

FILED

05/12/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 3, 2023

IN RE EMMALYN H.

Appeal from the Chancery Court for Washington County
No. 22-AD-0007 James E. Lauderback, Judge

No. E2022-00710-COA-R3-PT

A mother appeals the chancery court’s decision to terminate her parental rights based on the grounds of abandonment by failure to visit and support and severe child abuse. The mother also challenges the chancery court’s finding by clear and convincing evidence that termination of her parental rights was in the best interest of the child. The petitioners challenge the chancery court’s dismissal of persistence of conditions ground for termination. We reverse the court’s decision to terminate based on abandonment by failure to visit and support, but we affirm the court’s decision in all other aspects.

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

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

Mark W. McFall, Johnson City, Tennessee, for the appellant, Whitney H.

Rachel Warren Ratliff, Johnson City, Tennessee, for the appellees, Jason C. and Tara C.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the termination of Whitney H.’s (“Mother”) parental rights to her daughter, Emmalyn H. (born in January 2021). Although no father is listed on Emmalyn’s birth certificate, Corey G. (“Father”) is allegedly the child’s putative biological father. Mother and Father were never married. In fact, at the child’s birth and throughout the

termination proceedings, Father was married to another woman. Father is currently serving a sentence in federal prison and was not served in the termination proceedings.¹

Mother has a history of drug use that continued during and after her pregnancy with the child. At the child's birth, both the child and Mother tested positive for methamphetamine and THC. The results of this test were sent to the Tennessee Department of Children's Services ("DCS" or "the Department"). The Department entered into an immediate protection agreement with Mother that the child would be discharged from the hospital into the custody of her paternal aunt, Shanna G. ("Aunt"). Because the child experienced difficulty taking in adequate nutrition, she was required to consume two ounces of formula before being discharged into Aunt's custody. According to Aunt, Mother suggested pouring out formula to make it look as though the child had consumed the requisite amount of formula in order to accelerate the discharge process. Despite the child's intrauterine drug exposure, the hospital noted that the child's neonatal abstinence syndrome scores were appropriate and that she had no symptoms of withdrawal on the date of discharge.

On February 3, 2021, after the child was discharged from the hospital into Aunt's custody, DCS filed a petition in Washington County Juvenile Court, alleging that the child was dependent and neglected. On February 8, 2021, the court adjudicated the child dependent and neglected due to, among other reasons, Mother's drug use. That same day, the court also entered a protective custody order placing the child in Aunt's temporary legal custody, where the child remained until July 20, 2021.

Aunt's temporary legal custody was terminated after a standoff with law enforcement occurred at her apartment on July 12, 2021. The standoff occurred when the Elizabethtown Police Department, the Carter County Sheriff's Department, and agents from the Department of Homeland Security and the Drug Enforcement Agency responded to Aunt's apartment to serve a federal arrest warrant on Father.² Throughout the approximately ninety-minute standoff, Father was armed with a revolver. Aunt, Mother, and the child were present in the apartment during this incident. After the standoff concluded, Father was arrested. Aunt admitted to law enforcement that Father and Mother had been living with her to hide from police for several days.

On July 20, 2021, the child's guardian ad litem filed a motion in juvenile court asking for the court to remove the child from Aunt and place her into DCS's custody. The court entered a protective custody and ex parte order awarding temporary care and custody of the child to DCS. The court further ordered that Mother and Father could have no contact

¹ This case does not involve Father's parental rights.

² The charges in this warrant included conspiracy to distribute methamphetamine and money laundering.

with the child prior to a hearing. In the order, the court noted that a DCS worker interviewed Mother after the standoff, and Mother admitted to using methamphetamine and marijuana recently. Mother then submitted to a drug screen that returned positive for MDMA.³

The child remained in DCS's custody from July 20, 2021, to September 30, 2021. In August 2021, the child's maternal grandmother and Elsie W., who is of no blood relation to Mother or the child but has custody of the child's four half-siblings,⁴ filed competing petitions in the juvenile court for custody of the child. In an order entered on October 19, 2021, the court released the child from DCS custody and placed the child in the temporary legal and physical custody of Elsie W. with the agreement of the child's maternal grandmother.

At some point thereafter, Elsie W. gave physical custody of the child to Jason and Tara C. (collectively, "Petitioners") via a power of attorney. The child has remained continuously in Petitioners' physical custody since that time. Petitioners filed a petition to terminate Mother's parental rights in the Washington County Chancery Court on January 6, 2022.⁵ Mother had previously filed a petition for visitation in the juvenile court that was still pending but, upon the filing of the termination and adoption petition in the chancery court, the juvenile court suspended its hearing on the visitation petition.

Mother was incarcerated during part of the juvenile court's proceedings awarding temporary custody to Elsie W. because Mother pleaded guilty to multiple charges, including evading arrest, leaving the scene of an accident, reckless driving, driving without a license, and following too close. As part of her plea deal, Mother agreed to enter recovery court. Mother entered a rehabilitation facility mandated by the recovery court on October 17, 2021, and remained there until November 15, 2021. After leaving the rehabilitation facility, Mother went to Storie House, a sober-living halfway house that the recovery court arranged for her. Mother continued to live there throughout the remainder of the case. At the time of trial, Mother had completed three stages of her recovery court program and had another six months to complete. She had maintained sobriety since September 1, 2021.

At the conclusion of the hearing on Petitioners' termination petition, the chancery court entered an order terminating Mother's parental rights. The court determined that Petitioners proved by clear and convincing evidence the following grounds for termination: (1) abandonment by failure to support the child, (2) abandonment by failure to visit the

³ MDMA is a synthetic drug commonly referred to as "Ecstasy or Molly." *MDMA (Ecstasy/Molly) DrugFacts*, NAT'L INST. ON DRUG ABUSE, <https://nida.nih.gov/about-nida> (last visited May 2, 2023).

⁴ Elsie W.'s granddaughter is Father's wife. The child's half-siblings whom Elsie W. is fostering are her granddaughter's children with Father.

⁵ As the legal custodian of the child, Elsie W. joined the termination petition as a co-petitioner. She elected not to participate on appeal.

child, and (3) severe child abuse. The court concluded that Petitioners failed to prove the persistence of conditions ground by clear and convincing evidence. The court then determined that there was clear and convincing evidence that termination of Mother's parental rights was in the best interest of the child.

Mother appealed and presents the following issues for our review: (1) whether the chancery court erred in concluding that grounds for termination existed, and (2) whether the chancery court erred in determining that there was clear and convincing evidence to support the court's finding that the termination of Mother's parental rights was in the child's best interest. Petitioners raise an additional issue for us to address: whether the chancery court erred in failing to find that Petitioners proved the persistent conditions ground by clear and convincing evidence.

STANDARD OF REVIEW

Under both the federal and state constitutions, a parent has a fundamental right to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 249-50 (Tenn. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996) (citing *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994)). Although this right is fundamental, it is not without limitations and may be terminated in certain circumstances. *In re Angela E.*, 303 S.W.3d at 250. Our legislature has identified ““those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought.”” *In re Jacobe M.J.*, 434 S.W.3d 565, 568 (Tenn. Ct. App. 2013) (quoting *In re W.B., IV.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005)).

Tennessee Code Annotated section 36-1-113 provides the grounds and procedures for terminating parental rights. First, parties seeking termination of parental rights must prove that at least one of the statutory grounds for termination exists. Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d at 251. If one or more of these grounds are shown, it must then be proven by clear and convincing evidence that terminating parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The termination of a parent's rights is one of the most serious decisions courts make because “[t]erminating parental rights has the legal effect of reducing the parent to the role of a complete stranger,” *In re W.B., IV.*, 2005 WL 1021618, at *6, “and of ‘severing forever all legal rights and obligations of the parent or guardian.’” *Id.* (quoting Tenn. Code Ann. § 36-1-113(l)(1)). Consequently, a parent has a constitutional right to fundamentally fair procedures during termination proceedings. *In re Hannah C.*, No. M2016-02052-COA-R3-

PT, 2018 WL 558522, at *2 (Tenn. Ct. App. January 24, 2018) (citing *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016)).

Tennessee law ensures fundamental fairness in termination proceedings by requiring a heightened burden of proof—clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *In re Carrington H.*, 483 S.W.3d at 522. Before a parent’s rights may be terminated, a petitioner must prove both the grounds and the child’s best interest by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. The purpose of this heightened burden of proof is “to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights.” *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “Clear and convincing evidence ‘establishes that the truth of the facts asserted is highly probable and eliminates any serious or substantial doubts about the correctness of the conclusions drawn from the evidence.’” *In re Serenity B.*, No. M2013-02685-COA-R3-PT, 2014 WL 2168553, at *2 (Tenn. Ct. App. May 21, 2014) (quoting *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004)).

We review the trial court’s findings of fact de novo with a presumption of correctness unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *In re Serenity B.*, 2014 WL 2168553, at *2. In light of the heightened standard of proof, we must then make our own determination “as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights.” *In re Carrington H.*, 483 S.W.3d at 524 (citing *In re Bernard T.*, 319 S.W.3d at 569-97)).

ANALYSIS

I. Grounds for termination

A. Abandonment

The chancery court terminated Mother’s parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(1), which states that parental rights may be terminated if a parent abandons his or her child as defined in Tenn. Code Ann. § 36-1-102. This statute defines “abandonment” in several ways. In the termination petition, Petitioners alleged that Mother abandoned the child as defined in Tenn. Code Ann. § 36-1-102(1)(A)(i), which states as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights of the parent or parents or the guardian or guardians of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or the guardian or guardians either have

failed to visit or have failed to support or have failed to make reasonable payments toward the support of the child[.]

Because Petitioners filed the termination petition on January 6, 2022, the four-month period applicable under this definition of abandonment was September 6, 2021, to January 5, 2022. In the order terminating Mother’s parental rights, the chancery court applied this four-month period to conclude that clear and convincing evidence established that Mother abandoned the child by failing to visit the child and by failing to support the child. Both Petitioners’ and the chancery court’s reliance on this definition of abandonment was misplaced, however, because the record shows that Mother was incarcerated for part of the four months immediately preceding the filing of the petition. Specifically, Mother testified that she was incarcerated from September 1 to October 17, 2021. Therefore, the definition of abandonment provided in Tenn. Code Ann. § 36-1-102(1)(A)(i) was inapplicable to this case. *See In re Colton R.*, No. E2016-00807-COA-R3-PT, 2017 WL 499439, at *9 (Tenn. Ct. App. Feb. 7, 2017) (stating that “this Court has repeatedly held that the definition of abandonment found in subsection (i) is inapplicable where the parent has been incarcerated during all or part of the four months preceding the filing of the termination petition.”).

The definition of abandonment found in Tenn. Code Ann. § 36-1-102(A)(iv) would apply to facts at issue here. Under Tenn. Code Ann. § 36-1-102(1)(A)(iv), “abandonment” means:

(iv) A parent or guardian is incarcerated at the time of the filing of a proceeding, pleading, petition, or amended petition to terminate the parental rights of the parent or guardian of the child who is the subject of the petition for termination of parental rights or adoption, or a parent or guardian has been incarcerated during all or part of the four (4) consecutive months immediately preceding the filing of the action and has:

(a) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding the parent’s or guardian’s incarceration;

(b) Failed to visit, has failed to support, or has failed to make reasonable payments toward the support of the child during an aggregation of the first one hundred twenty (120) days of nonincarceration immediately preceding the filing of the action[.]

“This definition recognizes that an incarcerated parent has limited opportunities to visit or to earn money with to which to pay support,” and it prevents a parent from having “a ready-made excuse for his or her failure to visit or support the child” *In re Colton R.*, 2017 WL 499439, at *9 (citing *In re Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005)); *In re W.B., IV.*, 2005 WL 1021618, at *9 (citing *In re Adoption of Copeland*, 43

S.W.3d 483, 488-89 Tenn. Ct. App. 2000)). Thus, the applicable four-month period to determine whether Mother abandoned the child by failing either to visit or to support the child was the four months immediately preceding her incarceration, May 1 to August 31, 2021.

We are unable to now apply the applicable definition to this case, however. A thorough review of the termination petition shows no allegation of a ground for termination based on a failure to visit or support during the four months preceding Mother's incarceration. The petition alleges only abandonment by Mother's failure to visit or support during the four months immediately preceding the filing of the petition. As previously held by this Court, "[t]his pleading limited the ruling to that ground because to find otherwise would place the parent at a disadvantage in preparing a defense." *In re W.B., IV*, 2005 WL 1021618, at *10; *see also In re M.J.B.*, 140 S.W.3d at 651 (holding that because of the fundamental nature of parental rights, courts must take a very strict view of procedural omissions that could put a parent at a disadvantage in preparing for trial). Furthermore, although there was some testimony about the degree of Mother's visitation and support during the child's life, we cannot conclude from this record that there was an implied consent to try the ground set out in Tenn. Code Ann. § 36-1-102(1)(A)(iv). *See* TENN. R. CIV. P. 15.02 (allowing trial of an unpleaded issue by the express or implied consent of an adverse party). Indeed, during trial, the following exchange occurred:

THE COURT: While we've got a break, let me mention. The Petition, for the record, the Petition was filed on January 6th of this year, 2022. So is there any disagreement that the relevant four month period would be September 5th 2021 through January 5th 202[2]?

MR. MCFALL [counsel for Mother]: That's agreed, Your Honor.

THE COURT: Okay.

MS. RATLIFF [counsel for Petitioners]: That's fine, Your Honor.

Thus, there is no basis to support a finding of trial by consent.

Because the chancery court terminated Mother's parental rights on an abandonment ground that was simply not applicable as a matter of law, we must reverse the court's termination of Mother's parental rights based on a failure to visit and support during the four months immediately preceding the filing of the petition.

B. Severe Child Abuse

The chancery court also terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(4) which states:

The parent or guardian has been found to have committed severe child abuse, as defined in § 37-1-102, under any prior order of a court or is found by the

court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against any child[.]

Tennessee Code Annotated section 37-1-102 defines severe child abuse in several ways. The chancery court used the definition found in Tenn. Code Ann. § 37-1-102(b)(27)(A)(i), which defines “severe child abuse” as “[t]he knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death[.]”

In reviewing a terminating court’s independent finding of severe child abuse, as opposed to a finding of severe child abuse made in a prior dependency and neglect proceeding, we have described the standard of review as follows:

In determining whether severe child abuse is established by clear and convincing evidence, we must “distinguish between the specific facts found by the trial court and the combined weight of those facts.” *In re S.J.*, 387 S.W.3d 576, 591 (Tenn. Ct. App. 2012) (quoting *In re Tiffany B.*, 228 S.W.3d 148, 156 (Tenn. Ct. App. 2007)). The specific underlying facts, including whether the parent’s conduct with respect to the child’s injuries was “knowing,” “need only be established by a preponderance of the evidence.” *Id.* at 592. Once the facts have been proven, the court must examine “the combined weight of all of those facts, to see if they clearly and convincingly show severe child abuse.” *Id.*

In re S.S., No. E2021-00761-COA-R3-PT, 2022 WL 1151424, at *8 (Tenn. Ct. App. Apr. 19, 2022) (quoting *In re Walter B.*, No. M2020-00069-COA-R3-PT, 2020 WL 7422070, at *4 (Tenn. Ct. App. Dec. 18, 2020)).

In the present case, Mother testified that she used methamphetamine and marijuana while she was pregnant with the child. We have previously held that a mother’s drug use while pregnant may constitute severe child abuse to the unborn child under the definition set forth in Tenn. Code Ann. § 37-1-102(b)(27)(A)(i). *In re Joshua C.*, No. E2016-00081-COA-R3-PT, 2016 WL 4069288, at *3 (Tenn. Ct. App. July 28, 2016) (citing *In re Alleyanna S.*, No. M2015-00544-COA-R3-PT, 2016 WL 697359, at *7 (Tenn. Ct. App. Feb. 19, 2016)). In addition to Mother’s testimony, the record includes medical records confirming that there was “intrauterine drug exposure” to the child. *See In re Shannon P.*, No. E2012-00445-COA-R3-PT, 2013 WL 3777174, at *5 (Tenn. Ct. App. July 16, 2013) (relying on medical records and a drug testing to find that a mother exposed a child to drugs in utero). Furthermore, the record shows that Mother knew she was pregnant when she used drugs because she testified that she attended regular prenatal appointments throughout her pregnancy, and during the neonatal appointment one month before the child’s birth, Mother tested positive for methamphetamine. *See id.* (defining “knowing” as “[she] has

actual knowledge of the relevant facts and circumstances or when ... [she] is either in deliberate ignorance of or in reckless disregard of the information that has been presented to ... [her]”).

A lasting injury is not required to sustain a finding of severe child abuse, *In re K.P.*, No. E2013-01636-COA-R3-JV, 2014 WL 2442923, at *5 (Tenn. Ct. App. May 28, 2014), but the record contains evidence showing that the child suffered some harm from intrauterine drug exposure. At the hospital, the child had difficulty taking in nutrition as a result of her drug exposure. Tara C. testified that the child has difficulty keeping food down and that she regularly takes the child to a clinic for children diagnosed with Neonatal Abstinence Syndrome due to drug exposure.

In light of the foregoing, we conclude that the chancery court properly determined that Petitioners proved this termination ground by clear and convincing evidence.

C. Persistence of Conditions

The chancery court determined that Petitioners failed to prove by clear and convincing evidence that Mother’s parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(3). Generally, our review is limited to the grounds relied upon by the trial court in terminating the parent’s parental rights. *See In re Carrington H.*, 483 S.W.3d at 525-26 (holding that “the Court of Appeals must review the trial court’s findings as to each ground for termination”). Because Petitioners specifically challenge the dismissal of this ground, we must also consider this issue.

The termination ground set forth in Tenn. Code Ann. § 36-1-113(g)(3) is often referred to as “persistence of conditions” and allows courts to terminate parental rights in situations where:

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

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

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

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

Tenn. Code Ann. § 36-1-113(g)(3)(A).

This ground “focuse[s] on the results of the parent’s efforts at improvement rather than the mere fact that he or she had made them.” *In re Audrey S.*, 182 S.W.3d at 874. The purpose behind this ground for termination is “to prevent the child’s lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child.” *In re Dakota C.R.*, 404 S.W.3d 484, 499 (Tenn. Ct. App. 2012) (quoting *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008)). Courts must answer the questions of “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).

Here, DCS filed a dependency and neglect petition on February 3, 2021, and the juvenile court entered a protective custody order removing the child from Mother’s custody on February 8, 2021. Thus, there is no dispute that the child had been removed from Mother’s custody for more than six months by a court order entered during proceedings in which a petition alleging dependency and neglect had been filed. *See* Tenn. Code Ann. § 36-1-113(g)(3)(B). The child was removed due to Mother’s drug use and the child being exposed to drugs in utero.

The chancery court dismissed this ground for termination, finding “[t]he conditions that led to the child’s removal—Mother’s drug addiction—have improved significantly. Mother has sought help and is making progress in her rehabilitation.” The evidence does not preponderate against this finding. Mother had completed three phases of recovery court and had been living in a sober-living home since being released from the rehabilitation facility. Mother had not tested positive for drugs while living at this facility. She had generally complied with her recovery court program and discontinued her drug use. Therefore, the chancery court correctly found that this condition no longer existed.

Petitioners point to language in the statute that allows for courts to consider whether “other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect[.]” Tenn. Code Ann. § 36-1-113(g)(3)(A)(i). According to Petitioners, Mother’s continued reliance on her sober-living program will, in all reasonable probability, lead to further abuse or neglect of the child. We cannot agree with this contention. Petitioners are correct that Mother was residing in one of the sober-living program’s halfway houses. That fact, by itself, however, is not sufficient to show that the child will, in all reasonable probability, suffer further abuse and neglect. The record

shows that Mother has her own room in this house, and she is allowed to live there with her infant son, who has been thriving in Mother's care while in this home. Although it is true that at the time of trial, Mother was living in the house with other individuals recovering from drug addiction, there is nothing in the record to indicate that living in this house would lead to future neglect or abuse.

Petitioners further contend that Mother is reliant on her recovery program to meet her daily needs, including transportation, and that this program may be suspended if Mother does not comply with its requirements, therefore removing an important support for Mother. This is too speculative to conclude that a condition exists that will lead to future neglect and abuse. There is nothing in the record to suggest that Mother is at risk of being removed from the program or the house in which she resides. On the contrary, there is testimony from a program liaison for the recovery program in support of Mother, saying "I see that she is maturing. She's still very young, you know, but she is maturing. She is becoming responsible. She's maintaining a job, she's doing great with saving money towards moving out on her own." However, in response to whether Mother would be able to live on her own, the program liaison testified "I don't think she's ready now." Petitioners point to this testimony from the program liaison as evidence of a condition that would lead to further neglect or abuse. However, this testimony does not indicate that Mother is at risk of being removed from the program, but rather that Mother still requires the program's assistance. This does not mean that she will lose the program's support or that she will abuse or neglect the child. In sum, Petitioners failed to prove by clear and convincing evidence that a condition persists which would lead to further neglect or abuse. We affirm the chancery court's dismissal of this ground.

II. Best Interest Analysis

Having determined that clear and convincing evidence of at least one statutory ground exists to terminate Mother's parental rights, we must next consider whether the trial court properly determined that termination of Mother's parental rights was in the child's best interest. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017) (citing *In re Carrington H.*, 483 S.W.3d at 523). After a court has found by clear and convincing evidence a ground for termination is present, the child's best interest becomes paramount, and the interests of the parent and child diverge. *In re Marr*, 194 S.W.3d 490, 498 (Tenn. Ct. App. 2005). When considering the best interest factors, courts must remember to view the child's best interest from the child's perspective, rather than the parent's. *In re Audrey S.*, 182 S.W.3d at 877. However, not all parental misconduct is irredeemable, and our parental termination statutes recognize that "terminating an unfit parent's parental rights is not always in the child's best interest." *In re Marr*, 194 S.W.3d at 498. In the best interests analysis, the facts considered must be proven by "a preponderance of the evidence, not by clear and convincing evidence." *In re Gabriella D.*, 531 S.W.3d at 681 (quoting *In re Kaliyah S.*, 455 S.W.3d 553, 555 (Tenn. 2015)). "After making the underlying factual findings, the trial court should then consider the combined

weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child's best interest[s].” *Id.* (quoting *In re Kaliyah S.*, 455 S.W.3d at 555).

The best interest analysis “is and must remain a factually intensive undertaking.” *Id.* at 682 (citing *In re Carrington H.*, 483 S.W.3d at 523). This is to ensure that every parent receives individualized consideration before his or her fundamental right as a parent to the care and custody of his or her child is terminated. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Although the statute enumerates a list of factors for courts to consider, this list is “illustrative, not exclusive.” *In re Carrington H.*, 483 S.W.3d at 523. The statute enumerates factors that the court “shall consider,” *In re Angela E.*, 303 S.W.3d at 251, but a court is not required to find that each of the enumerated factors exists before concluding that it is in the best interests of the child to terminate a parent's rights. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The statute similarly does not call for a mechanical determination of each of the statute's factors, but rather the relevancy and weight of each factor will be unique to each case. *In re Marr*, 194 S.W.3d at 499. Therefore, in certain circumstances, the consideration of one factor may be determinative. *Id.* (citing *In re Audrey S.*, 182 S.W.3d at 878). However, this does not relieve a court of its duty to consider each factor and even in cases where one factor is outcome determinative, the court must consider all factors and relevant proof that a party offers. *In re Gabriella D.*, 531 S.W.3d at 682. The Tennessee General Assembly amended the statutory best interest factors in 2021. *See* 2021 TENN. PUB. ACTS ch. 190 § 1 (S.B. 205), eff. Apr. 22, 2021. Because Petitioners filed the termination petition after April 22, 2021, the new best interest factors apply in this case. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding that the version of the termination statute “that was in force when the petition was filed governs this case”) (quoting *In re Tianna B.*, No. E2015-02189-COA-R3-PT, 2016 WL 3729386, at *7 (Tenn. Ct. App. July 6, 2016)).

During the nearly year-long period following removal, Mother began to take steps to remedy the conditions that led to the removal. However, at the time of trial, these steps were not enough to allow reunification with the child. *See* Tenn. Code Ann. § 36-1-113(i)(1)(C), (J), (K) (“Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs[.]” “[w]hether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent,” and “[w]hether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions[.]”). Mother has failed to take action to meet the child's basic needs, including failing to provide monetary support, engage in visitation with the child, or continuously provide a stable living environment for the child. We agree with the court's finding that Mother has made commendable changes in her life to remedy her drug addiction and has taken advantage of available programs to attempt to make a lasting adjustment of her conditions, but it is unclear whether this will be a lasting change. We also agree with the

trial court's finding that, based on Mother's current living situation, returning the child to Mother's custody would not be beneficial to the child.⁶

In contrast, the child has found stability and continuity in her current home, where she had lived for lived for seven months (almost half her life) at the time of trial. In its analysis, the court strongly factored in the presumption found in Tenn. Code Ann. § 36-1-113(i)(2) that a prompt and permanent placement is presumed to be in the child's best interest. At the time of trial, Mother had six months remaining before she would be finished with her recovery court program, whereas Petitioners were already in a position to provide a loving, caring, and stable home for the child. Tara C. and Elsie W. testified that a change in the child's caretakers at this time would have a severely detrimental effect on the child. Further, Tara C. is significantly involved with the child's continuing healthcare needs by ensuring that the child received early developmental care in addition to medical care. Tara C. allowed the child to visit with her half-siblings regularly and wanted the child to have a relationship with the child's biological family. Petitioners have formed strong parental bonds with the child. Mother, on the other hand, has never resided with the child and has failed to consistently visit the child most of her young life, negating the possibility of a "secure and healthy parental attachment" between Mother and child. It is unlikely that the child would even recognize Mother at this stage, making it unlikely that Mother could form such an attachment in the future. *See id.* 36-1-113(i)(1)(A), (B), (D), (E), (H), (I) ("The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement," "[t]he effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition," "[w]hether the parent and child have a secure and healthy parental attachment," "[w]hether the parent has maintain regular visitation," "[w]hether the child has created a healthy parental attachment with another person," and "[w]hether the child has emotionally significant relationships with persons other than parents and caregivers[.]").

Mother has subjected the child to severe child abuse by exposing the child to methamphetamine and marijuana while in utero. Moreover, Mother exposed the child to a dangerous environment that could have resulted in significant injury to the child when she allowed the child to be present during Father's armed standoff with police. *See id.* 36-1-113(i)(N) ("Whether the parent . . . has shown . . . physical . . . abuse or neglect toward the child[.]"). Mother has never provided safe and stable care for the child. However, she has made significant progress toward providing care for her youngest child, who was living with her in the halfway house. Mother's program liaison testified that Mother had made progress toward learning how to care for her youngest child's needs and had greatly matured as a mother. We acknowledge that in this trend of personal growth, Mother has begun making some child support payments. The record lacks sufficient evidence,

⁶ Although we previously found that living in a halfway house was not enough to satisfy the persistence of conditions ground for termination, the result is different here because we must consider this factor from the child's perspective.

however, to show that Mother made payments toward this child.⁷ *See id.* 36-1-113(i)(1)(O), (S) (“Whether the parent has ever provided safe and stable care for the child or any other child,” “[w]hether the parent has consistently provided more than token financial support.”). Lastly, we agree with the chancery court’s finding that the remaining factors are not applicable to the determination because the record contains little to no evidence relating to them. *See* Tenn. Code Ann. § 36-1-113(i)(1)(F), (G), (L), (M), (P), (Q), (R), and (T).

Based on the foregoing, we conclude that the combined weight of the proven facts amounts to clear and convincing evidence that termination of Mother’s parental rights is in the best interest of the child.

CONCLUSION

We affirm the chancery court’s termination of Mother’s parental rights on the ground of severe child abuse. We reverse the chancery court’s termination of Mother’s rights on the ground of abandonment by failure to visit and support, and we affirm the trial court’s holding that Petitioners failed to prove the ground of persistence of conditions by clear and convincing evidence. We also affirm the chancery court’s decision that termination is in the child’s best interest. The judgment of the chancery court terminating Mother’s parental rights to the child is affirmed. Costs of this appeal are assessed against the appellant, Whitney H., for which execution may issue if necessary.

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

⁷ Mother attempted to admit into evidence payment receipts to show she had started making payments. However, the payment receipts lacked any information showing that the payments went toward Emmalyn. Mother has several children for whom she must make payments. The receipts were, therefore, admitted for identification only and cannot be used to show Mother made payments toward this child.