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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 1, 2023

IN RE MICHAEL C. ET AL.

**Appeal from the Circuit Court for Hamilton County
No. 20A0264L. Marie Williams, Judge**

No. E2022-01063-COA-R3-PT

The appellant challenges the trial court’s termination of her parental rights. The trial court found that clear and convincing evidence established four grounds for termination of parental rights including (1) abandonment by failure to visit; (2) persistent conditions; (3) substantial noncompliance with the permanency plan; and (4) failure to manifest an ability and willingness to assume custody. The trial court also found clear and convincing evidence established that termination was in the children’s best interests. The appellant challenges the trial court’s findings as to both the existence of grounds for termination and the conclusion that termination was in the best interests of the children. We affirm.

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

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

Brian A. Caldwell, Chattanooga, Tennessee, for the appellant, Lisa M.

Jonathan Skrmetti, Attorney General and Reporter, and Jordan K. Crews, Assistant Attorney General, Tennessee, for the appellee, Tennessee Department of Children Services.

OPINION

The trial court terminated the parental rights of Lisa M. (“Mother”) and Michael C., Jr., (“Father”) to Michael C., III, born February 2017, and Gabriel C., born November 2018 (the Children).¹ Michael and Gabriel are the parents’ seventh and eighth children. All of their previous children have been removed from their custody by various states. A trial

¹ It is the policy of this Court to protect the privacy of children in parental termination cases by avoiding the use of full names.

was held on May 3, 2022, at which the trial court found clear and convincing evidence of grounds to terminate both Mother's and Father's parental rights and that termination was in the Children's best interests. Mother has appealed the termination of her parental rights. Father did not appeal the termination of his parental rights.

The Children first came to the attention of the Tennessee Department of Children's Services ("DCS") on May 18, 2019. On that date, Amy S. brought the Children to Erlanger Children's Hospital in Chattanooga, Tennessee. Amy is not related to either Parent and appears to have been a stranger to the family. Amy, who had just met Mother that day, indicated that she took Mother to a Burger King at Mother's request so that she could make use of the internet wi-fi there. In the meantime, Amy took the Children to her home, taking care of them and watching them. When Amy went back to return the Children to Mother at the Burger King, Amy could not find Mother. Since Amy could not find Mother and did not know where or how to locate her, on the advice of a family member, she took the children to a nearby hospital.

Mother insisted that Amy had kidnapped the Children while she and the Children were at the Burger King.² As to why she had not reported this alleged kidnapping, Mother stated that she could not locate a phone with which she could make an emergency call to 911. When asked, Mother could not provide any specifics on how the Children came into Amy's care.

No matter how the Children came into Amy's care, since Amy could not provide names or dates of birth for the Children, police and DCS were immediately notified. While at the hospital, the Children were cleared medically, although it was noted that Gabriel's head was completely flat, which can result from a baby being left on his or her back for too long.

Detective Christopher Graff and DCS Caseworker Catherine Gray arrived at the hospital to investigate. Detective Graff began searching for the identity of Mother and the Children. Around 7:00 p.m., approximately seven hours after the Children were left with Amy, Mother contacted the police in an effort to locate the Children. The police advised Mother of the location of the Children and brought her to Erlanger Children's Hospital.

Once Mother arrived at the hospital, Detective Graff and Ms. Gray observed that Mother appeared to be under the influence of drugs. Ms. Gray observed Mother had slurred speech and droopy eyes and was acting erratically. Detective Graff observed Mother to "be under the influence of a substance and overly sleepy and confused." While in response to police questioning Mother alleged that Amy had kidnapped the Children, she refused to speak to Detective Graff about it.

² The juvenile court found that Amy did not kidnap the Children as alleged by Mother.

Mother was tested for drugs. She tested positive for morphine, buprenorphine, oxycodone, and benzodiazepine. Mother had prescriptions for the oxycodone and benzodiazepine, but she could not produce a prescription for the morphine or buprenorphine. Mother alleged that she received a prescription for morphine at a hospital for her broken leg.

After speaking to Mother at Erlanger Children's Hospital, Detective Graff and Ms. Gray went to the family home to meet Father. At the family home, Detective Graff and Ms. Gray observed that Father also appeared to be under the influence of drugs. Father was "sweating profusely, with large pupils, was erratic and jumping from subject to subject in his speech." Ms. Gray performed a drug test and Father tested positive for morphine and buprenorphine. Father claimed that the results were wrong. Father insisted that he only smoked "cigarettes and drinks soda pop." Detective Graff also observed that Father was not acting in accordance with what one would expect if Father thought his children had been kidnapped.

The Children were placed in DCS custody and into a foster home. On May 20, 2019, DCS filed a Petition for Temporary Legal Custody of the Children. That same day, the juvenile court granted the petition, finding

probable cause to believe that the above-named children are dependent and neglected pursuant to Tenn. Code Ann. § 37-1-102(b)(13), based upon the parent[s'] illegal drug use and because the mother had left the children with a stranger. Additionally, the parents were under the influence of drugs when located and were not able to care for the children and the father had advised that they had fled another state with the oldest child in an effort to evade CPS in Arkansas.

The juvenile court found there was no less drastic measure than immediately placing the Children into protective custody because the parents had previously fled Arkansas with Michael when the Arkansas Division of Children and Family Services became involved. DCS alleged, and the juvenile court found, that there was a significant risk that the parents would flee to another state if the Children were not immediately removed from the parents' custody.

In 2019, Ms. Gray left DCS and was replaced by Ms. Kelly Dyer as the Children's case manager. A trial was subsequently held on January 24, 2020, and February 13, 2020, regarding the petition. The juvenile court adjudicated the Children dependent and neglected.

DCS created permanency plans with Mother and Father with the ultimate goal of reuniting the Children with the parents. The first permanency plan was created in June 2019, but that plan was never ratified by the trial court. A second permanency plan was

created in March 2020, and the trial court ratified it in May 2020, finding the requirements to be in the best interests of the Children and reasonably related to the reason the Children were placed into DCS custody. A third permanency plan was created in October 2021, and ratified by the trial court in December 2021. The requirements for Mother remained the same in the second and third permanency plans. The permanency plans required:

- 1) [Mother] will ensure her children are being supervised by a sober, appropriate adult at all times;
- 2) [Mother] will sign all required releases for the Department to ensure proper case management;
- 3) [Mother] will not be around those that use or are known to use/abuse illegal substances, alcohol, or non-prescribed medications;
- 4) Anyone in the home over the age of 18 will submit to random drug screens by the Department. If a failed drug screen is present, that individual will attend and complete an alcohol and drug assessment, following all recommendations;
- 5) [Mother] will provide a drug-free home environment while maintaining her sobriety;
- 6) [Mother] will attend and complete an alcohol and drug assessment, following all recommendations;
- 7) Upon any relapse or any failed drug screen, [Mother] will seek a new assessment and follow all recommendations;
- 8) [Mother] will submit to random drug screens by the Department, which include but are not limited to urine, saliva, and hair follicle testing;
- 9) [Mother] will attend and complete a DCS approved domestic violence course and support group to focus on the concerns of domestic violence between the Respondents;
- 10) [Mother] will maintain residential stability in a home that is clean, safe, and appropriate for a minimum of six (6) consecutive months;
- 11) [Mother] will pay child support as ordered by the Court, and provide necessary items to meet the child's needs during any visitation or parenting time;
- 12) [Mother] will provide the Department with a copy of a current valid driver's license, proof of car insurance, vehicle registration, or a transportation plan;
- 13) [Mother] will provide the Department with proof of legal and verifiable income or proof of disability;
- 14) [Mother] will provide the Department with a copy of a rental lease agreement in her own name;
- 15) [Mother] will take any medications prescribed to her as prescribed and submit to all pill count request by [a family care worker];
- 16) [Mother] will ensure her medications are locked up and secure due to

- concerns of her medication being stolen in the past;
- 17) [Mother] will be mentally stable and able to function in the community and parent her children safely and without concern.
 - 18) [Mother] will have a full mental health assessment, following all recommendations to address the concerns of mental health issues;
 - 19) [Mother] will participate in therapy if requested to do so by treatment providers;
 - 20) [Mother] will attend and complete a parenting assessment, following all recommendations;
 - 21) [Mother] will attend and complete a DCS approved parenting course. A certificate of completion will be submitted to DCS as proof of the fulfillment of this requirement;
 - 22) [Mother] will cooperate and participate with all service providers and follow recommendations;
 - 23) [Mother] will resolve any current or pending legal issues/probation and not incur any new criminal charges;
 - 24) [Mother] will maintain contact with the Department of Children's Services and update the [family care worker] regarding changes in address, telephone, employment, etc. within twenty-four (24) hours of the changes being made;
 - 25) [Mother] will attend all Child and Family Team Meetings (CFTMs) and court hearings, as requested;
 - 26) [Mother] will maintain contact with both [Children]; [She] will to utilize visitation in a positive manner to aid[] in the reunification process; [She] will attend regularly scheduled visitation with the children and notify the Department in advance if she cannot attend a scheduled visitation;
 - 27) [Mother] will participate in school-related meetings, such as [Individualized Educational Plan] meetings to develop an appropriate plan to meet the children's needs; and [Mother] will follow the recommendations of any and all assessments that are school-related.

Mother participated in the creation of the plan and understood the requirements of the plan, but she refused to sign the plan. Mother was often uncooperative with DCS. Shortly after the creation and ratification of the permanency plan, the parents' rental home caught fire in April 2020. After the fire, the parents were forced to find another place to live. Mother sought assistance from the Salvation Army to obtain new housing. Upon request from the Salvation Army, Ms. Dyer also worked with the organization to find Mother long-term housing. Ultimately, the Salvation Army was unable to procure long-term housing for Mother, so Ms. Dyer provided Mother with information regarding other housing resources.

After the rental home fire, Mother and Father both refused to provide either DCS or the trial court with the location of where they were living. After the fire in April 2020,

Mother did not “update the [family care worker] regarding changes in address, telephone, employment, etc. within twenty-four (24) hours of the changes being made” as required by the permanency plan. During the course of this matter, there were extended periods of time, sometimes months, where DCS could not locate Mother.

DCS arranged for both Mother and Father to have weekly visits with the Children. Initially, the parents visited the Children together, but at some point, Mother made allegations of domestic violence against Father, so the visitations were separated.

In June 2020, JoAnn Deal replaced Ms. Dyer as the Children’s case manager. At that time, Ms. Deal noted that the parents still needed to comply with the majority of their permanency plan requirements. Mother had not completed parenting classes or clinical parenting assessments, Mother had not provided her address or housing information, and Mother did not maintain contact with DCS. At a meeting, Ms. Deal reviewed the permanency plan requirements with Mother, which she seemed to understand. Mother provided some letters stating she had attended counseling at a few places, but when Ms. Deal reached out to the providers to verify, she was told that Mother had asked providers for letters, but she had not completed the counseling.

Ms. Deal attempted to arrange counseling and clinical assessments through clinics in both Cleveland, Tennessee, and Dalton, Georgia. Father was hostile, made threats, and insisted on recording the assessments at the clinic in Cleveland, Tennessee, so the clinic refused to complete the services for either parent. The parents refused to go to Georgia due to outstanding warrants. Ms. Deal was able to schedule and the parents did complete their clinical parenting assessments and classes through Omni Health. The certificates of completion were provided to DCS.

In order to help facilitate Mother’s visitation with the Children, DCS provided Mother with a gas card. The gas card was supposed to last for approximately one month; however, Mother used the gas card up entirely by her first visit. Mother failed to provide the receipt to Ms. Deal, despite knowing she needed to do so in order to obtain additional gas cards.

While the parents were visiting together, both exercised their visitation regularly. However, after a domestic violence allegation by Mother against Father, and separation of their visits per Mother’s request, she stopped showing up for her visitation with the Children. At no point after the Children were brought into DCS custody did either parent receive unsupervised visitation with the Children.

Mother told Ms. Deal that she was pregnant and that her doctor’s appointments conflicted with her visitation schedule. Ms. Deal rearranged Mother’s visitation with the Children to be at times when Mother would not be at the doctor’s office, but Mother still did not appear for her scheduled visitation times. Mother would occasionally appear for

about five minutes during Father's visitation times. She would not stay, however, asserting without documentation that she had a medical appointment; furthermore, due to the domestic violence allegations, DCS did not allow Mother to visit with the Children during Father's scheduled visitation. Mother's last visitation prior to the filing of the petition for termination was on July 13, 2020. As noted above, Mother did appear for a few minutes at a few of Father's visitations after July 13, 2020, including one visitation on October 7, 2020, but she did not appear for any of her own scheduled visitations.

DCS filed the petition for termination on December 22, 2020, alleging four grounds supporting termination against Mother: (1) abandonment by failure to visit; (2) persistent conditions; (3) substantial noncompliance with the permanency plan; and (4) failure to manifest an ability and willingness to assume custody. DCS also alleged that it was in the Children's best interest for Mother's and Father's parental rights to be terminated.

In January or February 2021, Mother informed Ms. Deal that she no longer resided in Tennessee and requested video visitation. Ms. Deal requested Mother send some documentation that she no longer resided in Tennessee. Mother eventually sent a photo of an envelope with everything except her name and zip code blacked out. From this information, Ms. Deal was able to confirm that Mother was staying in an extended-stay motel in Monticello, Arkansas. While in Arkansas, Mother gave birth, but the child was stillborn. Ms. Deal was able to confirm the child's death through the Arkansas vital records office. During a conversation with Mother, Mother confirmed she was in Arkansas, but stated she was on her way to stay with her mother in Texas. Ms. Deal testified that Mother was concerned that Father would obtain her address and that Father would kill her if he found her. Shortly thereafter, Ms. Deal lost contact with Mother again.

In March 2021, Mother contacted Ms. Deal asking for visitation with the Children, as she had just come back to Chattanooga after being in Arkansas but would only be in Chattanooga for a week. Ms. Deal was able to arrange a visit. At the visit, Michael recognized Mother, but Gabriel did not. After that visit, Ms. Deal again lost contact with Mother.

In April 2021, Mother moved to Oregon to take care of an outstanding warrant due to a theft conviction in Marion County, Oregon, on February 11, 2015. Several months later, Ms. Deal found Mother in Oregon. Ms. Deal eventually contacted Mother after verifying her incarceration in Oregon through the Marion County court system. Mother confirmed that she had been incarcerated in Oregon after turning herself in for outstanding warrants. However, Mother refused to give Ms. Deal her address in Oregon. Ms. Deal did eventually find an address for Mother, which Mother refused to confirm.

During her time as the Children's caseworker, Ms. Deal located Mother's Facebook account and used that to monitor Mother. Ms. Deal testified that Mother never confirmed the account was hers, but the account listed Mother's full name and had a profile picture

of Mother with the Children. In addition, when Ms. Deal mentioned the Facebook account to Mother in a conversation, Mother stopped posting on the account. However, a few months later, Mother began posting again. Mother posted several times about Father's domestic violence toward her. Mother also posted several times seeking money for herself and the Children as they were unhoused and sleeping in a car. However, at the time of Mother's postings, Mother did not have custody of the Children. Mother also posted about another pregnancy.

From their initial removal through the trial proceedings, the Children lived in two foster homes. The second foster home was a placement with Elizabeth A. ("Foster Mother"), whose home the Children were in at the time of trial. They were placed with Foster Mother in March 2021. When DCS first took custody of the Children, Gabriel was six months old and Michael was just over two years old. Gabriel had a flat head from being left lying on his back too long. Gabriel was treated for his flat head and enrolled in speech therapy. Gabriel graduated from speech therapy before trial. Michael was thin, pale, and reserved. Michael also had developmental delays. When he spoke, if he spoke at all, he was difficult to understand. Once Michael entered foster care, he was enrolled in speech therapy, occupational therapy, and physical therapy through the Hamilton County Schools. Michael received an IEP and made significant progress. By the time of trial, Michael was speaking in short sentences. The Children were progressing well under the care of Foster Mother, and she is interested in adopting the Children.

A trial was held on May 3, 2022, regarding the termination of Mother's and Father's parental rights. At trial, Mother and Father were both represented by counsel.³ Additionally, Ms. Dyer, Ms. Deal, Foster Mother, and Justin Carter, a friend of Mother's, appeared as witnesses. Mother did not testify on her own behalf. When called as a witness, Mother refused to answer questions, asserting ". . .it goes against [her] religious beliefs." The trial court ultimately concluded that Mother refused to participate in the hearing after the following exchange:

Ms. Hodgkins: Are you declining then to participate any further in this hearing?

[Mother]: What part of I do not have to answer anything because it goes against my religious beliefs, period. That's all. Period. End of discussion.

The Court: Okay. You understand that based on your position, the Court will make a finding that you have been offered every opportunity to participate in this hearing and an

³ Mother had trouble appearing via video conferencing, so the trial court allowed her to call into the hearing.

attorney has been appointed for you at your request to assist you in participating in this hearing and that you are declining to participate. You're declining to be involved in this hearing at all; is that your position?

[Mother]: I am not testifying. It goes against my religious beliefs. Period.

The Court: Okay. We will proceed on the basis that [Mother] has declined to participate in this hearing. She may monitor it, but she may not testify.

No constitutional or statutory arguments were raised with the trial court, nor have any been raised on appeal, asserting any violation of Mother's religious liberty.

At the conclusion of proof, the trial court found that DCS had proven by clear and convincing evidence four grounds for termination of Mother's parental rights. Those include (1) abandonment by failure to visit; (2) persistent conditions; (3) substantial noncompliance with the permanency plan; and (4) failure to manifest an ability and willingness to assume custody. The trial court also found that clear and convincing evidence established that termination of Mother's parental rights was in the Children's best interest. Accordingly, the trial court terminated Mother's parental rights.

Mother appealed the trial court's decision. On appeal before this court, she asserts that the trial court erred in finding the existence of grounds for termination to be demonstrated by clear and convincing evidence. She also contends that termination of her parental rights is not in the best interests of the Children.

I.

Parents have a fundamental constitutional interest in the care and custody of their own children. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). This fundamental interest is "far more precious than any property right." *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). "[P]ublic policy strongly favors allowing parents to raise their biological or legal children as they see fit, free from unwarranted governmental interference." *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010). However, a parent's rights are not absolute and may be terminated on clear and convincing evidence that statutory grounds for termination exist and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1)-(2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

In a termination of parental rights case, we review a trial court's findings of fact de novo on the record with a presumption of correctness unless the evidence preponderates

otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. R. App. P. 13(d). “In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re Bernard T.*, 319 S.W.3d at 596–97). The grounds for termination and the determination that termination is in the child’s best interest must be established by clear and convincing evidence, that is, evidence that “enables the fact-finder to form a firm belief or conviction regarding the truth of the facts” and which “eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. Code Ann. § 36-1-113(c). “The trial court’s ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review *de novo* with no presumption of correctness.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). All other questions of law are reviewed *de novo* with no presumption of correctness. *In re Carrington H.*, 483 S.W.3d at 524. This court applies the versions of the parental termination statutes in effect on the date the petition was filed. *In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding “that the version of the statute in effect at the time of the petition’s filing controls this action”).

II.

Under Tennessee Code Annotated section 36-1-113(c), termination of parental rights must be based upon (1) a finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) a finding that termination of the parent’s rights is in the best interests of the child. The trial court found by clear and convincing evidence four grounds for termination of Mother’s parental rights and that it was in the Children’s best interests to terminate Mother’s parental rights.

A. Grounds for Termination

The trial court found clear and convincing evidence that Mother’s parental rights should be terminated based upon: (1) abandonment by failure to visit; (2) substantial noncompliance with the permanency plan; (3) persistence of conditions; and (4) failure to manifest the ability and willingness to assume custody. Tenn. Code Ann. 36-1-113(g)(1)-(3), (14) (effective March 6, 2020 to April 21, 2021).

1. Abandonment by Failure to Visit

The trial court found that clear and convincing evidence established that Mother abandoned the Children by a willful failure to visit. In her statement of issues, Mother specifically raises the issue of whether the trial court erred as to the other three grounds for

termination but does not address abandonment by failure to visit. She makes no specific argument addressed to this ground, but asserts in a conclusory manner that clear and convincing evidence was not provided to support any of the grounds for termination. Nevertheless, we address this ground as the “Court of Appeals must review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal.” *In re Carrington H.*, 483 S.W.3d at 525-26.

Abandonment occurs when a parent fails to visit his or her child “[f]or a period of four (4) consecutive months immediately preceding” the filing of the termination petition. Tenn. Code Ann. § 36-1-102(1)(A)(i). “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) (effective March 6, 2020 to June 30, 2021). Mother did not plead the absence of willfulness as a defense. DCS filed the termination petition on December 22, 2020. *See In re Malik G.*, E2019-01040-COA-R3-PT, 2019 WL 6245483, at *14 (Tenn. Ct. App. Nov. 21, 2019) (we have interpreted this four-month period “includes the four months preceding the day the petition to terminate parental rights is filed but excludes the day the petition is filed.”). Visitation must be more than just token visitation; i.e. visitation that “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(1)(C).

Irrespective of Mother’s pleading, the trial court found by clear and convincing evidence that Mother willfully abandoned the Children. Mother did not attend any of her scheduled visitations after July 13, 2020. The trial court found that any visitation or contact between Mother and the Children during the four-month period was token at best, including her five-minute appearance at Father’s scheduled visitation on October 7, 2020. During the relevant time period, Mother had the ability to visit and elected not to do so. Mother’s next visit with the Children was not until a one-time visit in March 2021 after the termination petition had been filed.

DCS assisted Mother in an attempt to facilitate her visitation. Ms. Deal rescheduled Mother’s visitation around her scheduled doctor’s appointments. Ms. Deal provided Mother with a gas card to assist in transportation to visits and, after Mother failed to comply with the requirements to receive more gas cards, DCS assisted with access to local bus transportation. However, despite DCS’s efforts, Mother still did not attend her scheduled visitation.

The trial court found any visitation by Mother during the four-month period to be merely token visitation as defined by statute. The trial court concluded that “the mother’s contact with the [C]hildren constitutes nothing more than perfunctory visitation and is of such an infrequent nature and such short duration that it constitutes and establishes minimal

or insubstantial contact with each child.”

Clear and convincing evidence establishes that Mother failed to visit the Children between August and December 2020. Mother had the ability to attend visitation, and DCS made reasonable attempts to schedule Mother’s visitation at times convenient for her. The trial court did not err in concluding that clear and convincing evidence established that Mother abandoned the Children through her failure to visit.

2. Substantial Noncompliance with Permanency Plan

The trial court found that clear and convincing evidence established that Mother failed to substantially comply with her permanency plan. Termination can be ordered on clear and convincing evidence that “[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan. . . .” Tenn. Code Ann. § 36-1-113(g)(2). This ground requires the responsibilities as outlined by the plan to be “reasonable and related to remedying the conditions which necessitate[d] foster care placement.” *In re Carrington H.*, 483 S.W.3d at 537 (quoting *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002)). The court must not merely “count[] up the tasks in the plan to determine whether a certain number have been completed.” *In re Carrington H.*, 483 S.W.3d at 537. Substantial noncompliance “requires more proof than that a parent has not complied with every jot and tittle of the permanency plan.” *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). Instead, the parent’s noncompliance must be “substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met.” *Id.* “Trivial, minor, or technical deviations from a permanency plan’s requirements will not be deemed to amount to substantial noncompliance.” *Id.* Whether noncompliance is substantial is a question of law reviewed de novo. *In re Ethan W.*, No. M2021-01116-COA-R3-PT, 2023 WL 415999, at *6 (Tenn. Ct. App. Jan. 26, 2023) (citing *In re Valentine*, 79 S.W.3d at 548).

The trial court found that DCS has demonstrated (1) that the plan requirements “are reasonable and related to remedying the conditions that caused [the Children] to be removed from the parent’s custody,” *In re M.J.B.*, 140 S.W.3d at 656-57 (citing *In re Valentine*, 79 S.W.3d at 547; *In re L.J.C.*, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003)); and (2) “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,” *In re M.J.B.*, 140 S.W.3d at 657 (citing *In re Valentine*, 79 S.W.3d at 548-49; *In re LIS.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at * 12 (Tenn. Ct. App. June 3, 2003)). The permanency plan was created with the ultimate goal of reuniting the Children with Mother. The permanency plan, created March 6, 2020, and ratified May 27, 2020, required Mother to, in part, resolve her legal issues, maintain a suitable home free from drugs and violence, complete a mental health assessment or individual counseling, complete a clinical parenting assessment and take parenting classes, and “show a general ability to function in the community and parent the Children safely without any concern.”

On appeal, Mother alleges that her noncompliance with the permanency plans was due, in large part, to her mental health and the limits she was placed under due to her medical condition. Mother alleges that while DCS did arrange several opportunities for her to take mental health assessments, she was not able to follow through on those for reasons outside her control. DCS asserts that Mother was uncooperative.

Mother did make progress. For example, Mother completed an alcohol and drug assessment and parenting classes. She also signed the required consent forms for Michael to access speech therapy, occupational therapy, and physical therapy. However, the progress Mother made does not outweigh the requirements Mother failed to complete. Mother failed to visit or support the Children. Mother did not resolve her pending legal issues with an outstanding warrant in Georgia. Mother refused to cooperate with DCS's efforts to schedule a mental health assessment or individual assessments. Mother never completed the parenting assessment. Mother continuously refused to provide DCS with her address or contact information. She would move and fail to apprise DCS. Since Mother did not provide evidence of any housing to DCS, DCS was unable to ascertain the suitability of her residence for the Children. When DCS did have an address for Mother, she refused to confirm it. She did not complete any domestic violence classes nor submit herself to random drug screens.

Mother argues that, as a part of resolving her legal issues in Oregon, she participated in a program that provided services in Oregon. Despite having Ms. Deal's contact information and the address of the DCS office in Chattanooga, Mother never provided any proof she attended the program. Mother never provided any documentation to show what services were provided through the Oregon court program. At trial, Mother chose not to testify, so the trial court had no evidence Mother attempted to complete the requirements of the permanency plan beyond the parenting class and drug and alcohol assessment.

DCS presented clear and convincing proof that Mother failed to adhere to numerous requirements of her permanency plan. While Mother argues that mental health challenges prevented her from complying but are not so serious as to prevent her from effectively parenting the Children, she failed to cooperate with DCS despite its attempt to assist Mother with any mental health problems that Mother has. The requirements Mother failed to complete were tailored to rectify the conditions that brought the Children into DCS custody in the first place, including any mental health challenges that Mother may have. We conclude that the trial court did not err in finding that clear and convincing evidence established that Mother failed to comply with the requirements of her permanency plan.

3. Persistent Conditions

The trial court found that clear and convincing evidence established the ground of termination based upon persistent conditions. Parental rights may be terminated for the

persistence of conditions when:

(g)(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 the proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

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

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

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

(B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard. . . .

Tenn. Code Ann. § 36-1-113(g)(3).

The trial court found clear and convincing evidence to support the ground of persistence of conditions. The Children were removed from the physical and legal custody of the parents on May 18, 2019, and were placed in foster care at that time. They have remained in foster care since that time. The Children were removed due to illegal drug use, failure to provide a suitable home, and inadequate and inappropriate supervision. The Children were adjudicated dependent and neglected on February 13, 2020. The conditions that led to removal still existed at the time of trial. Mother refused to disclose where she lived or with whom. DCS presented evidence that Mother was unhoused and seeking assistance on social media. Mother presented no proof to indicate that she had any source of income. Rather than demonstrating an ability to provide adequate and appropriate supervision, Mother has failed to visit the Children and has gone extended periods without contacting them or informing DCS of her location. Mother has failed to address her mental health concerns or take advantage of DCS resources addressing domestic violence in the home. The trial court found that there was little chance that the conditions could be remedied at an early date in the near future to allow the Children to return to Mother. The trial court concluded that Mother has “not been cooperative and [has] essentially abandoned these children in foster care.”

The trial court concluded that the continuation of the parent/child relationship would prevent the Children's chances of early integration into a safe, stable, and permanent home. The Children are thriving in their foster home. They have been in the same foster home, together, since March 2021, with Foster Mother. Foster Mother is able to meet the Children's needs and ensure that they have a safe, stable environment. The Children are making excellent progress in the Foster Mother's home, and Foster Mother has expressed a desire to adopt the Children should they become available for adoption.

The record shows by clear and convincing evidence that the conditions which brought the Children into DCS custody—notably failure to provide a suitable home and inadequate and inappropriate supervision—still persist with little chance of being remedied at an early date. Mother repeatedly moved without providing information to DCS regarding her location. According to social media posts presented by Ms. Deal, Mother claimed she was still living in Oregon unhoused and sleeping in a car. Mother had been incarcerated in Oregon and still had pending charges in Georgia. DCS presented evidence at trial that Mother was seeking money for food and rent via social media posts including asking for money to feed Children who were not in her custody. She showed no source of income. Mother refused to provide DCS with information regarding her housing. She also failed to visit the Children or take classes related to addressing domestic violence. While Mother attributes her failure to perform better as a parent to mental health issues, she failed, however, to cooperate with DCS despite its attempts to help Mother address her mental health challenges. The trial court did not err in concluding that clear and convincing evidence established a persistence of conditions.

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

Parental rights may also be terminated when “[a] parent or guardian 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 [parent’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).

In construing this statute, the Tennessee Supreme Court has “held that the first prong requires clear and convincing proof that the parent ‘has failed to manifest either ability or willingness’ to assume custody of or responsibility for the child.” *In re Manning H.*, No. M2020-00663-COA-R3-PT, 2021 WL 2935047, at *6 (Tenn. Ct. App. July 13, 2021) (quoting *In re Neveah M.*, 614 S.W.3d 659, 677 (Tenn. 2020)).

In Re Travionna W. et al., No. W2021-01349-COA-R3-PT, 2022 WL 8080022 at *10 (Tenn. Ct. App. Oct. 14, 2022). The Tennessee Supreme Court has stated that the statute places a “conjunctive obligation on a parent or guardian 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). Failure of the parent to manifest either ability or willingness will satisfy the first prong. *Id.* “Ability focuses on the parent’s lifestyle and circumstances,” while willingness is a parent’s attempts “to overcome obstacles” preventing the parent from assuming custody. *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at *6 (Tenn. Ct. App. Feb. 8, 2019). A parent’s express desire to reunite with the child is insufficient to establish a willingness to assume custody. *See In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *17 (Tenn. Ct. App. July 15, 2019). On the contrary, “[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); *In re Zaylee W.*, No. M2019-00342-COA-R3-PT, 2020 WL 1808614, at *5 (Tenn. Ct. App. Apr. 9, 2020) (quoting *In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, at *7 (Tenn. Ct. App. May 31, 2018), *overruled on other grounds by In re Neveah M.*, 614 S.W.3d at 677). This court may instead consider “whether a parent has attempted ‘to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child.’” *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at *9 (Tenn. Ct. App. Apr. 17, 2019) (quoting *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at *8 (Tenn. Ct. App. Mar. 22, 2019)). A failure to make efforts to overcome such obstacles “can undercut a claim of willingness.” *Id.*

Mother argues that she manifested an ability and willingness to assume custody and control of the Children because she “strived to get back on sound, stable ground.” Overall, Mother’s actions do not show that she has manifested an ability to “personally assume legal and physical custody or financial responsibility of the [Children].” Tenn. Code Ann. § 36-1-113(g)(14). The evidence presented at trial showed that Mother did not have a suitable home for the Children to live in. According to her social media posts, Mother was currently sleeping in a car and seeking charitable contributions to feed herself and the Children. Mother admits in her briefing that she does not have an income so she cannot financially support the Children. There is clear and convincing evidence that Mother has not manifested an ability to take custody of the Children. *Id.*

In addition, Mother has failed to manifest a willingness to “personally assume legal and physical custody or financial responsibility of the [Children].” Tenn. Code Ann. § 36-1-113(g)(14). Mother failed to comply with the majority of the requirements of her parenting plan which was created to help Mother overcome the obstacles that led to Mother losing custody of the Children. *In re Jaxx M.*, 2019 WL 1753054, at *9. Mother continually refused to cooperate with DCS, and failed to keep DCS informed of her address or even which state she was in. The evidence at trial was that Mother did not have any income, through employment or disability.

To satisfy the second prong of Tennessee Code Annotated section 36-1-113(g)(14),

DCS must show “clear and convincing proof that placing the child in the parent’s physical custody would likely cause substantial harm.” *In re Manning H.*, No. M2020-00663-COA-R3-PT, 2021 WL 2935047, at *6 (Tenn. Ct. App. July 13, 2021) (quoting *In re Neveah M.*, 614 S.W.3d at 677). Though the statute does not specifically define “substantial harm,” this court has construed it to require evidence of “a real hazard or danger that is not minor, trivial, or insignificant.” *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

In Re Travionna W. et al., 2022 WL 8080022 at *10. The risk of harm need not be inevitable or a theoretical possibility, but “must be sufficiently probable to prompt a reasonable person to believe the harm will occur more likely than not.” *Ray*, 83 S.W.3d at 732.

The trial court found that DCS established by clear and convincing evidence that

placing the [C]hildren in the care of [Mother] poses a risk of substantial harm to the physical or psychological welfare of the [C]hildren. [Mother has] made very little progress towards reunification since the [C]hildren entered foster care in May 2019. [Mother has] not regularly visited the [C]hildren and [has] gone extensive periods of time without having any contact with the [C]hildren. There are very serious concerns regarding [Mother’s] mental health and ongoing domestic violence between [Mother and Father]. It would be harmful to place these children back into an unstable environment when they have made so much progress since entering foster care.

DCS has shown by clear and convincing evidence that placing the Children in Mother’s custody would pose a risk of substantial harm to their physical or psychological welfare. Addressing substantial harm, this court has observed the following:

. . . forcing a child to begin visitation with a near-stranger would make psychological harm sufficiently probable. *See In re Antonio J.*, No. M2019-00255-COAR3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App. Nov. 25, 2019) (holding that substantial harm could be established when a child was removed from a home when very young and had nightmares out of fear of being removed from his foster family); *State v. C.H.H.*, No. E2001-02107-COA-R3-CV, 2002 WL 1021668, at *9 (Tenn. Ct. App. May 21, 2002) (holding that removal from the child’s current family and placement with a near-stranger could constitute substantial harm). 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. *In re O.M.*, No. E2018-01463-COA-R3-PT, 2019 WL 1872511, at *4 (Tenn. Ct. App. Apr. 26, 2019) (quoting *In re Amyynn K.*, No. E2017-01866-COA-R3-

PT, 2018 WL 3058280, at *15 (Tenn. Ct. App. June 20, 2018)). 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 Brantley O.*, No. M2019-01265-COA-R3-PT, 2020 WL 6253562, at *6 (Tenn. Ct. App. Oct. 22, 2020) (holding that the mother’s continued struggle with drug addiction and her relationship with a registered sex offender presented a risk of substantial harm); *In re Piper B.*, No. M2017-00930-COA-R3-PT, 2018 WL 3954328, at *10 (Tenn. Ct. App. Aug. 17, 2018) (holding that the mother’s failure to address her history of drug addiction, mental illness, and domestic abuse “create[d] a substantial hazard or risk of danger to the children’s welfare that [wa]s not minor, trivial, or insignificant”); *In re Isaiah B.*, No. E2017-01699-COA-R3-PT, 2018 WL 2113978, at *18 (Tenn. Ct. App. May 8, 2018) (holding that the mother’s failure to cut ties with the father who had a history of domestic violence led to a risk that was not “minor, trivial, or insignificant”).

In re Brianna B., M2019-01757-COA-R3-PT, 2021 WL 306467, at *6 (Tenn. Ct. App. Jan. 29, 2021).

Mother’s progress towards reunification since the Children entered foster care in 2019 has been limited. She has failed to complete the majority of the steps in her permanency plan including vital steps aimed at addressing the reasons that the Children were taken into DCS custody. Mother did not address her mental health issues or learn to address domestic violence. Mother did not visit the Children between July 2020 and March 2021. At her sole visit in March 2021, Gabriel did not recognize Mother. Michael did not ask about Mother. Mother was incarcerated in Oregon and had an outstanding warrant in Georgia.

Furthermore, Mother has failed to cooperate with DCS in providing information related to her housing and location. She has moved without providing any notice. As best as DCS has been able to determine, Mother appears to be without a house or apartment, living in a vehicle. She appears to have no source of income or means of ensuring a stable and safe home environment for the Children. The trial court did not err in concluding that clear and convincing evidence supports the finding that Mother failed to manifest an ability and willingness to assume custody of the Children.

B. Best Interests

Once grounds for termination have been established by clear and convincing evidence, the focus shifts from the parent to the child’s best interests. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The Tennessee Supreme Court has summarized the law pertaining to 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.” “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 interests.” 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.” Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. “[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”

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. 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 Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017) (citations omitted).

The General Assembly amended Tennessee Code Annotated section 36-1-113(i) effective April 22, 2021. *See* 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205). As the petition in this case was filed prior to the effective date, the previous version of statute applies. *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022); *In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at *6 (Tenn. Ct. App. Jan. 10, 2023) (“This court applies the versions of the parental termination statutes in effect on the date the petition was filed.”). Accordingly, the factors to be considered are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (effective March 6, 2020 to April 21, 2021).

The trial court found that the best interest factors weighed in favor of terminating Mother's parental rights. Regarding the first factor, Tennessee Code Annotated section 36-1-113(i)(1), the trial court found

the conduct, circumstance and conditions of the parents which relate to the safety and best interest of the children have actually deteriorated. They have demonstrated no stability which would be in the best interest of the children. They actually have failed to take any steps to improve the conditions in any way that would be to the benefit of their children.

At the beginning of the case, Mother had a physical home. Since that home burned, she has failed to maintain a home or inform DCS of the existence of the home. The only evidence of Mother's living situation came from Mother's social media posts that stated she was sleeping in her car.

As to the second factor, Tennessee Code Annotated section 36-1-113(i)(2), the trial court concluded that DCS made exhaustive efforts to provide Mother with services to assist her, but she failed to take advantage of them. The trial court found that lasting changes seemed to be impossible given that Mother did not take advantage of the assistance offered to her during the pendency of the case.

With regard to the third factor, Tennessee Code Annotated section 36-1-113(i)(3), the trial court found that Mother did not maintain regular visitation, with her last visit being a single visit in March 2021. Prior to March 2021, Mother's last visit was in July 2020. Mother did not maintain regular visitation with the Children.

Considering the fourth factor, Tennessee Code Annotated section 36-1-113(i)(4), the trial court found that the Mother had no meaningful relationship with the Children, nor did Mother make a meaningful effort to maintain a relationship with the Children. In contrast, contemplating the fifth factor, Tennessee Code Annotated section 36-1-113(i)(5), the trial court found the Children were thriving with their Foster Mother after their earliest years that involved little to no stability. The Children have bonded with Foster Mother and her extended family. The trial court concluded that removing the Children from the stability of Foster Mother's home would be extremely detrimental to the Children's emotional, psychological, and physical health.

Reflecting on the sixth factor, Tennessee Code Annotated section 36-1-113(i)(6), the trial court found that Mother neglected the Children before they entered foster care. The juvenile court adjudicated the Children dependent and neglected and found that Mother could not provide a safe, stable home for them. The trial court found that Mother had exposed the Children to illegal drugs and left them with inadequate or inappropriate supervision.

Turning its attention to the seventh factor, Tennessee Code Annotated section 36-1-113(i)(7), the trial court found that Mother's lack of cooperation with DCS presented problems with being able to find that the home that she would provide would now be "healthy, safe, free from criminal activity and/or drug use or abuse and . . . stable."

As to the eighth factor Tennessee Code Annotated section 36-1-113(i)(8), the trial court found Mother's emotional and mental status "very troubling." The trial court found that Mother's hostility towards DCS and the court displayed "an emotional status detrimental to the children and gives the Court no evidence [she is] attempting to provide safe and stable care and supervision for the children."

Finally, with regard to the ninth factor, Tennessee Code Annotated section 36-1-113(i)(9), the trial court found that Mother did not pay any child support, much less child support consistent with the guidelines. The record supports the trial court's factual findings as to each of these factors.

On appeal, Mother argues that the trial court erred in finding that it was in the Children's best interests to terminate Mother's parental rights. Mother argues that she may suffer from some mental health issues, but there was no evidence that Mother suffered from any major mental health issues. Mother asserted that her mental health status does not prevent her from effectively parenting the Children.

The Children have been placed into a loving home with Foster Mother, who wants to adopt them if they become adoptable. The Children have been thriving in their foster home. Alternatively, Mother largely ceased visiting the Children and has not supported the Children. The Children have no significant relationship with Mother. Mother did not take advantage of the assistance offered by DCS to address her mental health issues or learn to address the domestic violence. Mother has not demonstrated that she has developed a stable home for the Children, and the best evidence that DCS had given Mother's lack of cooperation with DCS and the decision not to testify is that Mother was living in her vehicle. Mother has not shown any source of income. We conclude that clear and convincing evidence exists supporting the trial court's conclusion that terminating Mother's parental rights is in the Children's best interest.

III.

The judgment of the Hamilton County Circuit Court is affirmed. Costs of this appeal are taxed to Appellant, Lisa M., for which execution may issue if necessary.

JEFFREY USMAN, JUDGE