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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 1, 2022

IN RE ANIYAH W.

Appeal from the Juvenile Court for Shelby County
No. EE5177 Harold W. Horne, Special Judge

No. W2021-01369-COA-R3-PT

After Mother filed a notice of appeal of the termination of her parental rights, her appointed counsel filed what was characterized as a brief, but which contained no statement of facts, no statement of the case, and no argument. The Tennessee Department of Children's Services argues that Mother's appeal should be waived under these circumstances. Based on the Tennessee Supreme Court's opinion in ***In re Carrington H.***, 483 S.W.3d 507 (Tenn. 2016), we are not at liberty to waive consideration of either the grounds for termination or the best interests of the child despite the deplorable state of Mother's "brief." Following our review, we reverse the trial court's finding of the ground of abandonment based on the Tennessee Department of Children's Services' decision not to defend that ground. We affirm the remaining grounds, as well as the trial court's finding that termination was in the child's best interest.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and ARNOLD B. GOLDIN, J., joined.

Leonard Jamerson, Memphis, Tennessee, for the appellant, Amber C.W.

Jonathan Skrmetti, Attorney General and Reporter; Kathryn A. Baker, Senior Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On June 12, 2018, Appellee the Tennessee Department of Children's Services ("DCS") filed a petition to declare Aniyah W.[1] (born in May 2018) dependent and neglected in the Shelby County Juvenile Court ("the trial court"). Therein, DCS alleged that it had received a referral that the child was born drug-exposed and that the child's mother, Appellant Amber C.W. ("Mother"), was the perpetrator. The petition further alleged that the child remained in the hospital, but that Mother was in jail for drug possession and awaiting extradition to Texas. The petition asked that the child be placed in DCS custody. The petition stated, however, that the child was not a victim of severe abuse. The petition was later amended to remove reference to a putative father who was later excluded as the child's biological father.

The trial court entered an ex parte protective custody order on June 19, 2018, awarding temporary legal custody to DCS.[2] The trial court later granted DCS's petition for dependency and neglect by order of October 24, 2019.

In the course of the dependency and neglect case, at least two permanency plans were created—the first from July 2018 and the second from April 2019.[3] The plans generally required the following of Mother: (1) complete an alcohol and drug assessment and follow all recommendations; (2) comply with random drug screens and test negative; (3) complete a parenting assessment and follow recommendations; (4) visit with the child and demonstrate parenting skills; (5) obtain safe, stable housing; (6) complete a mental health assessment and follow the recommendations; (7) refrain from criminal activity; and (8) obtain legal employment or a legal source of income. Mother participated in the creation of the first plan by telephone and also approved of the Criteria and Procedures for Termination of Parental Rights in the same manner. Mother eventually signed the Criteria and Procedures for Termination of Parental Rights on July 11, 2018.

DCS filed its petition to terminate Mother's parental rights in the trial court on April 9, 2020. The petition alleged the following grounds: (1) abandonment in various forms (2) substantial noncompliance with permanency plans; (3) persistent conditions; (4) severe child abuse; and (5) failure to manifest a willingness and ability to care for the child. An order entered on September 17, 2020, stated both that Mother was present for a hearing on that date and that she "is in a detention facility in Texas." Regardless, the trial court appointed counsel for Mother and continued the trial. Mother, by and through appointed counsel, filed an answer to the termination petition on May 27, 2021.

Trial was eventually held on September 30, 2021. Mother was not present, but her

[1] In cases involving termination of parental rights, it is this Court's policy to remove the full names of children and other parties to protect their identities.

[2] The order states that custody would be awarded to DCS on the date the order was signed. The order was signed on the same day the petition was filed, June 12, 2018.

[3] According to DCS, two additional permanency plans later were created later in the case but are not in the record.

counsel was. The trial court heard from three witnesses: Family Service Workers ("FSW") Rita Dortch and Latoya Greer and foster mother Kelly B. ("Foster Mother"). Medical records related to both Mother and the child were admitted into evidence. The child tested positive for benzodiazepines and methadone at birth and was diagnosed with Neonatal Abstinence Syndrome ("NAS"). She was treated with morphine for several days following her birth and finally discharged from the hospital two weeks later. Upon her discharge, DCS placed the child with Foster Mother, where she has remained continuously.

Mother's drug abuse was unfortunately not a new issue. Medical records entered as exhibits at trial indicated that she had been using illegal substances since she was eleven years old and had used substances ranging from marijuana, alcohol, and Xanax to heroin, methamphetamine, and cocaine. Two weeks prior to the child's birth, Mother tested positive for cocaine while incarcerated. Mother remained incarcerated at the time of birth. Mother has previously been found to have committed severe abuse for exposing another child to benzodiazepines, cocaine, and methadone. This child was also placed with Foster Mother. The medical records further indicated that Mother had a history of bipolar depression and schizophrenia.

Mother also has a history of criminal conduct and repeated incarcerations. At the time of the child's birth, Mother was incarcerated awaiting extradition to Texas. It is not entirely clear to which charge the extradition was related. Mother was released at some point, however, because she continued to be charged with crimes after the removal of the child. First, on November 17, 2018, Mother allegedly committed an assault on a peace officer/judge. Mother pleaded guilty to this charge on February 27, 2019, but the adjudication of guilt was deferred. On the same day, Mother was convicted of driving while intoxicated (third or more), a felony, for which Mother was placed on seventy-two months of community supervision in Texas.[4] Later, Texas officials attempted to revoke Mother's probation due to her not complying with the conditions of her release and incurring new criminal charges related to three counts of harassing a public official in the summer of 2020 and one count of prostitution in the summer of 2019.

According to FSW Dortch, Mother was essentially in and out of jail throughout the custodial period. When she was out of jail, Mother was homeless. And at no point did she complete a single task on any of the permanency plans. For example, Mother did not complete any assessments, take any parenting classes, or pay any child support during the custodial period. Mother also declined assistance that DCS offered her. As FSW Dortch explained, Mother "would always say she was going to get her daughter and bring her back to Texas." Mother also stated that she did not need DCS's help setting up assessments because "she knew where all of that was in Texas." FSW Dortch did testify, however, that most services offered to Mother were offered through Mother's Texas probation officer.

[4] Mother's prior driving while intoxicated offenses were in Mississippi in 2005 and 2003.

In the over three years that the child was in DCS custody, Mother had only one visit with the child. This visit occurred in October 2018, in the hallway during a juvenile court hearing. DCS was concerned during the visit, however, because Mother attempted to take the child down the hallway away from the DCS caseworker. Mother never requested another visit and did not attempt to Facetime the child, despite encouragement from Foster Mother to do so. Mother did sometimes request pictures of the child or that the child be moved to Texas. Mother had no plan for reunification with the child if she was moved to Texas, however; instead, she simply wanted the child placed in foster care in Texas. Mother never sent gifts or support of any kind to the child. On the contrary, she once asked Foster Mother to send her money for bail. According to Foster Mother, the last contact of any kind she had with Mother was a phone call in March 2019 when Mother was in jail.

The witnesses agreed that the child has a strong bond with Foster Mother, who she has been placed with continuously since the removal. When asked whether it was her intention to adopt the child, Foster Mother replied that she would do so "[a]s quickly as y'all will let me."

At the conclusion of the trial, the trial court orally ruled that DCS met its burden to show grounds for termination and that termination was in the child's best interest. The trial court entered a written order terminating Mother's parental rights on October 20, 2021. Therein, the trial court found clear and convincing evidence of the following grounds for termination: (1) abandonment; (2) substantial noncompliance with the permanency plans; (3) persistent conditions; and (4) failure to manifest an ability and willingness to care for the child.[5] The trial court further found that termination was in the child's best interest.[6] Mother appealed.

II. STANDARD OF REVIEW

Parental rights are "among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re Carrington H.***, 483 S.W.3d 507, 521 (Tenn. 2016) (collecting cases). Therefore, "parents are constitutionally entitled to fundamentally fair procedures in parental termination proceedings." ***Id.*** at 511. These procedures include "a heightened standard of proof—clear and convincing evidence." ***Id.*** at 522 (citations and quotations omitted). "Clear and convincing evidence is evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (quotation marks and citation omitted).

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[5] During trial, DCS informed the trial court that it was not proceeding under the severe abuse ground.

[6] Mother identified two potential biological fathers for the child, both of whom were eventually excluded by DNA testing. No other potential fathers were identified and the Putative Father Registry revealed no claims.

In Tennessee, termination of parental rights is governed by statute, which identifies "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.***, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at *7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g))). Thus, a party seeking to terminate a parent's rights must prove by clear and convincing evidence (1) the existence of at least one of the statutory grounds in section 36-1-113(g), and (2) that termination is in the child's best interest. *See* ***In re Valentine***, 79 S.W.3d at 546. "Considering the fundamental nature of a parent's rights, and the serious consequences that stem from termination of those rights, a higher standard of proof is required in determining termination cases." ***In re Addalyne S.***, 556 S.W.3d 774, 782 (Tenn. Ct. App. 2018). The clear and convincing evidence standard applicable here is "more exacting than the 'preponderance of the evidence' standard, although it does not demand the certainty required by the 'beyond a reasonable doubt' standard. To be clear and convincing, the evidence must eliminate any substantial doubt and produce in the fact-finder's mind a firm conviction as to the truth." ***In re S.R.C.***, 156 S.W.3d 26, 29 (Tenn. Ct. App. 2004) (internal citation omitted).

In termination cases, appellate courts review a trial court's factual findings de novo and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d); ***In re Carrington H.***, 483 S.W.3d at 523–24 (citations omitted). "The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness." ***In re Carrington H.***, 483 S.W.3d at 524 (citation omitted).

III. ANALYSIS

A. Briefing Issues

Before we can address the merits of this appeal, we must first consider DCS's argument that Mother's appeal should be waived in its entirety for failure to file a proper brief. A timeline of events that occurred after Mother filed her notice of appeal are helpful to this discussion. Following the filing of the record in this case, Mother's counsel filed no appellate brief. As such, on August 4, 2022, DCS filed a motion to dismiss Mother's appeal. In response, on August 22, 2022, this Court entered a show cause order directing Mother to file an appellate brief within fourteen days lest her appeal be dismissed. More than fourteen days later, Appellant, by and through her appointed counsel, filed a motion to allow her counsel to withdraw, stating as the ground only that "the continued representation would violate the Rules of Procedure and Professional Conduct." The motion was not accompanied by an affidavit or memorandum of law. *See generally* Tenn. R. App. P. 22. On the same day, Appellant, by and through appointed counsel, also lodged

what was captioned as "BRIEF OF APPELLANT AMBER [C.W.]" This "brief" contained a table of contents with the following sections: (1) statement of Mother; (2) statement of Mother's attorney; (3) Mother's attorney's motion to withdraw; and (4) a certificate of service.[7] As to the "statements" of Mother and her counsel, the brief stated as follows:

> I. [MOTHER] DISAGREES WITH THE TRIAL COURT DECISION TO TERMINATE HER PARENTAL RIGHTS. [MOTHER] RELIES ON THE RECORD.
> II. [MOTHER'S] ATTORNEY HAS FILED A MOTION TO WITHDRAW AS COUNSEL.

The body of this brief, however, was nothing more than a verbatim reproduction of the earlier motion to withdraw.

On October 12, 2022, this Court filed another order in which it: (1) denied Appellant's counsel's request to withdraw;[8] and (2) ordered counsel to file a brief on or before October 17, 2022, or otherwise show cause why the appeal should not be dismissed. On October 12, 2022, Mother, by and through her appointed counsel, filed a second copy of the "brief" that had previously been lodged. DCS filed its brief on November 1, 2022.

In its brief, DCS understandably argues that Mother's brief is deficient and her appeal should be waived in its entirety as a result. We agree that what Mother filed in this case does not constitute a proper brief. Pursuant to Rule 27(a) of the Tennessee Rules of Appellate Procedure, the appellant's brief must include the following:

> (1) A table of contents, with references to the pages in the brief;
> (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;
> (3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;
> (4) A statement of the issues presented for review;
> (5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;
> (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
> (7) An argument, which may be preceded by a summary of argument, setting forth:

[7] The certificate of service did not indicate that it was served on Mother.

[8] The order noted that counsel's motion to withdraw was not supported by any "factual or legal support[.]"

> (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and
> (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
>
> (8) A short conclusion, stating the precise relief sought.

Mother's brief contains only two of the eight requirements. It contains no facts, no procedural history, and no standard of review. Most importantly, it contains no argument of any kind, supported by legal authority or otherwise, concerning whether the trial court was correct in terminating her parental rights.[9] Given its lack of facts, procedural history, or argument, it is not surprising that it contains no references to the appellate record.

DCS contends that deficient briefing of this measure shifts the burden to it to argue this appeal. We agree. Raising an issue is not sufficient to preserve an issue on appeal; it must also be properly argued. *See* ***Childress v. Union Realty Co.***, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) ("[W]hen a party raises an issue in its brief, but fails to address it in the argument section of the brief, we consider the issue to be waived."). As the Tennessee Supreme Court has aptly explained, "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived." ***Sneed v. Bd. of Pro. Resp. of Supreme Ct.***, 301 S.W.3d 603, 615 (Tenn. 2010). Indeed, the Tennessee Supreme Court has recently explained that the doctrine of waiver stems from a desire to maintain the fairness of the adjudicative process so that a party may not be faced with an argument that it did not have notice of and a meaningful opportunity to respond. *See* ***State v. Bristol***, 654 S.W.3d 917, 924 (Tenn. 2022). Based on the well-settled principles of waiver, we have held that a party waived its arguments when his or her brief contained far more than what was presented in this case. *See, e.g.,* ***Biles v. Roby***, No. W2016-02139-COA-R3-CV, 2017 WL 3447910 (Tenn. Ct. App. Aug. 11, 2017); ***Purifoy v. Mafa***, 556 S.W.3d 170 (Tenn. Ct. App. 2017); ***Tennessee Firearms Ass'n v. Metro. Gov't of Nashville & Davidson Cnty.***, No. M2016-01782-COA-R3-CV, 2017 WL 2590209 (Tenn. Ct. App. June 15, 2017); ***Woodgett v. Vaughan***, No. M2016-00250-COA-R3-CV, 2016 WL 7220508, at *3 (Tenn. Ct. App. Dec. 13, 2016). Given that Mother has essentially filed no brief at all, we have little compunction concluding that the deficient briefing in this case should subject Mother to waiver.

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[9] Mother's counsel's failure to file a proper brief even after his motion to withdraw was denied may be violative of the Tennessee Rules of Professional Responsibility. *See generally* Tenn. Sup. Ct. R. 9, RPC 1.1 (requiring competent representation, including "thoroughness"); RPC 1.3 (requiring diligence and promptness when representing a client). That question is outside the scope of this appeal.

Our conclusion that waiver *should* apply, however, is unfortunately not the end of the inquiry. Instead, we must consider the nature of the present action: an appeal of an order terminating a parent's fundamental rights to her child. Particularly, we must consider the Tennessee Supreme Court's opinion in ***In re Carrington H.***, 483 S.W.3d 507 (Tenn. 2016). In that case, the appellant mother argued that her appointed counsel was ineffective and the termination of her parental rights should be overturned as a result. ***Id.*** at 521. The Tennessee Supreme Court declined to provide parents with a right comparable to the post-conviction procedure where a parent may challenge a termination order on the basis of ineffective assistance of counsel. ***Id.*** at 533. Instead, the Court held that the parent's fundamental rights were protected by existing safeguards "replete" in Tennessee law and the requirement "that appellate courts 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." ***Id.*** at 535. So, the Tennessee Supreme Court held that rather than allow a parent to challenge a termination proceeding post-judgment, in any appeal of a termination order, "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."[10] ***Id.*** at 525–26. Thus, waiver does not apply in the context of either the grounds for termination or whether termination is in a child's best interest.

The obvious result of the rule adopted in ***Carrington*** is that regardless of whether a proper brief is filed, petitioners/appellees in a termination of parental rights appeal are on notice that that they will be required to defend the trial court's factual findings in support of termination regardless of any effort by the parent to undermine those findings. Of course, we doubt that the Tennessee Supreme Court envisioned such a lackluster attempt at briefing as occurred in this case when it decided ***Carrington***. Indeed, the "brief" filed in this case is little more than a title page and a statement of issues. Still, our reading of ***Carrington*** leaves little room for avoidance of its rule even when faced with a brief so lacking in any of the necessities as to barely constitute a brief at all. *Cf.* ***id.*** at 525 (describing the Court of Appeals' duty as one to "review *thoroughly* the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests" (emphasis added)). Thus, regardless of the heavy burden placed on petitioners/appellees by this rule, we must conclude that waiver cannot apply in this context. Fortunately for us, DCS has shouldered the unfair burden placed on it in this case by briefing both grounds for termination and best interest despite Mother's failure to brief either of these issues. We will therefore proceed to consider both the grounds for termination and the best interest of the

[10] The Tennessee Supreme Court suggested that the Court of Appeals could respond to this holding by "adopt[ing] a rule requiring parents to brief these issues in every appeal." ***Id.*** at 526 n.16. Of course, this Court's jurisprudential rules already require that parties properly brief issues lest they be waived. *See, e.g.*, Tenn. R. App. P. 27(a); Tenn. R. Ct. App. 6(a); ***Sneed***, 301 S.W.3d at 615. It is therefore unclear whether the adoption of such a rule would have any impact on whether the Court of Appeals would nevertheless be required to consider issues not briefed, in violation of the adopted rule. As of the date of this Opinion, the Court of Appeals has not chosen to adopt such a rule.

child at issue consistent with our obligations under ***Carrington***.

B. Grounds for Termination

Although DCS alleged at least five grounds in its termination petition and the trial court found four grounds,[11] DCS chooses to defend only three grounds on appeal: (1) substantial noncompliance with the permanency plans; (2) persistent conditions; and (3) failure to manifest and ability and willingness to care for the child. Given DCS's choice not to defend these grounds and for purposes of judicial economy, we reverse the trial court's findings related to all grounds involving abandonment and consider only the three grounds defended by DCS. *See* ***In re Mason C.***, No. E2018-00535-COA-R3-PT, 2018 WL 4771109, at *3 (Tenn. Ct. App. Oct. 2, 2018) ("Because DCS does not defend this ground, we reverse the trial court's termination of Appellant's parental rights on the ground of abandonment by failure to provide a suitable home.").

1. Substantial Noncompliance

DCS first relies on the ground of substantial noncompliance with permanency plans pursuant to Tennessee Code Annotated section 36-1-113(g)(2). According to the Tennessee Supreme Court:

> Substantial noncompliance is a question of law which we review de novo with no presumption of correctness. Substantial noncompliance is not defined in the termination statute. The statute is clear, however, that noncompliance is not enough to justify termination of parental rights; the noncompliance must be substantial. *Black's Law Dictionary* defines "substantial" as "[o]f real worth and importance." *Black's Law Dictionary* 1428 (6th ed. 1990).

In re Valentine, 79 S.W.3d at 548. As discussed by this Court in ***In re M.J.B.***, 140 S.W.3d 643 (Tenn. Ct. App. 2004):

> Terminating parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) requires more proof than that a parent has not complied with every jot and tittle of the permanency plan. To succeed under Tenn. Code Ann. § 36-1-113(g)(2), [DCS] must demonstrate first that the requirements of the permanency plan are reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place,

[11] Both DCS and the trial court variously treat abandonment as both a single ground and as multiple grounds. As we have noted, abandonment has various definitions and applications, and it is unclear "whether 'abandonment' is one ground with several definitions, . . . or whether each definition of abandonment presents a separate and distinct ground for review." ***In re Navada N.***, 498 S.W.3d 579, 591 n.8 (Tenn. Ct. App. 2016) (citations omitted).

> ***In re Valentine***, 79 S.W.3d at 547; ***In re L.J.C.***, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003), and second that the parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. ***In re Valentine***, 79 S.W.3d at 548–49; ***In re Z.J.S.***, [No. M2002-02235-COA-R3-JV,] 2003 WL 21266854, at *12 [(Tenn. Ct. App. June 3, 2003)]. Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance. ***In re Valentine***, 79 S.W.3d at 548; ***Department of Children's Servs. v. C.L.***, No. M2001-02729-COA-R3-JV, 2003 WL 22037399, at *18 (Tenn. Ct. App. Aug. 29, 2003) (No Tenn. R. App. P. 11 application filed).

Id. at 656–57.

Here, Mother's tasks under the two permanency plans contained in the record amounted to the following: (1) complete an alcohol and drug assessment and follow all recommendations; (2) comply with random drug screens and test negative; (3) complete a parenting assessment and follow recommendations; (4) visit with the child and demonstrate parenting skills; (5) obtain safe, stable housing; (6) complete a mental health assessment and follow the recommendations; (7) refrain from criminal activity; and (8) obtain legal employment or a legal source of income. There is no serious question that the requirements of Mother's permanency plans were reasonable and related to remedying the issues that caused the child to be removed, particularly Mother's drug issues and her lack of stability. The testimony at trial was also undisputed that Mother failed to complete even a single one of these requirements.

It is true that Mother was apparently incarcerated during much of the custodial period. *See* ***In re Melvin M.***, No. M2021-01319-COA-R3-PT, 2022 WL 17250274, at *5 (Tenn. Ct. App. Nov. 28, 2022) ("A parent's incarceration does not excuse his responsibility to fulfill the requirements set out in a permanency plan, but incarceration is a 'relevant consideration when judging that parent's ability to fulfill his . . . responsibilities to the child.'" (quoting ***In re Jonathan F.***, No. E2014-01181-COA-R3-PT, 2015 WL 739638 at *13 (Tenn. Ct. App. Feb. 20, 2015))). But the evidence shows that she continued to pick up criminal charges periodically after the child was born. So she was evidently not incarcerated for the entirety of the custodial period. And Mother did not complete a single task contained in the permanency plans, despite DCS testimony that Mother was offered help. According to the DCS caseworkers who testified, when they spoke to Mother, she also expressed no plan for completing the tasks following her current incarceration. Under these circumstances, we conclude that the evidence presented at trial demonstrated that Mother had the opportunity to at least attempt some of the tasks of the permanency plans, but simply made no effort to do so. Therefore, we conclude that clear and convincing evidence was presented of this ground for termination.

2. Persistent Conditions

DCS also relies on the ground of persistence of conditions. This ground may be found in the following circumstances:

> (3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian 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 guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;
> > (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and
> > (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable, and permanent home;
>
> (B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard; . . .

Tenn. Code Ann. § 36-1-113.

Here, there is no question that the child was removed from Mother's custody in the course of a dependency and neglect proceeding and had been removed for a period of longer than six months. Thus, the dispositive questions are whether conditions persist that prevent the safe return of the child, whether the conditions will likely be remedied at an early date, and whether the continued relationship prevents early integration of the child into a safe, stable, permanent home. As we have previously explained,

> "A parent's continued inability to provide fundamental care to a child, even if not willful, . . . constitutes a condition which prevents the safe return of the child to the parent's care." ***In re A.R.***, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (citing ***In re T.S. & M.S.***, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *7 (Tenn. Ct. App. July 13, 2000)). The failure to remedy the conditions which led to the removal need not be willful. ***In re T.S. & M.S.***, 2000 WL 964775, at *6 (citing ***State Dep't of Human Servs. v. Smith***, 785 S.W.2d 336, 338 (Tenn. 1990)). "Where . . . efforts to provide help to improve the parenting ability, offered over a long period of time, have proved ineffective, the conclusion []

> that there is little likelihood of such improvement as would allow the safe return of the child to the parent in the near future is justified." ***Id.*** The purpose behind the "persistence of conditions" ground for terminating parental rights 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 A.R.***, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at *20 (Tenn. Ct. App. Oct. 13, 2008) (quoting ***In re D.C.C.***, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)).

In re Navada N., 498 S.W.3d 579, 605–06 (Tenn. Ct. App. 2016).

The record indicates that the Mother has not remedied the conditions that prevent the return of the child and is unlikely to do so in the near future. Mother oscillates between periods of incarceration and homelessness. According to DCS, Mother has done nothing to remedy these issues. Instead, she has continued to incur new criminal charges that have resulted in the revocation of her probation, ultimately placing the possibility of reunification even farther in the future. The evidence shows that Mother has long suffered from drug abuse issues, resulting in the removal of not one, but two of her children. At least in part due to her incarceration in another state, she has not participated in any drug screens, nor has she presented DCS any proof of drug treatment.[12] On the whole, the evidence presented at trial was that conditions continue to exist that prevent the safe return of the child to Mother's care and that are unlikely to be remedied any time soon. In contrast, the child is in a loving pre-adoptive home that is essentially the only home that she has ever known. DCS proved this ground for termination by clear and convincing evidence.

3. Willingness and Ability

DCS next contends that Mother failed to manifest a willingness and ability, whether by act or omission, to personally assume legal and physical custody or financial responsibility of the child and that placing the child in her legal and physical custody would create a risk of substantial harm to the child's physical or psychological welfare. Tenn. Code Ann. § 36-1-113(g)(14). Essentially, the statutory ground has two distinct elements which must be proven by clear and convincing evidence:

> First, DCS must prove that [the parent] failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility of the child." DCS must then prove that placing the child[] in [the parent's] "legal and physical custody would pose a risk of substantial

[12] FSW Dortch testified that Mother informed her that she was attempting to go to drug rehabilitation in March 2021, but that was the last time that FSW Dortch had any contact with Mother so DCS had no proof that Mother had gained entry to or participated in any treatment program.

harm to the physical or psychological welfare of the child."

In re Maya R., No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *7 (Tenn. Ct. App. Apr. 4, 2018) (quoting Tenn. Code Ann. § 36-1-113(g)(14)) (some alterations of the original text removed). As for the first element, the petitioner must "prove[ ] by clear and convincing proof that a parent or guardian has failed to manifest either [an] ability or willingness" to parent the child. ***In re Neveah M.***, 614 S.W.3d 659, 677 (Tenn. 2020).

With regard to this ground, the trial court found that Mother's actions in failing to visit with the child, failing to obtain housing when not incarcerated, failing to pay child support, and failing to complete any of the tasks on the permanency plans show that Mother is both unwilling and unable to take physical custody or financial responsibility of the child. We agree. As previously discussed, Mother chose to engage in criminal conduct that placed her at risk of incarceration following the removal of the child. She told FSW Dortch that she wanted the child taken to Texas, not because she could actually take custody of the child but simply to have the child placed in the care of child protective services more locally. Thus, Mother asked that the child be removed from the only home she has ever known for her own convenience with little prospect of actual reunification. Mother never provided any financial support for the child; instead, she asked Foster Mother to support her by providing her bail money. Under these circumstances, Mother's actions demonstrate that she is unwilling and unable to either take physical custody of the child or provide for her financial support.

The trial court also found that placing custody with Mother would pose a risk of substantial harm. Here, the child was removed from Mother nearly at birth and has enjoyed one single visit with Mother at the courthouse. Mother is a stranger to the child. We have previously held that returning the child to a virtual stranger meets the substantial harm threshold. *See, e.g.*, ***In re Brianna B.***, No. M2019-01757-COA-R3-PT, 2021 WL 306467, at *6 (Tenn. Ct. App. Jan. 29, 2021); ***In re Braelyn S.***, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020). So the trial court did not err in finding clear and convincing evidence to support this ground for termination.

C. Best Interest

Because we have determined that at least one statutory ground has been proven for terminating Mother's parental rights, we must now decide if DCS has proven, by clear and convincing evidence, that termination of Mother's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); ***White v. Moody***, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). If "the interests of the parent and the child conflict, courts are to resolve the conflict in favor of the rights and best interest of the child." ***In re Navada N.***, 498 S.W.3d at 607.

According to the version of the statute at issue when this the termination was filed, the trial court was directed to consider the following best interest factors:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2020).[13] "This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's rights is in the best interest of a child." ***In re M.A.R.***, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005) (citations omitted).

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[13] The trial court utilized the best interest factors as amended on April 22, 2021. *See* 2021 Tenn. Laws Pub. Ch. 190 (S.B. 205), eff. April 22, 2021. However, "the amended statute applies only to petitions for termination filed on or after April 22, 2021." ***In re Riley S.***, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022). Regardless, this Court has held that a trial court's reliance on the newer factors is not generally reversible error "because the old factors are essentially contained within the new factors." ***In re Bralynn A.***, No. M2021-01188-COA-R3-PT, 2022 WL 2826850, at *9 (Tenn. Ct. App. July 20, 2022) (citing ***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)), *perm. app. denied* (Tenn. Aug. 12, 2022). We will therefore use the correct factors in this appeal.

The evidence here fully supports the trial court's finding that termination is in the child's best interest. Here, Mother has made no effort to change her circumstances so as to create a safe space for the child to return to. *See* Tenn. Code Ann. § 36-1-113(i)(1) & (2). Mother has had essentially no visitation with the child, even through Facetime. *See* Tenn. Code Ann. § 36-1-113(i)(3). Given the young age at which the child was removed, she has no relationship, meaningful or otherwise, with the child. *See* Tenn. Code Ann. § 36-1-113(i)(4). In contrast, the child is living in the only home that she has ever known, along with her sibling who was also removed from Mother's care. The child's foster mother was unequivocal in her desire to adopt the child. As such, a change in caretakers could be emotionally devastating for the child. *See* Tenn. Code Ann. § 36-1-113(i)(5).

The evidence further shows that both the child and her sibling were born with illegal drugs in their system, resulting in a severe abuse finding as to the child's sibling. *See* Tenn. Code Ann. § 36-1-113(i)(6). The evidence further shows that Mother has no home of any kind, as she spends her time either incarcerated or homeless. *See* Tenn. Code Ann. § 36-1-113(i)(7). Evidence at trial also showed that Mother has been diagnosed as bipolar and schizophrenic. Moreover, the evidence shows that Mother has a long-standing drug abuse problem. According to DCS, Mother has presented nothing to suggest she is combating these issues. *See* Tenn. Code Ann. § 36-1-113(i)(8). Finally, Mother has paid no child support for the child throughout the custodial period. *See* Tenn. Code Ann. § 36-1-113(i)(9).

In sum, every or at least nearly every factor in this case favors termination of Mother's parental rights. Only one person has chosen to be a mother to this child. And it is not Mother. So we affirm the trial court's finding that termination is in the child's best interest.

IV. Conclusion

The judgment of the Shelby County Juvenile Court is reversed in part and affirmed in part. The termination of Appellant Amber C.W.'s parental rights is affirmed. Costs of this appeal are taxed to Appellant Amber C.W., for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE