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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 1, 2022

IN RE DEFARI R.

**Appeal from the Juvenile Court for Knox County
No. 184982 Timothy E. Irwin, Judge**

No. E2022-00550-COA-R3-PT

A father appeals the termination of his parental rights to his child. The juvenile court terminated parental rights on the grounds of failure to provide a suitable home, substantial noncompliance with the permanency plan, persistence of conditions, and failure to manifest an ability and willingness to assume custody or financial responsibility for his child. The court also determined that termination was in the child's best interest. We agree and affirm.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and THOMAS R. FRIERSON II, J., joined.

Kafele F., Knoxville, Tennessee, pro se appellant.

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

OPINION

I.

A.

In November 2019, the Tennessee Department of Children's Services received a referral for a drug-exposed baby, Defari R. The child's urine tested positive for amphetamine, methamphetamine, cocaine, fentanyl, opiates, and THC.¹ And Defari was diagnosed with and treated for neonatal abstinence syndrome. His mother, Lakeisha R.

¹ Tetrahydrocannabinol or THC "is a marijuana metabolite." *Interstate Mech. Contractors, Inc. v. McIntosh*, 229 S.W.3d 674, 677 (Tenn. 2007).

(“Mother”), tested positive for amphetamine, opiates and THC. She admitted to daily use of THC and Opana.² Mother also reported that she was homeless.

On November 22, 2019, DCS petitioned to adjudicate the child dependent and neglected because of the “parents’ substance abuse and the father’s criminal history.” Specifically, with respect to the child’s father, Kafele F. (“Father”), the petition alleged that he had “failed a urine drug screen for marijuana and ha[d] a lengthy criminal history including felony drug convictions.”³ DCS also requested a finding that the child was severely abused based on Mother’s illegal drug use during pregnancy. Shortly after learning she was pregnant with Defari, Mother had tested positive for cocaine, THC, morphine, fentanyl, and Opana. The same day as the petition, the juvenile court entered a protective custody order authorizing DCS to remove the child from Mother’s custody.

The first family permanency plan, developed in December 2019, required Father to confirm paternity with DNA testing, attend regular visitation sessions with the child, and pay child support. The plan also required Father to pass random drug screens; complete an alcohol and drug (A&D) assessment and participate in any recommended treatment; complete a mental health assessment and participate in any recommended therapy; complete parenting classes; obtain and keep stable housing; comply with unannounced and scheduled home visits; be law abiding; obtain a legal source of income; and obtain stable and reliable transportation.

Around the time the permanency plan was being developed, Father’s urine tested positive for cocaine and THC. Father completed an A&D assessment on December 17, 2019, which recommended an intensive outpatient treatment program (“IOP”) if he tested positive for illegal drugs in the future. When, on January 22, 2020, a hair-follicle test was positive for cocaine, Father participated in his first IOP from January to March 2020. Father’s March 2020 urine tests were negative for all illegal substances.

Meanwhile, the dependency and neglect case proceeded. Following a hearing on July 31, 2020, the juvenile court adjudicated Defari dependent and neglected and severely abused. The court based its findings on Mother’s illegal drug use during pregnancy and unresolved substance abuse issues. And it ordered custody to remain with DCS. As for Father, at a permanency hearing held the same day, DCS complained that Father had failed to submit to hair-follicle drug screens in May, June, and July 2020. But DCS conceded

² Opana is the brand name for oxymorphone hydrochloride, “a semi-synthetic opioid analgesic” prescribed “for the relief of moderate to severe acute pain.” PHYSICIANS’ DESK REFERENCE 1117, 1118 (63d ed. 2009). It is “a Schedule II controlled substance with an abuse liability similar to morphine.” *Id.* at 1118.

³ Mother is not a party to this appeal. So we focus on the facts relevant to Father.

that Father's urine screens during that time period were negative. Father also had a negative oral drug screen in July 2020.

On September 10, 2020, Father's hair-follicle drug screen was positive for cocaine. So the permanency plan was modified to require Father to complete a second A&D assessment. On January 28, 2021, Father's hair-follicle test was again positive for cocaine. So the juvenile court modified the plan to require Father to complete a second IOP "due to rising levels of cocaine use on hair-follicle drug screens."

Father completed his second A&D assessment on February 26, 2021, and he participated in his second IOP from May through July 2021.

B.

The month before Father began his second IOP, DCS petitioned to terminate Father's parental rights. At trial, the juvenile court heard from four witnesses: Father; an expert on drug testing; the family service worker ("FSW"); and one of the child's foster parents ("Foster Father").

Much of Father's testimony focused on his drug use. Father claimed that he last used cocaine in 1999. He admitted using ecstasy for "a short amount of time . . . maybe in 2018." And he asserted he last used his drug of choice, marijuana, in December 2019. During and shortly after participating in his second IOP, Father submitted to two hair-follicle drug screens. Both were negative for all illegal substances. But an October 19, 2021 hair-follicle test was positive for cocaine. And a January 10, 2022, nailbed drug test was positive for cocaine and THC. When asked about his recent positive tests for cocaine, Father denied using cocaine after 1999. He surmised that the positive results were because he had been intimate with someone who had used cocaine. He also suggested that the hair-follicle test was inaccurate due to the length of his hair.

By the time of trial, Father was in the middle of his third IOP, which he had started mid-December 2021. And he claimed that he was passing twice-weekly drug screens as part of the program.

As for his progress on the other requirements of the permanency plans, Father had established his paternity with DNA testing, was visiting with Defari "at least twice a month," and was paying child support. He had completed parenting education classes and was living in a two-bedroom home with room for Defari. He "collect[ed] social security and disability" and shot "freelance videos in [his] spare time." Father did not have a driver's license, but he testified that his mother could provide transport as needed.

Dr. David Engelhart, the director for the laboratory that processed Father's hair-follicle tests, testified as an expert. He explained the science behind the hair-follicle drug screen and how the screen was performed. A positive result would "demonstrate ingestion

of the drug in some manner” and not external exposure to the drug. And false positives were “[v]ery unlikely,” occurring 0.0002 percent of the time. He described the hair-follicle screen as having the same reliability as urine and nailbed screens. The biggest difference between urine and hair-follicle screens was the time frame for detecting drug usage. Dr. Engelhart had no doubt that Father was positive for cocaine based on the testing results.

The FSW had been involved with the case since the child’s removal. She described the services DCS had provided to Father. She also discussed Father’s progress with the permanency plans. Father did have negative drug screens after DCS filed the petition to terminate Father’s parental rights. But his October 2021 screen showed positive for cocaine and THC. According to the FSW, Father had “completed a majority of the tasks that [DCS] asked of him. The issue continues to be the positive drug screens.”

As for the child, Defari had been with the same foster family since his removal from Mother in November 2019. The child was receiving occupational therapy and participating in a program for drug-exposed children. The FSW agreed that the foster parents were able to provide for the child’s specialized needs. And “he seem[ed] very healthy and [wa]s doing well overall.”

Finally, Foster Father testified about Defari’s living arrangements and progress. Besides Defari, the foster parents had two biological children: a son two years older and a daughter four years older than Defari. Defari had bonded with the family and referred to his foster siblings as his brother and sister. The foster family lived in a three-bedroom house where Defari shared a bedroom with his foster brother.

Foster Father explained that, because Defari was born drug exposed, they were initially taking him to occupational therapy four days a week as well as physical therapy. But the situation was “drastically different” now. According to Foster Father, Defari had improved significantly, although the child had recently restarted occupational therapy as a precautionary measure. Foster parents wished to adopt Defari.

In its final judgment, the court found by clear and convincing evidence the following grounds for terminating Father’s parental rights: (1) abandonment by failure to establish a suitable home; (2) substantial noncompliance with the permanency plan; (3) persistence of conditions; and (4) failure to manifest an ability and willingness to assume legal and physical custody of or financial responsibility for the child. The court also found by clear and convincing evidence that termination of Father’s parental rights was in the child’s best interest.

II.

Tennessee Code Annotated § 36-1-113 describes both the grounds and procedures for terminating parental rights. *In re Kaliyah S.*, 455 S.W.3d 533, 546 (Tenn. 2015). First, parties seeking termination of parental rights must prove the existence of at least one

statutory ground for termination. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c)(1) (Supp. 2020). If they prove the existence of one or more statutory grounds, they then must prove that termination is in the child’s best interest. *Id.* § 36-1-113(c)(2).

Because of the constitutional dimension of the rights at stake in a termination proceeding, parties seeking to terminate parental rights must prove both the grounds and the child’s best interest by clear and convincing evidence. *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) (citing Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d at 546). This heightened burden of proof serves “to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights.” *Id.* “Clear and convincing evidence” leaves “no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). It produces a firm belief in the fact-finder’s mind regarding the truth of the facts sought to be established. *In re Bernard T.*, 319 S.W.3d at 596.

We review the trial court’s findings of fact “de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise.” *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013); TENN. R. APP. P. 13(d). We then “make [our] own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court’s conclusions of law de novo with no presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007).

A.

Father represents himself on appeal. His appellate brief does not comply with the Tennessee Rules of Appellate Procedure or the rules of this Court. *See* TENN. R. APP. P. 27; TENN. CT. APP. R. 6. Among other deficiencies, his brief does not include “[a] statement of the issues presented for review” or an argument “including the reasons why [his] contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on.” TENN. R. APP. P. 27(a)(4), (a)(7)(A).

Father begins his brief with the idea that pro se appellants “are to be held to less stringent standards than . . . lawyers.” And it is true that we “give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs.” *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (citing *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000); *Paehler v. Union Planters Nat’l Bank, Inc.*, 971 S.W.2d 393, 397 (Tenn. Ct. App. 1997). Still, “[i]t is not the role of the courts, trial or appellate, to research or construct a litigant’s case or arguments.” *Sneed v. Bd. of Prof’l Resp. of Supreme Court*, 301 S.W.3d 603, 615 (Tenn. 2010). Ordinarily, an appellant’s failure to comply with the rules would be grounds for dismissal of the appeal.

See Crowe v. Birmingham & N.W. Ry. Co., 1 S.W.2d 781, 781 (Tenn. 1928) (recognizing that failure to comply with court rules is an appropriate basis “for refusing to consider a case upon its merits”); *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) (dismissing appeal for failure to comply with appellate rules). But an appeal from a judgment terminating parental rights dictates a different result. *See In re Aniyah W.*, No. W2021-01369-COA-R3-PT, 2023 WL 2294084, at *6 (Tenn. Ct. App. Mar. 1, 2023) (recognizing that deficient briefing does not result in waiver of all issues on appeal in parental termination cases). Even with the shortcomings in Father’s brief, we “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.” *In re Carrington H.*, 483 S.W.3d 507, 535 (Tenn. 2016).

1. Abandonment by Failure to Provide a Suitable Home

The juvenile court found by clear and convincing evidence that Father abandoned Defari by failing to provide him a suitable home. In termination of parental rights cases, a parent has abandoned his child if:

(a) The child has been removed from the home or the physical or legal custody of a parent or parents . . . 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 [DCS] . . . ;

(b) The juvenile court found . . . that [DCS] . . . 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, [DCS] . . . made reasonable efforts to assist the parent or parents . . . to establish a suitable home for the child, but that the parent or parents . . . 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.

Tenn. Code Ann. § 36-1-102(1)(A)(ii) (Supp. 2020).

We conclude that the evidence clearly and convincingly supported termination of Father’s parental rights to Defari on the ground of abandonment by failure to provide a suitable home. Defari was removed from the physical and legal custody of a parent, specifically Mother, by a court order after the filing of a dependency and neglect petition. *See id.* § 36-1-102(1)(A)(ii)(a). The child was placed in the custody of DCS. *See id.* And

the court found that DCS made “[r]easonable efforts . . . to prevent the child’s removal from the home.” *See id.* § 36-1-102(1)(A)(ii)(b).

DCS also made reasonable efforts to assist Father in establishing a suitable home for more than four months. *See id.* § 36-1-102(1)(A)(ii)(c). The statutory definition permits examination of DCS’s efforts during any four-month period after removal of the child. *In re Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016). The juvenile court heard proof on the four-month period immediately after Defari’s removal. It found that, during that period, DCS provided Father with resources for scheduling alcohol and drug assessments, resources for scheduling mental health assessments, and a community resource guide. DCS also provided therapeutic visitation services and conducted random drug screens. And it provided services that would assist Father with eventually caring for Defari.

Father failed to make reciprocal reasonable efforts to establish a suitable home. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). Although Father started fulfilling the requirements of the permanency plan and completed most of them, his drug screens continued to show illegal drug use. A “suitable home” means something “more than a proper physical living location.” *Tenn. Dep’t of Children’s Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007). “[A] suitable home must be free from drugs.” *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016).

At trial, Father challenged the reliability of the drug screens on two fronts. First, he questioned the timing and types of drug screens because the screens had detection windows that overlapped.⁴ Second, Father denied using cocaine, contending that the positive test results must have resulted from his physical contact with people who used cocaine or from an improperly conducted test.

But even ignoring potentially-overlapping drug screens, there was still evidence to support a finding that Father used illegal drugs over an extended period of time, including after the filing of the petition to terminate parental rights. As for Father’s denials of illegal drug use and criticism of the manner in which the tests were conducted, the court credited the expert witness’s testimony that the presence of metabolites in the hair-follicle screens confirmed ingestion rather than casual contact with the illegal drugs and that the length of Father’s hair would not impact the manner in which the hair was sampled. We find no basis in this record to disturb that credibility assessment. *See Coleman Mgmt., Inc. v. Meyer*, 304 S.W.3d 340, 348 (Tenn. Ct. App. 2009).

⁴ Father argued the January 22, 2020, hair-follicle screen could be detecting the same drug use that was detected by December 10, 2019, urine screen. And he argued the January 10, 2022, nailbed screen could be detecting the same drug use that was detected by the October 19, 2021, hair-follicle screen.

Finally, Father demonstrated a lack of concern for the child such that it appeared unlikely that he would be able to provide a suitable home for Defari at an early date. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c). Even after positive drug screens, Father continued to deny use of cocaine, offering implausible explanations for screens being positive.

2. Substantial Noncompliance with Permanency Plan

Another ground for termination is “substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan.” *Id.* § 36-1-113(g)(2). Before analyzing a parent’s compliance with the permanency plan, the court must find that the plan’s requirements were “reasonable and [we]re related to remedying the conditions that necessitate foster care placement.” *Id.* § 37-2-403(a)(2)(C) (Supp. 2021). Permanency plan requirements may focus on remedying “conditions related both to the child’s removal and to family reunification.” *In re Valentine*, 79 S.W.3d at 547. If the plan’s requirements are reasonable and related to remedying the conditions that necessitated foster care placement, the court must determine whether the parent’s noncompliance was substantial in light of the importance of the requirements to the overall plan. *Id.* at 548-49. We presume the court’s findings of fact concerning the parent’s compliance are correct unless the evidence preponderates against them. *See id.* at 547. But whether the parent’s noncompliance was substantial “is a question of law which we review de novo with no presumption of correctness.” *Id.* at 548.

We conclude that the evidence clearly and convincingly supported termination of Father’s parental rights to Defari on the ground of substantial noncompliance with the permanency plan. We agree with the juvenile court that the permanency plan requirements were reasonable and related to remedying the conditions that necessitated foster care. The child entered foster care primarily due to his parents’ drug use. Drug screens conducted at or near the time of the child’s birth were positive for use of illegal drugs. To address this issue, the permanency plans required Father to pass random drug screens; complete an A&D assessment and participate in any recommended treatment; complete a mental health assessment and participate in any recommended therapy; and be law abiding.

Father’s noncompliance was substantial. As the court found, Father did “not maintain sobriety” and “continue[d] to abuse illegal substances.” The evidence does not preponderate against these findings. Father also failed to submit to all requested drug screens. Although Father met all other permanency plan requirements, failure to meet one requirement can constitute substantial noncompliance. *See Dep’t of Children’s Servs. v. Wright*, No. M2008-01607-COA-R3-PT, 2009 WL 302292, at *7 (Tenn. Ct. App. Feb. 6, 2009) (concluding that a parent’s “fail[ure] to comply with the single most important requirement of the permanency plan” constituted substantial noncompliance). Here,

submitting to and passing drug screens and being law abiding were essential to addressing concerns over Father's ability to care for Defari and keep him safe.

3. Persistence of Conditions

The juvenile court also found termination of parental rights appropriate under Tennessee Code Annotated § 36-1-113(g)(3), a ground commonly referred to as "persistence of conditions." See *In re Audrey S.*, 182 S.W.3d 838, 871 (Tenn. Ct. App. 2005). This ground focuses "on the results of the parent's efforts at improvement rather than the mere fact that he or she had made them." *Id.* at 874. So the question before the court is "the likelihood that the child can be safely returned to the custody of the [parent], not whether the child can safely remain in foster care." *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000).

There are several elements to the ground of persistence of conditions. Persistence of conditions may be a basis to terminate parental rights when

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

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

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

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

Tenn. Code Ann. § 36-1-113(g)(3)(A). Each of the statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 550.

At the time of trial, Defari had been removed from a parent's custody for well over six months. See Tenn. Code Ann. § 36-1-113(g)(3)(B) (providing that "[t]he six (6) months must accrue on or before the first date the termination of parental rights petition is set to be

heard”). DCS removed the child in November 2019. DCS did not file the termination petition until April 2021, well over a year later.

As noted above, the primary condition that led to the removal of the child was drug use. After removal, Father’s continued drug use prevented the child’s safe return to him. Although Father made commendable efforts at improvement, ultimately Father could not remain drug-free and was unwilling to acknowledge his use of illegal drugs. So the evidence clearly and convincingly showed the conditions that led to the child’s removal – illegal drug use – still persisted.

Finally, we conclude that the “continuation of the parent . . . and child relationship greatly diminishes the child’s chances of early integration into a safe, stable, and permanent home.” Tenn. Code Ann. § 36-1-113(g)(3)(A)(iii). The child had been in DCS’s custody, and not in Father’s care, since birth, a period of over two years at the time of trial. And Father was participating in his third IOP. Meanwhile, the child lived in a safe and stable home with a foster family that wished to adopt him.

4. Failure to Manifest an Ability and Willingness

Finally, the court found termination of Father’s parental rights appropriate under Tennessee Code Annotated § 36-1-113(g)(14). Under this ground, a parent’s rights may be terminated if he “[1] failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody . . . 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.” *Id.* Both the failure-to-manifest and the substantial-harm prongs of the ground must be established by clear and convincing evidence. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020).

The failure-to-manifest prong requires proof that a parent is either unable or unwilling to “assume legal and physical custody or financial responsibility for the child.” *Id.* at 677. Ability focuses on the parent’s lifestyle and circumstances. *See In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018). When evaluating willingness, we look for more than mere words. *See In re Keilyn O.*, No. M2017-02386-COA-R3-PT, 2018 WL 3208151, at *8 (Tenn. Ct. App. June 28, 2018). Parents demonstrate willingness by attempting to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child. *See In re Isaiah B.*, No. E2017-01699-COA-R3-PT, 2018 WL 2113978, at *18 (Tenn. Ct. App. May 8, 2018) (focusing on the mother’s lack of effort to remove the threat of domestic violence); *In re Maya R.*, 2018 WL 1629930, at *7 (focusing on the mother’s lack of effort to fulfill her responsibilities in the parenting plan).

The substantial-harm prong requires proof that placing the child in the parent’s custody would pose a “risk of substantial harm,” a term that is not defined by the statute.

Of the circumstances that might pose a risk of substantial harm, this Court has previously explained

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

Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnote omitted).

We conclude that the evidence clearly and convincingly supported termination of Father’s parental rights on the ground of failure to manifest an ability and willingness to assume legal and physical custody. The proof showed Father had neither the ability nor willingness to assume custody of Defari. He was participating in his third IOP for drug use while denying use of the illegal drugs for which he had tested positive. And Father’s recent positive drug tests indicate a sufficiently probable danger to Defari if placed in Father’s custody. *See In re Brianna B.*, No. M2019-01757-COA-R3-PT, 2021 WL 306467, at *6 (Tenn. Ct. App. Jan. 29, 2021) (recognizing that “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”).

B.

Because “[n]ot all parental misconduct is irredeemable,” our parental termination “statutes recognize the possibility that terminating an unfit parent’s parental rights is not always in the child’s best interests.” *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). So even if a statutory ground for termination is established by clear and convincing evidence, termination of parental rights must also be in the child’s best interest. In making a best interest determination, courts consider a nonexclusive list of statutory factors. *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2020). Although “[f]acts relevant to a child’s best interests need only be established by a preponderance of the evidence, . . . the combined weight of the proven facts [must] amount[] to clear and convincing evidence that termination is in the child’s best interests.” *In re Carrington H.*, 483 S.W.3d at 535.

Here, the juvenile court made its determination of Defari’s best interests using the “new” list of twenty statutory factors. *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2022). But those factors did not take effect until April 22, 2021, after DCS filed its petition to terminate Father’s parental rights. *See* 2021 Tenn. Pub. Acts 509 (ch. 190). The best interest determination should have been made using the “old” list of nine statutory factors. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (recognizing the version of the statute in effect at the filing of the petition to terminate applies). Despite the use of the wrong factors, we have noted that “the old factors are essentially contained within the

new factors.” See *In re Bralynn A.*, No. M2021-01188-COA-R3-PT, 2022 WL 2826850, at *9 (Tenn. Ct. App. July 20, 2022), *perm. app. denied*, (Tenn. Aug. 12, 2022); see also *In re Da’Moni J.*, No. E2021-00477-COA-R3-PT, 2022 WL 214712, at *23 (Tenn. Ct. App. Jan. 25, 2022), *perm. app. denied*, (Tenn. Apr. 1, 2022). And, using the court’s factual findings, we are able to conduct our review using the applicable factors.

The first two statutory factors consider the parent’s current lifestyle and living conditions. The first factor focuses on whether the parent “has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child’s best interest to be in the home of the parent.” Tenn. Code Ann. § 36-1-113(i)(1) (Supp. 2020). The second factor considers the potential for lasting change “after reasonable efforts by available social services agencies.” *Id.* § 36-1-113(i)(2). The court found that DCS made reasonable efforts to assist Father, but Father had “not made changes in his conduct or circumstances that would make it safe for the child to go home.” In particular, the court found that Father had “continued to test positive for illegal substances even though he ha[d] completed substance abuse treatment” and that it was “unsafe for the child to be placed with the father.” The evidence does not preponderate against these findings.

The third factor considers the consistency of visitation. See *id.* § 36-1-113(i)(3). The court noted that Father had attended visitation regularly, but the court found it significant that Defari nevertheless “created healthy parental attachments with other people in the absence of his father” and that the child “ha[d] been with the foster family his entire life and views them as his family.” The evidence does not preponderate against these findings.

The fourth factor asks “[w]hether a meaningful relationship has otherwise been established between the parent . . . and the child.” *Id.* § 36-1-113(i)(4). While the court found “a meaningful relationship” existed between Defari and Father, it found Defari’s “strong attachment to his foster parents and foster siblings” more meaningful. The evidence supports these findings.

The fifth factor considers the effect a change in caregivers would have on the children’s emotional, psychological, and medical condition. *Id.* § 36-1-113(i)(5). The court found that “any change in caretaker or physical environment would be traumatic to the child.” The evidence does not preponderate against this finding.

The sixth factor asks whether the parent or another person residing with the parent “has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child . . . or [another] adult in the family or household.” *Id.* § 36-1-113(i)(6). The child was removed from Mother and Father due to their drug use, and the court found Defari severely abused based on Mother’s illegal drug use during pregnancy. Mother did not live with Father.

The seventh factor looks at whether the parent’s home environment is healthy and safe. *Id.* § 36-1-113(i)(7). The juvenile court found that the “physical environment of [Father’s] home [wa]s not healthy and safe for the child” due to Father’s continued use of illegal drugs. The evidence does not preponderate against these findings.

The eighth factor evaluates whether the parent’s mental or emotional status prevents proper parenting. *Id.* § 36-1-113(i)(8). The court found that Father had “not demonstrated a sense of urgency in addressing the circumstances, conduct, or conditions that made an award of custody unsafe.” And Father “ha[d] not admitted to substance abuse issues even though he continue[d] to test positive for illegal substances through drug screens.”

Lastly, the ninth factor examines the parent’s child support history. *Id.* § 36-1-113(i)(9). The court found Father had “provided financial support for the child.”

Here, clear and convincing evidence supports the juvenile court’s best interest determination. As the juvenile court found, the child had created a family bond with his foster parents and foster siblings. And he was thriving in that home, overcoming Mother’s prenatal drug use that had harmed his health. And the foster parents desired to provide the child permanency through adoption. For his part, Father was still addressing drug abuse issues.

III.

We affirm the termination of Father’s parental rights. The record contains clear and convincing evidence to support four statutory grounds for termination of Father’s parental rights. We also conclude that terminating Father’s parental rights was in the child’s best interest.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE