

FILED

02/28/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 3, 2022

IN RE KRISLEY W.

Appeal from the Juvenile Court for Loudon County
No. 21-JV-218 Henry E. Sledge, Magistrate

No. E2022-00312-COA-R3-PT

Mother appeals the trial court's termination of her parental rights to her minor child. The trial court found clear and convincing evidence to support five grounds for termination: (1) abandonment for failure to provide a suitable home; (2) substantial noncompliance with the permanency plan; (3) persistence of conditions; (4) severe abuse; and (5) failure to manifest the ability and willingness to assume custody. The trial court also found that termination was in the best interests of the minor child. Mother appeals the trial court's order terminating her rights. The Department of Children's Services concedes on appeal one of the grounds, and we find three others to be unsupported by clear and convincing evidence. We find, however, the termination ground of severe abuse to be supported and the best interests of the child to favor termination. Accordingly, we affirm the trial court's termination of Mother's parental rights.

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

JEFFREY USMAN, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

Brian E. Nichols, Loudon, Tennessee, for the appellant, Ashley W.

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

OPINION

I.

Ashley W. ("Mother") used illegal substances for approximately a decade. During

this time period, Mother had two children. Both children were removed from her custody in 2014 based on her drug use and a domestic disturbance, but they were returned to Mother's custody eight months later. At twenty-six or twenty-seven, Mother became sober for a little over a year. During this time of sobriety, she gave birth to her third child. Mother, however, thereafter began using illegal substances again and drugs were sold out of her dwelling. She retained custody of her children until being incarcerated for six months. Mother has not had custody since then of any of her children.

Mother asserts that after a heroin overdose in June 2020, she discovered she was five to six months pregnant with her fourth child. Asked to explain how she could have, having experienced pregnancy on three previous occasions, only then realized that she was pregnant, Mother indicated that she had been "lost in addiction." Mother attempted drug treatment, making some progress, but she continued to use illegal substances throughout her pregnancy, including the day she went into labor.

Mother's fourth child Krisley W. was born in September 2020. It is the termination of Mother's parental rights as to Krisley that is at issue in this appeal. At the time of Krisley's birth, Mother tested positive for amphetamines, benzodiazepine, and buprenorphine.¹ Mother did not have a prescription for any of these substances. At birth, Krisley tested positive for amphetamine and buprenorphine. Krisley was immediately admitted to the Neonatal Intensive Care Unit ("NICU") for Neonatal Abstinence Syndrome observation. Krisley remained in the NICU for six days.

On September 22, 2020, the Department of Children's Services ("DCS") filed a Petition for Temporary Emergency Custody with the trial court, and the trial court entered an Ex Parte Protective Custody Order. Krisley was taken into DCS's custody based upon in utero exposure to illegal drugs. She had remained hospitalized prior to the filing of and throughout the resolution of DCS's petition, so Krisley never lived at home with Mother. DCS placed Krisley in foster care with Kimberly C. ("Foster Mother"). Krisley has remained in Foster Mother's home since she was six days old.

Krisley has experienced developmental delays. When Krisley was only two months old, Krisley's pediatrician expressed concerns because Krisley had trouble holding her head up. Krisley's pediatrician referred Krisley for both physical and occupational therapy once a week. Therapy improved Krisley's ability to hold her head up. At six months old, Krisley's eyes and brain did not communicate properly, so she was prescribed special glasses to help her eyes focus. In addition, Krisley suffered from severe acid reflux because her stomach was physically located too high in her chest. To help combat the acid reflux, Krisley needed a special formula and was referred to a Gastrointestinal Specialist. Krisley wore foot braces and did not use the left side of her body as much as the right side. Foster Mother had Krisley participating in multiple therapies and enrolled in a head start program.

¹ Buprenorphine is also referred to as Subutex and Suboxone in the record.

DCS had initiated a dependency and neglect action against Mother promptly after Krisley's birth. The trial court adjudicated Krisley as dependent and neglected. The court concluded Krisley was a victim of severe child abuse perpetrated by Mother based on Mother's stipulation that Krisley tested positive for drugs at birth and Krisley's medical records showing a positive urinalysis for amphetamine and buprenorphine.

In September 2020, after giving birth and her discharge from the hospital, Mother was admitted to Stepping Stone Recovery Program for inpatient treatment. Mother was successfully discharged from the inpatient program in October 2020. Once Mother was discharged in October 2020, she moved in with Christopher B., her significant other. Mother and Christopher B. lived in a home owned by Christopher B.'s parents. DCS acknowledged the physical aspects of the home were suitable for a child.

To facilitate Krisley's return to Mother's custody, DCS created two permanency plans. The first permanency plan was created in October 2020 and ratified by the trial court in November 2020. Mother and Christopher B., who DCS initially believed to be Krisley's father, both participated in the creation of the first permanency plan. According to the plan, Mother was required to: complete treatment at Stepping Stone, follow any recommendations, and follow her aftercare plan; sign releases for DCS; pass random drug screens and participate in pill counts; attend therapy; complete domestic violence classes and follow recommendations; complete parenting classes; resolve legal issues and comply with probation; provide proof of income; provide proof of stable and appropriate housing; notify DCS of changes in contact information; and maintain reliable transportation and provide proof. Mother was granted video visits with Krisley due to Covid and was required to confirm visits twenty-four hours in advance. Mother's failure to confirm visits or to call in during the first fifteen minutes of the visit resulted in visits being canceled.

DCS created a second permanency plan in April 2021, in which Mother participated. Mother's responsibilities largely remained the same with a few additions: attending intensive outpatient treatment; following the recommendations from Stepping Stone, including attending AA/NA meetings, maintaining contact with a sponsor, abstaining from mood-altering chemicals, and continuing therapy; requiring any roommates to have background checks and random drug screens; maintaining her driver's license and providing registration and insurance information to DCS; and providing certification of the completion of the domestic violence and parenting classes.

Since completing her inpatient rehabilitation program, Mother has tested negative for all drugs except her prescribed medications. Mother continues to take, pursuant to a prescription and under medical supervision, medication to assist in her sobriety. Before trial, Mother completed the intensive outpatient program, anger management classes, domestic violence classes, had a valid driver's license, and continued therapy. She also maintained employment with two cleaning companies. Mother only left the first company

after the owner suffered a medical emergency and discontinued the business. Mother also paid child support to DCS in support of Krisley. Mother continued to live with Christopher B. despite his failure to comply with his requirements under the plan. Completion of a number of plan requirements by Mother was delayed, sometimes significantly so, rather than prompt.

With regard to visitation, Mother failed to attend by video or in person multiple scheduled visits with Krisley. Between the time that Krisley came into DCS custody in September 2020 and June 2021, DCS scheduled twenty-six video conference visits between Krisley and Mother, but Mother missed fifteen of those visits. DCS acknowledged the difficulty of video conference visits with such a young child, but video visits were required due to COVID policies in place until June 2021. Prior to beginning video conference visits, DCS worked with Mother to set up WebEx for the visits. While on the phone with DCS, Mother was able to download the software and test it prior to her first visit with Krisley. Several visits were canceled because Mother did not log on to the video conference within fifteen minutes of the start of the conference. Mother did miss some visits for other reasons. For example, in November 2020, Mother missed a video conference with Krisley because she thought the call was at a different time, and in December 2020, Mother missed the video visit because Mother was asleep, sick, and missed her alarm. Most frequently though Mother blamed technology problems for missing her visits. DCS countered by noting that Mother regularly and repeatedly failed to contact them as required within the first 15 minutes of the scheduled visit to inform them of a technology problem. DCS also noted that it provided Mother with technical assistance. For example, Mother obtained a new phone in January 2021, leading her to call in late to a video conference visit because Mother did not set up the WebEx program on her phone prior to the beginning of the visit. Prior to her next scheduled video conference visit, DCS visited Mother's home to ensure she had the correct video conference links and the program was working properly so Mother would not miss future visits with Krisley. In almost every conversation with Mother, DCS reminded Mother of her next scheduled visitation and the importance of informing DCS during the first fifteen minutes of the visit if Mother was having difficulties with WebEx.

Once Covid protocols changed in June 2021, Mother was allowed in-person, supervised visits with Krisley. DCS scheduled fourteen visits between June 2021 and December 2021. Mother attended eleven of these visits but three were canceled due to Mother's failure to confirm the visits the day before as required. These visits were generally supervised by DCS caseworker Kara Clare. According to Ms. Clare, during the visits Krisley

would cry when the foster parent left, and the child would exhibit discomfort during the first 15 minutes of the visit. Mother acted appropriately, and was able to distract the minor child with toys and snacks. During the visits, [M]other would bring the child snacks, read to her, try to get her to walk, and

the child would typically fall asleep during the last 10 to 15 minutes of the visit.

Krisley regularly looked to Foster Mother for comfort during these meetings.

After the visits, Foster Mother stated that Krisley's behavior would change for the worse. Krisley would have trouble sleeping, and it would sometimes take weeks to soothe her. Foster Mother believed that it was because Mother had been inconsistent with her visits and Krisley did not know her.

Christopher B. also participated in the creation of the first permanency plan. He was made aware of his requirements and the importance of complying with the plan. Mother has admitted she and Christopher B. had taken drugs together prior to Krisley's birth. Accordingly, DCS required him to complete a mental health assessment and follow any recommendations; complete alcohol and drug assessments and follow any recommendations; participate in random drug screens; and take parenting classes.

In the time between the creation of the first permanency plan and trial, Christopher B. did complete an alcohol and drug assessment and a mental health assessment, but he did not follow the recommendations. Mother was aware of the importance of Christopher B.'s compliance with the permanency plan and that he was not in compliance. Christopher B. refused a drug screen on June 28, 2021. However, Christopher B. did have a hair follicle test on July 29, 2021, which was negative for all illegal substances. He was not at home, rather he was at work, when random drug tests were attempted at his home in September and December 2021. He also, according to DCS, apparently had multiple other negative drug tests, but it is unclear from the record when these drug tests occurred. Christopher B. also failed to complete parenting classes, though he had started taking these classes at the time of the termination hearing, and he failed to complete alcohol and drug education, which was recommended in connection with his alcohol and drug assessment.

Krisley has been in Foster Mother's care since Krisley left the hospital at six days old. While in Foster Mother's care, Krisley developed a familial relationship with Foster Mother, which Mother acknowledges. Foster Mother, who cannot have biological children, wishes to adopt Krisley. Foster Mother has placed Krisley in the various forms of recommended therapy as well as a head start program to aid her development. Foster Mother has provided all necessities for Krisley in the form of housing, food, medicine, etc. Foster Mother and Krisley have a strong bond. The trial court did not find such a bond to exist between Mother and Krisley.

DCS filed this Petition to Terminate Parental Rights ("Petition") on May 18, 2021, seeking termination of both Mother and Father's parental rights. DCS alleged Mother and Father's parental rights should be terminated on the following grounds: (1) Abandonment for Failure to Visit; (2) Abandonment for Failure to Provide a Suitable Home; (3)

Substantial Noncompliance with the Permanency Plan; (4) Persistent Conditions; (5) Failure to Manifest the Ability and Willingness to Assume Custody; (6) Severe Abuse; and (7) Best Interests. Mother answered the Petition denying all allegations except severe abuse, which she stipulated to in the dependency and neglect proceeding. While DCS initially operated pursuant to an understanding that Christopher B. was Krisley's father, DCS later learned that Jimmy H. was her father. Jimmy H. voluntarily gave up all parental rights to Krisley.²

Trial on the Petition for termination of Mother's parental rights was held on January 4, 2022. Present at trial to testify were Mother, Foster Mother, and DCS caseworker Ms. Clare. After trial, the court entered an Order concluding, based upon clear and convincing evidence, that the Petition filed by DCS was well taken, that Mother's parental rights should be terminated, and that termination was in Krisley's best interest. Mother has appealed the termination of her parental rights.

II.

“[I]n an appeal from an order terminating parental rights[,] 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 507, 525-26 (Tenn. 2016). Likewise, this court must “review the trial court's findings of fact and conclusions of law as to each ground for termination, even though the statute only requires the finding of one ground to justify terminating parental rights.” *Id.* at 525 (quoting *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010)). This court applies the versions of the parental termination statutes in effect on the date the petition was filed. *See 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”).

Parents have a fundamental constitutional interest in the care and custody of their children, *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), and this interest is “far more precious than any property right,” *In re Carrington H.*, 483 S.W.3d at 522 (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 interests of the child. T.C.A. § 36-1-113(c)(1)-(2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

We review the trial court's findings of fact related to parental termination de novo

² Jimmy H. died between the time he gave up his parental rights and trial.

on the record, giving the findings 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). The grounds for termination and the determination that termination is in the child’s best interests 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* T.C.A. § 36-1-113(c). Given the heightened burden of proof to be overcome in termination proceedings, “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. We review de novo with no presumption of correctness the trial court’s legal conclusions regarding whether the evidence sufficiently supports termination to meet this standard. *Id.*

III.

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 are in the best interests of the child. The trial court found by clear and convincing evidence five grounds for termination of Mother’s parental rights and that it was in Krisley’s best interests to terminate Mother’s parental rights.

A. Grounds for Termination of Parental Rights

The trial court found by clear and convincing evidence that Mother’s parental rights should be terminated based upon (1) abandonment for failure to provide a suitable home; (2) substantial noncompliance with the permanency plan; (3) persistence of conditions; (4) severe abuse; and (5) failure to manifest the ability and willingness to assume custody. T.C.A. § 36-1-113(g)(1)-(4), (14). On appeal, DCS concedes the ground of substantial non-compliance with the permanency plan, declining to support this finding on appeal. Therefore, we reverse the trial court’s finding as to this ground for termination.³

³ This court has previously reversed findings of grounds for termination when the party seeking termination did not defend the grounds on appeal. *See In re Jayce D.*, No. M2021-00539-COA-R3-PT, 2022 WL 817605, at *12 (Tenn. Ct. App. Mar. 18, 2022), *perm. app. denied* (Tenn. June 8, 2022) (reversing a trial court’s findings regarding one ground for termination when DCS did not defend the ground on appeal); *In re Jaylan J.*, No. W2019-02025-COA-R3-PT, 2020 WL 7861378, at *12 (Tenn. Ct. App. Dec. 22, 2020); *In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *6 (Tenn. Ct. App. Oct. 29, 2018) (citing cases in which a ground for termination was reversed or vacated when the party seeking termination did not defend the ground on appeal); *In re Zane W.*, No. E2016-02224-COA-R3-PT, 2017 WL 2875924, at *7 (Tenn. Ct. App. July 6, 2017) (holding that mandatory review under *Carrington* “has never been

Accordingly, we assess the remaining four grounds to determine if there is “clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524.

1. Abandonment for Failure to Provide A Suitable Home

A parent’s rights may be terminated for abandonment for failure to provide a suitable home. T.C.A. § 36-1-113(g)(1). Abandonment is defined, in relevant part, as

(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 the 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....

T.C.A. § 36-1-102(1)(a)(ii).

As this court has repeatedly noted, “[a] suitable home requires more than a proper

construed to require this Court to also consider the grounds sustained by the trial court and thereafter conceded or waived by the non-parent on appeal”); *see also In re Carrington H.*, 483 S.W.3d at 525 (providing that the rationale for requiring review of all grounds for termination is to “ensure that fundamental parental rights are not terminated except upon sufficient proof, proper findings, and fundamentally fair procedures”).

physical living location.” *See, e.g., In re Lily C.*, No. M2021-00885-COA-R3-PT, 2022 WL 2301598, at *6 (Tenn. Ct. App. June 27, 2022) (citations omitted); *In re Jason S.*, No. E2020-01479-COA-R3-PT, 2021 WL 1575469, at *8 (Tenn. Ct. App. Apr. 22, 2021). For example, to be suitable, the home needs to be free of illegal drugs. *See, e.g., In re Prince Kenyan F.*, No. M2020-01306-COA-R3-PT, 2021 WL 3855713, at *5 (Tenn. Ct. App. Aug. 30, 2021); *In re Jayda J.*, No. M2020-01309-COA-R3-PT, 2021 WL 3076770, at *23 (Tenn. Ct. App. July 21, 2021).

DCS case worker Ms. Clare, who stated in an affidavit that “[t]he Department has observed the home to be safe and appropriate,” indicated in her testimony that the home, nevertheless, is “not suitable due to the paramour [(Christopher B.)] in the home.” The trial court agreed. The animating basis for concern with the suitability of the home is tied to fear of the presence of drugs in the home via Christopher B.

Since her fourth child tested positive for illegal drugs at birth, Mother has participated in drug abuse treatment programs, and she remained under continuing medical treatment as of the time of the trial. Mother testified she no longer uses illegal drugs. She has submitted to regular testing and has passed every drug screen administered whether through treatment programs or random DCS drug screens. There was no evidence presented at trial to establish that Mother was continuing to use illegal drugs. Quite to the contrary, the evidence presented shows that Mother has made a remarkable transformation in terms of her abuse of illegal drugs.

DCS’s concern about the presence of drugs in the home, which was shared by the trial court, is driven not by Mother but instead by the presence of Christopher B. in the home. While conceding that she and Christopher B. previously used drugs together, Mother testified that Christopher B. is now clean. Unlike Mother, Christopher B. did not participate in drug treatment programs. Mother testified that Christopher B. instead went home to live with his parents, leaning on a strong support network, and got clean there. In the State’s September 22, 2020 Petition for Temporary Legal Custody and Ex Parte Order, DCS indicated that Christopher B., who at the time mistakenly thought he was Krisley’s biological father, as did DCS (based upon statements from Mother), admitted to DCS that he had a history of drug abuse and had a prior arrest for simple possession. Christopher B. insisted to DCS, however, that he would test negative for drugs should they choose to administer a test and that, while he had not received professional drug treatment, he had been clean for approximately three months at that point in September 2020. While there are variances as to precisely when in relation to Krisley’s birth Christopher B. stopped using drugs, Mother’s testimony at the termination trial in 2022 is largely consistent with what, according to DCS, Christopher B. stated in 2020 in an interview shortly after Krisley’s birth. At the termination trial, Mother indicated that if Christopher B. began to use drugs again she would leave the home they shared, but she insisted he was remaining clean.

In concluding that the home was not suitable, the trial court did not make a factual finding that Christopher B. was continuing to use drugs. Instead DCS emphasized that, unlike Mother, Christopher B. neither attended treatment programs nor submitted to random drug screens conducted by DCS that would demonstrate that he was drug-free. This was the source of the trial court’s concern with regard to the presence of drugs in the home. The evidence, however, is not entirely consistent with the image that DCS conjures. Christopher B. submitted to a random DCS drug test in July 2021, in which he tested negative for the presence of drugs. He had declined to submit to a test in June 2021. No clarifying testimony was offered about this occasion by DCS or Mother. Asked how many times DCS attempted to drug test Christopher B., Ms. Clare was “not sure how many times.” Based upon the testimony presented, it appears that after July 2021, there were only two attempts to randomly test Christopher B. for drugs. Ms. Clare indicated she attempted a random drug screen in September and again in December 2021, but that Christopher B. was not at home on either occasion. Mother agreed, insisting that Christopher B. is running his own business with his brother and that he was at work at the time of the attempts to conduct a random drug screen. DCS provided no evidence about how it conducts its random drug screens or whether there were any directions given to Christopher B. on how he might follow up to be drug tested, having been at work when DCS arrived at the home he shares with Mother to administer a random drug screen. Furthermore, and confusingly, Ms. Clare testified in response to two separate questions that Christopher B. actually had multiple negative drug tests rather than simply the one negative July 2021 test.⁴ There is no testimony nor is there any information in the record to clarify when these “multiple drug tests that are negative” for Christopher B. were conducted. If the DCS witness twice misspoke on this significant point, there was no clarification that was offered on redirect.

Accordingly, we conclude that the evidence presented by DCS fails to support by clear and convincing evidence the unsuitability of the home. We simply cannot say that the proof “eliminates any serious or substantial doubt about the correctness” of the conclusion that there are drugs in this home. The burden is on DCS to establish the existence of each ground for termination by clear and convincing evidence, and DCS has not satisfied its burden.

2. Persistence of Conditions

Parental rights may be terminated for persistence of conditions when:

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- ⁴ A. It’s not suitable due to the paramour in the home.
Q. And the same paramour that has these negative drug screens?
A. Correct.
...
Q. And we know that as far as controlled substances, we have got multiple, multiple drug tests that are negative both from [Mother] and [Christopher B.]?
A. Correct.

(g)(3)(A) [t]he 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. . .

T.C.A. § 36-1-113(g)(3).

As with unsuitability of the home, the animating basis for the trial court's conclusion that there are persistent conditions that prevent the safe return of the child is tied to fear of the continued presence of drugs in the home via Christopher B. For the reasons discussed above, we conclude that DCS has failed to establish by clear and convincing evidence the ground of persistence of conditions.

3. Failure to Manifest the Ability and Willingness to Assume Custody

Parental rights may also be terminated when "a parent or guardian has (1) 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 [parent]'s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." T.C.A. § 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 order to satisfy the second prong, DCS must show “clear and convincing proof that placing the child in the parent’s physical custody would likely cause substantial harm.” *Id.* at *6. 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., No. W2021-01349-COA-R3-PT, 2022 WL 8080022 at *10 (Tenn. Ct. App. Oct. 14, 2022).

As with the unsuitability of the home and the persistence of conditions grounds, the trial court’s conclusion that Krisley would likely suffer substantial harm is tied to concern about the presence of drugs in the home. For the reasons stated in the discussion of the unsuitability of the home analysis above, we conclude that DCS has failed to meet its burden of demonstrating the existence of this ground by clear and convincing evidence.

4. Severe Abuse

Parental rights may be terminated when “the parent or guardian has been found to have committed severe child abuse.” T.C.A. § 36-1-113(g)(4). Severe child abuse is defined, in relevant part, as “[k]nowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child . . .” T.C.A. § 37-1-102(b)(27)(E). The trial court found Mother knowingly exposed Krisley to illegal substances in utero. At birth, Krisley tested positive for illegal substances that were not prescribed to Mother. Mother stipulated to the fact that she exposed Krisley to illegal substances in the dependency and neglect action. The trial court entered an order finding severe abuse on April 20, 2021, in the dependency and neglect proceedings. Mother did not appeal that determination. Mother has not contested the finding that she exposed Krisley to illegal substances.

The record contains clear and convincing evidence to support the trial court’s finding that Mother committed severe abuse. Accordingly, the trial court properly found that a ground exists for the termination of Mother’s parental rights. Therefore, this Court must review the trial court’s decision that termination would be in Krisley’s best interest.

B. Best Interests of The Child

When a parent has been found to be unfit by the establishment of at least one statutory ground for termination of parental rights, as here, the focus shifts to what is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The

trial court found termination to be in Krisley’s best interests. The Tennessee Supreme Court has summarized the law pertaining to the best interests 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).

“In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court.” T.C.A. § 36-1-113(i)(1). The statutory best interest factors in Tennessee Code Annotated section 36-1-113(i) are “illustrative, not exclusive,” and the court must not merely “tally[]” the statutory factors but analyze the weight and relevance under the facts and circumstances of the case. *In re Gabriella D.*, 531 S.W.3d at 681-82. “The relevancy and weight to be given each factor depends on the unique facts of each case.” *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005). “Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” *Id.*

As provided by the version of the statute in effect at the time of filing of the petition to terminate,⁵

⁵ “This court applies the versions of the parental termination statutes in effect on the date the petition was filed.” *In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at *6 (Tenn. Ct. App. Jan. 10, 2023).

. . . [t]hose factors may include, but are not limited to, the following:

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;

(B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;

(C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;

(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;

(F) Whether the child is fearful of living in the parent's home;

(G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;

(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;

(O) Whether the parent has ever provided safe and stable care for the child or any other child;

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

(S) Whether the parent has consistently provided more than token financial support for the child; and

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

T.C.A. § 36-1-113(i)(1)(effective April 22, 2021 to June 30, 2021).

In considering and weighing these factors, the trial court concluded that terminating Mother's parental rights to be in Krisley's best interests by clear and convincing evidence. Addressing the factors, the trial court noted that Krisley had been removed from Mother's care at six days old due to in-utero drug exposure. T.C.A. § 36-1-113(i)(1)(O). Mother

immediately went into an inpatient treatment program. T.C.A. § 36-1-113(i)(1)(M). Since then, Mother has completed most of the steps of her permanency plan and maintained her sobriety. T.C.A. § 36-1-113(i)(1)(K). The trial court noted that she has complied with her medication management and tested negative for all other substances, and that this is the longest that Mother has remained drug-free since she was eighteen. However, the trial court determined that there was no reason to “conclude that [M]other has made a lasting adjustment of circumstances, conduct, or conditions to make it safe or beneficial for the child to be returned to the home of the [M]other,” T.C.A. § 36-1-113(i)(1)(J), despite social services making reasonable efforts to assist Mother in her transition, T.C.A. § 36-1-113(i)(1)(L).

The trial court noted that, despite knowing of the need to maintain a drug-free home, she remained in a relationship with and lived with Christopher B. The trial court observed that if Krisley is returned to Mother that she would be in the home with Christopher B. who has not proven that he could remain drug-free. T.C.A. § 36-1-113(i)(1)(R). The trial court found a danger that Krisley would be exposed to drugs in the home if she returned to Mother’s care, which would likely exacerbate Krisley’s experiences of trauma. T.C.A. § 36-1-113(i)(1)(G). The trial court concluded that Mother had not demonstrated an ability or commitment to creating a home that would be safe for Krisley. T.C.A. § 36-1-113(i)(1)(Q).

Since Krisley never lived with Mother, the trial court noted that it would be in Krisley’s best interests to remain in the custody of Foster Mother. Krisley has been in the care of the Foster Mother since she was six days old. The trial court observed that Foster Mother’s home is the only home Krisley has known, T.C.A. § 36-1-113(i)(1)(A), and that Krisley has bonded with Foster Mother in a healthy parental attachment. T.C.A. § 36-1-113(i)(1)(H).

The trial court also noted that Foster Mother has placed Krisley in occupational, developmental, and physical therapy as well as enrolling her in a head start program. The trial court was not persuaded that Mother could maintain the therapies for Krisley. T.C.A. § 36-1-113(i)(1)(C).

The trial court determined that removing Krisley from Foster Mother’s home would be detrimental to Krisley’s emotional and psychological well-being. T.C.A. § 36-1-113(i)(1)(B). The trial court found that Krisley has an attachment to Foster Mother, but did not find that Krisley had such an attachment with Mother. T.C.A. § 36-1-113(i)(1)(D). In addressing visitation as a ground for termination, the trial court observed that Mother missed visits both in person and via video conference, *cf.* T.C.A. § 36-1-113(i)(1)(E), but found that Mother’s actions were not willful and thus not an independent ground for termination in and of itself.

On appeal, Mother argues that the trial court erred in concluding that terminating

her parental rights is in Krisley's best interest. Mother argues that she has turned her life around by maintaining her sobriety through an outpatient program and completing parenting, anger management, and domestic violence classes. Mother argues that she has maintained employment. Mother distinguishes her actions from the actions of parents in other cases where this Court has upheld the termination of parental rights.

In considering Mother's arguments, this Court recognizes that Mother has made remarkable progress in transforming her life by avoiding illegal drugs and does not, for reasons discussed above, find that DCS has made an adequate evidentiary case to show the existence of drugs in the home that Mother and Christopher B. share. Nevertheless, the best interests analysis is focused on the best interests of the child, not the parent, and the record supports the trial court's conclusion by clear and convincing evidence that terminating Mother's parental rights is in Krisley's best interests.

We note that the trial court did not find a meaningful relationship to exist between Krisley and Mother. From our review of the record, it is apparent that Krisley does not have a meaningful relationship with Mother. From her birth, Krisley has been cared for by her Foster Mother, and Krisley has formed a strong bond and a meaningful relationship with her Foster Mother. This court has repeatedly indicated that "[o]ften, the lack of a meaningful relationship between a parent and child is the most important factor in determining a child's best interest." *In re London B.*, No. M2019-00714-COA-R3-PT, 2020 WL 1867364, at *12 (Tenn. Ct. App. Apr. 14, 2020).⁶

Additionally, we note that Krisley is a child who has significant and early-appearing developmental delays. Foster Mother, who wishes to adopt Krisley should Mother's parental rights be terminated, has proactively pursued occupational, physical, and other therapies related to developmental delay. She has acted to address gastrointestinal problems and medical issues related to bodily movement. Foster Mother has been undisputedly on top of assuring that Krisley receives the treatments and therapies that she needs to help her move forward. While making significant strides with her drug addiction, as correctly noted by the trial court, Mother has regularly been behind, significantly behind at times, on meeting requirements of her permanency plan. She has struggled with staying on top of important matters, whether visits with Krisley or timely coordination for the completion of plan requirements. Mother has not demonstrated a thorough understanding of Krisley's needs. Despite Krisley's significant medical needs and developmental delays, Mother did not, as of the time of trial, know who Krisley's doctors were nor where Krisley was enrolled in school for early educational opportunities.

⁶ See also, e.g., *In re Charles B.*, No. W2020-01718-COA-R3-PT, 2021 WL 5292087, at *11 (Tenn. Ct. App. Nov. 15, 2021); *In re Lauren F.*, No. W2020-01732-COA-R3-PT, 2021 WL 5234712, at *14 (Tenn. Ct. App. Nov. 10, 2021); *In re Christopher L.*, No. M2020-01449-COA-R3-PT, 2021 WL 4145150, at *9 (Tenn. Ct. App. Sept. 13, 2021); *In re Miley D.*, No. M2020-01416-COA-R3-PT, 2021 WL 2948776, at *6 (Tenn. Ct. App. July 14, 2021); *In re Cortez P.*, No. E2020-00219-COA-R3-PT, 2020 WL 5874873, at *12 (Tenn. Ct. App. Oct. 2, 2020).

The trial court concluded that

terminating the parental rights of [M]other will provide for stability and continuity of placement throughout the child's minority. Additionally, [M]other has not been the one providing for the medical needs of the child, nor does the history of [M]other provide proof that she would be able to provide for the needs of the children, and a change in caretakers would likely affect the child's emotional, psychological and medical condition.

All of these conclusions are adequately supported by the record.

With Krisley having left the NICU not for Mother's home but instead for the home of Foster Mother, Mother has never provided a home for Krisley. Mother has not provided a stable home for any of her three other children. Her three other children have all been removed from Mother's home. At various times, Mother was able to regain or maintain custody for periods of time, but as of the date of trial, none of Mother's four minor children were living in her home. While Mother has made impressive strides with regard to her drug addiction and it may be in Mother's best interests to gain custody of her child, we cannot say that it is in Krisley's best interests for Mother to do so. We conclude that clear and convincing evidence exists supporting the trial court's conclusion that termination of Mother's parental rights is in Krisley's best interests.

IV.

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, Ashley W., for which execution may issue if necessary.

JEFFREY USMAN, JUDGE