the following: (1) Pay child support; (2) Mental health intake with a parenting component and recommendations; (3) Sign a release of information for DCS to get assessment and services records; (4) Complete an alcohol and drug assessment, following all recommendations made thereof as to the mother; (5) Submit to random drug screens as requested by DCS as to the mother; (6) Comply with recommended medical treatment by mental health and substance abuse providers; (7) Participate in family counseling; (8) Comply with the terms of probation and refrain from further criminal activity; (9) Participate in grief and loss counseling; (10) Engage in regular visitation with the children; (11) Obtain and maintain stable housing; and (12) Obtain and maintain a legal source of income.

26. The Juvenile Court ratified the initial permanency plan as in the children's best interests and found that the requirements for the Respondent mother were reasonably related to remedying the reasons for foster care.

27. Respondent mother participated in the development of the plan, received a copy of the plan and was present in Court when the plan was ratified.

28. A revised plan was developed with the same [tasks] for the mother [] as the initial plan. The revised plan was ratified by the Juvenile Court as in the children's best interests and found that the requirements for the Respondent mother were reasonably related to remedying the reasons for foster care.

29. Respondent mother participated in the development of the first revised plan, received a copy of the plan and was present in Court when the plan was ratified.

30. Respondent mother has not successfully completed any tasks on the plans and is substantially noncompliant with the permanency plans. Respondent mother reported that she had completed drug rehabilitation on

three (3) different occasions but provided no proof of completion and tested positive for cocaine the day of trial, indicating additional need for treatment. Respondent mother has not completed a mental health intake or counseling, she has not consented regularly to random drug screens when requested, she has not obtained and maintained safe and appropriate housing, she has not maintained a legal source of income, she has not paid support, she has not regularly engaged in visitation, she has not participated in grief counseling or family therapy, and she has not addressed her mental health concerns.

31. The Court finds that, as of the date of hearing, the permanency plans are reasonable and related to remedying the reasons for which the children were placed into foster care, such that, had the Respondent mother cooperated with the same, it would have addressed the reasons for which the children were in DCS custody.

32. DCS has proven, by clear and convincing evidence, the ground of substantial noncompliance with the permanency plan against Respondent mother.

Mother asserts that she has completed some of the requirements listed on the permanency plan and therefore, her non-compliance was not “substantial,” and her rights should not be terminated. However, we do not reach the substantive question of whether Mother was substantially noncompliant with the permanency plans because Mother’s initial permanency plan does not appear in the record. During the time period following the children’s removal, DCS created two permanency plans, the first on December 30, 2019 and the second on December 30, 2020. This Court has previously confronted cases where permanency plans were absent from the record and has stated as follows:

When DCS relies on substantial noncompliance with a permanency plan for termination, “it is essential that the plan be admitted into evidence.” *In re A.J.R.*, [E2006-01140-COA-R3-PT], 2006 WL 3421284, at *4 [(Tenn. Ct. App. Nov. 28, 2006)]. Even if a plan is later revised, “the original plan must still be included in evidence, in addition to the revised plan, if DCS is relying on noncompliance with the original plan as a ground for termination.” *In re T.N.L.W.*, No. E2006-01623-COA-R3-PT, 2007 WL 906751, at *5 (Tenn. Ct. App. Mar. 26, 2007) (citing *In re A.J.R.*, 2006 WL 3421284, at *4). This is so both the trial court and this Court may understand “exactly what responsibilities and requirements were placed upon the parent by the permanency plan[s], and when they were to be completed.” *In re T.N.L.W.*, 2007 WL 906751, at *5. Without each permanency plan in the record, the lower court and this Court are unable to determine whether a parent complied with the responsibilities in the permanency plans. Further, without the permanency plans in the record, we cannot determine whether Mother “had notice of exactly what the . . . permanency plan[s] required of her.” *In re*

A.J.R., 2006 WL 3421284, at *4. This review is essential to ensuring each parent is afforded due process. *See In re Carrington H.*, 483 S.W.3d at 522 (“In light of the interests and consequences at stake, parents are constitutionally entitled to fundamentally fair procedures’ in termination proceedings.”) (quoting *Santosky*, 455 U.S. at 754); *see also Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

In re Dyllon M., No. E2020-00477-COA-R3-PT, 2020 WL 6780268, at *7 (Tenn. Ct. App. Nov. 18, 2020).

Here, the Department relied on both permanency plans in its termination petition, and the trial court did the same. In our posture as a reviewing court, without all of the plans in evidence, “we do not have an adequate record from which to review the trial court’s decision.” *Dep’t of Children’s Services v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 WL 1528367, at *4 (Tenn. Ct. App. Jun. 29, 2005). The Department argues that the Initial Permanency Plan/Plan of Care Hearing Order (“Plan of Care Order”) entered into evidence as Exhibit 8 is a satisfactory stand-in for the initial permanency plan. We disagree. The Plan of Care Order is a seven-page fill-in-the-blank document with handwritten notations made by the trial court. While it has some of the same information that is included in the sixteen-page parenting plan, it differs substantially and lacks a level of detail that the full parenting plan provides. Accordingly, we hold that DCS failed to meet its burden of proof regarding its allegations of substantial noncompliance with the initial permanency plan because the plan was not introduced into evidence or made part of the record on appeal. We reverse the trial court’s conclusion that DCS proved this termination ground by clear and convincing evidence.

D. Persistence of conditions

The trial court terminated Mother’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3), a ground often referred to as “persistence of conditions.” *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. Nov. 7, 2005). Persistence of conditions may be a basis for terminating a parent’s parental rights if:

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

- (i) The conditions that led to the child’s removal still persist, preventing the child’s safe return to the care of the parent . . . , or other

conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent . . . ;

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

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

Tenn. Code Ann. § 36-1-113(g)(3)(A).⁴ A petitioner seeking to terminate parental rights pursuant to this ground must prove each of the statutory elements by clear and convincing evidence. *In re Justin D.*, No. E2019-00589-COA-R3-PT, 2020 WL 4473032, at *9 (Tenn. Ct. App. Aug. 4, 2020) (citing *In re Michael B.*, No. M2019-01486-COA-R3-PT, 2020 WL 2988932, at *10 (Tenn. Ct. App. June 4, 2020)). We are mindful that, “[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 Nevada N.*, 498 S.W.3d 579, 605 (Tenn. Ct. App. 2016) (quoting *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008)).

Here, the children had been removed from Mother’s custody for seventeen months when the termination petition was filed (and had been removed from Mother’s custody for two years and ten months at the time of trial). The children were removed by court order entered in a proceeding in which the children were alleged to be dependent and neglected. Therefore, the first element of the statute is satisfied. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A).

Next, we examine whether the conditions that led to removal continue to persist. The conditions leading to the children’s removal included Mother’s drug use, non-compliance with DCS’s investigations, and truancy. Before the children came into DCS custody, Mother had a history of drug use, including the use of marijuana, marijuana laced with fentanyl, lortab, and, as recently as November 2019, criminal charges relating to drug paraphernalia, evading arrest, and unauthorized use of a vehicle. After the children came into DCS custody, Mother continued to fail drug screens, once for hydrocodone (without a prescription) and again for cocaine and marijuana in April 2021. Mother testified that she attended “The Next Door” program to address her substance abuse three times but did not provide any proof of doing so. Mother tested positive for cocaine on the morning of trial, but she denied using cocaine and testified that she only smoked marijuana. The evidence

⁴ We have cited to the version of the statute that was in effect when the termination petition was filed on May 19, 2021.

preponderates in favor of a finding that Mother's drug use persisted at the time of trial. In addition, Mother continued to reside in the same home that she was in when the children were removed from her custody, and she rebuffed any attempts DCS made to view the home. Mother testified that her boyfriend recently "died in [her] arms" after being shot ten times in the neighborhood where she lives. Regarding her neighborhood, Mother testified:

Q. What are you doing in situations where people are getting shot?

A. What do you mean? That's where I live, and that's what happens where I live at, and that's just society today. I don't live in no royal rich neighborhood.

Q. So you –

A. People get shot every day where I live at, almost. It's a lot, but that's not my fault. That's just where I'm housed. It's not my fault.

Mother cannot be charged with what others in her neighborhood do. We need not address whether Mother was intentionally exposing her children to violence because there is ample evidence that her drug use has persisted and her cooperation with DCS has not improved, as evidenced by her leaving the trial before her testimony was complete. There is no evidence these conditions will be remedied in the near future. *See Dep't of Children's Servs. v. B.B.M.*, No. E2006-01677-COA-R3-PT, 2007 WL 431251, at *9 (Tenn. Ct. App. Feb. 9, 2007) ("Given that [m]other has been unable to remedy these problems for many years, it is unlikely that these conditions would be remedied at any time in the near future.").

Finally, continuation of the parent-child relationship would diminish the children's chances of integration into a safe, stable and permanent home. The evidence shows that the children are in a pre-adoptive home, and Ms. Pelicci testified that they are "doing well." Meanwhile, Mother has failed to exercise all of the visitation available to her, has continued to abuse drugs, and has not resolved the issues leading to foster care placement. *See* Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). For these reasons, we affirm the trial court's determination that DCS proved the existence of the ground of persistence of conditions by clear and convincing evidence.

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

The trial court also terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated when (1) he or she "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 (2) "placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." Tenn. Code Ann. § 36-1-113(g)(14).

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

As to the first element, we agree with the trial court that Mother has failed to manifest an ability and a willingness to personally assume custody of the child. We have specifically focused on her lifestyle and circumstances. *See In re Serenity W.*, 2019 WL 511387, at *6. From the time the children were removed from her custody until trial, Mother had not overcome her substance abuse issues. Moreover, Mother never provided any support for the children during the entire custodial episode and very rarely engaged in visitation with them. Had Mother remedied her substance abuse issues and maintained contact with DCS, she could have resumed in-person visitation with the children, but she failed to do so. Mother’s inability to overcome her drug abuse, her failure to demonstrate to DCS that she had suitable housing, and her failure to pay support demonstrate her failure to manifest an ability and willingness to assume custody or financial responsibility of the children. Tenn. Code Ann. § 36-1-113(g)(14). Mother’s pleas at trial for her rights not to be terminated do not overcome this finding. *See In re Eli H.*, No. E2019-01028-COA-PT, 2020 WL 2300066, at *9 (Tenn. Ct. App. May 8, 2020) (“In assessing a parent’s willingness, ‘we look for more than mere words.’”) (quoting *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019)).

With respect to the second element, we must determine whether placing the children in Mother’s custody would result in “a risk of substantial harm to the physical or psychological welfare of the child.” When considering what constitutes “substantial harm,” we have observed the following:

[C]ourts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise

definition because of the variability of human conduct. However, the use of the modifier “substantial” indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnotes omitted). More recently, this Court has provided examples of circumstances that support a finding of substantial harm:

[F]orcing a child to begin visitation with a near-stranger would make psychological harm sufficiently probable. . . . Or placing a child with a parent who engaged in repeated criminal conduct that required incarceration would put a child at risk of substantial physical or psychological harm. And parents with a significant, recent history of substance abuse, mental illness, and/or domestic violence could lead to a conclusion of a risk of substantial harm.

In re Brianna B., No. M2019-01757-COA-R3-PT, 2021 WL 306467, at *6 (Tenn. Ct. App. Jan. 29, 2021) (citations omitted).

Here again, we agree with the trial court that removing the children from their current home and placing them back in Mother’s custody would pose a substantial risk of harm to them. Mother testified that she has unresolved, unspecified mental health issues and her drug screen shows that her drug use persisted at the time of trial. When the children were initially removed from her care in December 2019, Mother was unresponsive and unable to care for herself or the children. Furthermore, Mother’s refusal to allow DCS to enter the home to determine the cleanliness and safety of the home is concerning. Placing the children with Mother would expose them to a substantial risk of exposing them to drug use, or other forms of neglect and illegal activity. Therefore, we conclude that clear and convincing evidence exists to support the trial court’s findings that Mother failed to manifest an ability and willingness to assume custody and that placing the children in her care would pose a risk of substantial harm to them. The trial court’s termination of Mother’s parental rights on the ground of “failure to manifest” is affirmed.

II. Best interest

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Mother’s parental rights, we must next consider whether the trial court properly determined that termination of Mother’s parental rights was in the best interest of the children. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Audrey S.*, 182 S.W.3d at 860. After a court finds that clear and convincing evidence exists to support a ground for termination, the child’s interests diverge from those of the parent and the court

focuses on the child's best interests. *In re Audrey S.*, 182 S.W.3d at 877. A court must view the child's best interest from the perspective of the child, not that of the parent. *Id.* at 878. A finding that at least one ground for termination of parental rights exists does not necessarily require that a parent's rights be terminated. *Id.* at 877. Because some parental misconduct is redeemable, our termination of parental rights statutes recognize that "terminating an unfit parent's parental rights is not always in the child's best interests." *Id.* The facts a court considers in its best interest analysis must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. Ct. App. Tenn. 2015). Once a court makes the underlying factual findings, it should "consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest." *Id.*

When considering whether terminating a parent's rights to a child is in the child's best interest, a trial court must consider the factors enumerated in Tenn. Code Ann. § 36-1-113(i). A trial court is not required to find that each of the enumerated factors exists before concluding that it is in the best interest of the child to terminate a parent's rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Although in some circumstances "the consideration of one factor may very well dictate the outcome of the analysis," *In re Audrey S.*, 182 S.W.3d at 878, a court is still obligated to consider "all the factors and all the proof." *In re Gabriella D.*, 531 S.W.3d 662, 682 (Tenn. 2017). After considering all of the best interest factors, the trial court found that the factors favored terminating Mother's parental rights. *See* Tenn. Code Ann. § 36-1-113(i).

The evidence shows that during the nearly three-year period of removal, Mother failed to remedy her substance abuse issues or show that her home environment is safe for the children. *See* Tenn. Code Ann. § 36-1-113(i)(1)(C), (J), (K) ("Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs[.]" "[w]hether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent," and "[w]hether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions[.]"). Mother has failed to meet the children's needs, including failing to provide monetary support or engage in consistent visitation with the children. *See id.* 36-1-113(i)(1)(S) ("Whether the parent has consistently provided more than token financial support for the child[.]"). Most significant to our analysis is that Mother's failure to maintain sobriety has negatively impacted her ability to establish a "secure and healthy parental attachment" between herself and the children. *See id.* 36-1-113(i)(1)(D), (E) ("Whether the parent and child have a secure and healthy parental attachment," and "[w]hether the parent has maintained regular visitation[.]").

In contrast, the children have found stability and continuity in their current home with a pre-adoptive foster family, and the best interest factors presume that a prompt and permanent placement is in the child's best interest. *Id.* § 36-1-113(i)(2); *see also id.* 36-1-

113(i)(1)(H) (“Whether the child has created a healthy parental attachment with another person . . . in the absence of the parent[.]”). Based on the foregoing, we conclude that the combined weight of the proven facts amounts to clear and convincing evidence that termination of Mother’s parental rights is in the best interest of the children.

CONCLUSION

The judgment of the trial court is reversed and part and affirmed in part. Costs of this appeal are assessed against the appellant, Lindsey P., for which execution may issue if necessary.

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