IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 1, 2022

IN RE ETHAN W. ET AL.

Appeal from the Juvenile Court for Perry County
No. 17-JV-116 Michael Hinson, Judge

No. M2021-01116-COA-R3-PT

A mother appeals the termination of her parental rights to three of her children. The juvenile court concluded that there was clear and convincing evidence of five statutory grounds for termination. The court also concluded that there was clear and convincing evidence that termination was in the children's best interest. On appeal, we determine that some grounds do not support termination of parental rights. Still, clear and convincing evidence supports at least one statutory ground for termination and the best interest determination. So we 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.

Richard Boehms, Hohenwald, Tennessee, for the appellant, Christeana W.

Herbert H. Slatery III, Attorney General and Reporter, and Amber L. Barker, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I.

A.

On September 12, 2017, the Tennessee Department of Children's Services ("DCS") received a report that the four children living with Christeana W. ("Mother") and Jason W. ("Father") were dependent and neglected. Mother and Father were the biological parents of the two youngest children, Ethan and Avah. Mother was also the legal parent of the two older children.[1]

[1] Mother's parental rights to the older two children are not at issue in this appeal.

According to the report, the older children, aged eleven and nine, "waved down" a neighbor after they missed the school bus. They told the neighbor that they could not find their parents. The neighbor found the parents "passed out" in a bedroom. The house was in disarray, with clothes scattered "everywhere." And it "smelled of cat urine." The older children did not know "if there was any food." So they fixed bottles for Ethan, age three, and Avah, age two, before they left for school with the neighbor. Reportedly, this scenario was "fairly routine" for Mother and Father.

A Child Protective Services investigator came to the home later that day. Mother told the investigator that she forgot to set her alarm. Father was still in bed. Law enforcement found marijuana residue and unidentified pills in the bedroom. Mother reported that Father was on probation for domestic violence against her in February. And she was on probation for possession of marijuana and driving on a revoked license. The investigator administered drug screens to both parents. Mother's drug screen was negative. But Father's screen was positive for multiple illegal substances. He was arrested.

DCS did not immediately remove the children. Instead, it petitioned the juvenile court to adjudicate the children dependent and neglected and to order protective supervision. DCS also began providing services to the family. At a child and family team meeting, Mother disclosed her struggles with depression, anxiety, and "past trauma."

About a month later, DCS received a second referral. According to the report, law enforcement took Mother and the children to the hospital because Mother had been hallucinating for three days. She tested positive for "methamphetamines, amphetamines, benzodiazepine, ecstasy, opiates, Oxycodone, and marijuana." Father was in jail. The investigator found the children asleep on the floor of the waiting room. Hospital staff told the investigator that the children claimed they had not eaten that day.

The juvenile court awarded DCS temporary legal custody of Ethan and Avah on October 10, 2017. The court later adjudicated Ethan and Avah dependent and neglected based on Father's incarceration, Mother's hospitalization, and both parents' drug use. It also limited the parents to supervised visitation.

DCS worked with the parents[2] to develop a family permanency plan. At this point, the goal was to return Ethan and Avah to their parents or for the children to exit custody with a relative. The plan identified multiple concerns, including substance abuse, mental health, the home environment, and parenting. To address these concerns, Mother was required to complete an alcohol and drug assessment and follow all recommendations; submit to random drug screens; maintain a stable home; complete a parenting class;

[2] Father is not a party to this appeal. He voluntarily surrendered his rights to the children before trial. To the extent possible, we focus on the facts relevant to Mother.

participate in supervised visitation; comply with homemaker services; complete a mental health assessment and follow all recommendations; and follow all court orders and rules of probation. A subsequent plan added random home visits.

Although Mother made progress on her plan responsibilities over the next year, she continued to fail drug screens. Substance abuse was an ongoing issue for Mother throughout 2018 and into 2019. But in March 2019, circumstances began to change. Mother passed her drug screens for four consecutive months. In May, the court allowed unsupervised visitation. And in June, Mother gave birth to a third child, Alex. By early fall, DCS believed a trial home visit was imminent.

Then the parents relapsed. Mother's hair follicle drug screen on September 30, 2019 was positive for methamphetamines and amphetamines. And she tested positive for marijuana a few days later. Mother later acknowledged that she had a "really hard time" after Alex's birth.

On October 10, 2019, the guardian ad litem for Ethan and Avah filed an emergency ex-parte petition alleging that Alex was dependent and neglected. The court awarded temporary custody of the four-month-old to DCS and ordered supervised visitation for the three children. The court later adjudicated Alex dependent and neglected due to drug exposure. A drug screen on Alex's umbilical cord blood was positive for marijuana.

Mother's progress stalled after Alex entered foster care. Her relapse necessitated a new alcohol and drug assessment. With DCS's help, she obtained a new assessment in November 2019. It recommended mental health counseling and inpatient drug treatment. But Mother did not follow the recommendations. The final permanency plan, developed in March 2020, directed Mother to complete the recommendations. It also required Mother to ensure that the home was free of domestic violence in front of the children. Otherwise, the final plan requirements were essentially unchanged from previous plans.

On May 21, 2020, DCS filed a petition to terminate Mother's parental rights to Ethan, Avah, and Alex. The petition, as later amended, alleged six statutory grounds for termination against Mother: (1) abandonment by failure to support; (2) abandonment by failure to provide a suitable home; (3) substantial noncompliance; (4) persistent conditions; (5) failure to manifest an ability and willingness to assume custody; and (6) severe abuse.

B.

Two family service workers testified at trial, Brittany Rose and Ashley Tripp. Ms. Rose had worked with the family the longest – almost two years. She told the court that she went to great lengths to reunite this family because the children "loved their parents so much." Yet, at times, she felt like she was working harder than the parents. She explained the responsibilities in the plan. She offered services when needed. She administered weekly drug screens so that Mother could have visitation. She also provided

gas cards and transportation. She delivered clothing and toys to the parents so that they would have gifts for the children at holidays. She pushed for unsupervised visitation in 2019. But every time reunification appeared possible, "there would be a failed drug screen."

After Mother's relapse, Ms. Rose encouraged her to try inpatient rehabilitation. But Mother would never go. Ms. Rose told the court that Ethan and Avah had been waiting for Mother "to do what she need[ed] to do" for three years. They deserved permanency now.

Ms. Tripp replaced Ms. Rose as family service worker about four months before trial. During that time, she was unable to administer any drug screens or conduct any home visits. Shortly after Ms. Tripp came on board, Mother reported that she had moved. But Mother failed to provide a new address. Even after she did, Ms. Tripp was never able to locate Mother despite repeated visits to both the new and old addresses.

Whenever Ms. Tripp spoke with Mother, she stressed the importance of inpatient treatment. Several times, Mother assured Ms. Tripp that she had arranged to go. But she never followed through. Two months before trial, Mother "just kind of fell off the books completely and was not responding to anything."

Both family service workers reported that illegal drug use was an ongoing issue for Mother. Mother was a long-time marijuana user. And she admitted to smoking marijuana while pregnant with Alex. According to Mother, she knew smoking was "bad for baby" so she stopped as soon as she learned she was pregnant. She believed she quit roughly around November 2018. Yet, she tested positive for marijuana in December 2018, and January and February 2019. Mother blamed her positive tests on "being around" other marijuana smokers.

Mother agreed that she was essentially "right where [she] started in 2017." She never completed inpatient treatment. She had not had a random drug screen "in quite some time." And she was not receiving any mental health treatment. She blamed her lack of progress on her relationship with Father. She "let that completely take over everything."

According to Mother, domestic violence had been an issue in her marriage for years. Father had "an anger problem." She was "on egg shells around him [because] . . . he g[ot] pretty . . . violent." She claimed that he was never violent toward the children. But the children witnessed their arguments. And Father hit her in front of the children during an unsupervised weekend visit in 2019.

Father was arrested for domestic violence about five months before trial. After his arrest, Mother lived for several months either with a friend or her grandmother. She returned to the family home a week before trial.

Yet she was equivocal about the future of her marriage. At first, she claimed that a divorce was pending. She later admitted that the couple had never actually discussed divorce. By the end of trial she reversed course again, insisting that she was "done with the toxic relationship." Her children were her first priority.

Mother asked the court for another chance to prove herself. She wanted to be clean. She had simply been too busy to go to inpatient treatment before trial. For the last year, she had been contemplating a divorce, working, and "trying to figure out what . . . to do with [her] home." But she was willing to go. She assured the court that she had recently found an opening at an inpatient program in Nashville. But she postponed her admission to be present at trial.

The juvenile court terminated Mother's parental rights. The court concluded that there was clear and convincing evidence of five statutory grounds for termination: (1) abandonment by failure to provide a suitable home; (2) substantial noncompliance with the permanency plan; (3) persistent conditions; (4) failure to manifest an ability and willingness to assume custody; and (5) severe abuse. It found that DCS had not proven abandonment by failure to support. The juvenile court also concluded that there was clear and convincing evidence that termination of Mother's parental rights was in the children's best interest.

II.

A parent has a fundamental right, based in both the federal and state constitutions, to the care and custody of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995). But parental rights are not absolute. *In re Angela E.*, 303 S.W.3d at 250. The government's interest in the welfare of a child justifies interference with a parent's constitutional rights in certain circumstances. *See* Tenn. Code Ann. § 36-1-113(g) (Supp. 2020).

Tennessee Code Annotated § 36-1-113 sets forth both the grounds and procedures for terminating parental rights. *In re Kaliyah S.*, 455 S.W.3d 533, 546 (Tenn. 2015). Parties seeking termination of parental rights must first prove the existence of at least one of the statutory grounds for termination listed in Tennessee Code Annotated § 36-1-113(g). Tenn. Code Ann. § 36-1-113(c)(1). If one or more statutory grounds for termination are shown, they then must prove that terminating parental rights 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 539, 546 (Tenn. 2002)). 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 or conviction 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.

1. Abandonment by Failure to Establish a Suitable Home

One of the statutory grounds for termination of parental rights is "[a]bandonment by the parent." Tenn. Code Ann. § 36-1-113(g)(1). Statute defines "abandonment" in multiple ways. *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005); *see also* Tenn. Code Ann. § 36-1-102(1)(A) (Supp. 2020) (defining the term "abandonment"). The court concluded that Mother had abandoned the children by failing to provide a suitable home – the second definition of "abandonment." Tenn. Code Ann. § 36-1-102(1)(A)(ii).

Termination of parental rights may be appropriate under the second definition 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
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> (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.

Id. 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). The home must "be free of drugs and domestic violence." *In re Hannah H.*, No. E2013-01211-COA-R3-PT, 2014 WL 2587397, at *9 (Tenn. Ct. App. June 10, 2014).

We conclude that the evidence clearly and convincingly supports termination of Mother's parental rights to Alex on the ground of abandonment for failure to provide a suitable home. But this ground was not established as to Ethan and Avah.

As the trial court found, DCS removed Ethan and Avah from Mother's custody on October 10, 2017. Alex was removed exactly two years later. All three children were placed in DCS custody and later adjudicated dependent and neglected. When Alex was removed, the juvenile court found that reasonable efforts were made to prevent his removal. This was not the case for Ethan and Avah. The juvenile court expressly reserved ruling on DCS's efforts to prevent their removal, awaiting "further proof." And the trial court did not supply the necessary ruling in the final order.

Even so, this record contains ample proof that DCS made reasonable efforts to help Mother provide a suitable home for her children. *See* Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c) (providing that DCS's efforts "shall be found to be reasonable if such efforts equal or exceed the efforts of the parent. . . toward the same goal"). DCS offered proof of two time periods – October 2017 to February 2018 and October 2019 to February 2020. The court found that DCS made reasonable efforts to assist Mother during both of these time frames. Among other efforts, DCS assisted with supervised therapeutic visitation, gave Mother resources for rehabilitation programs, and provided transportation and gas cards.

The court also found that Mother did not put forth reciprocal effort during these periods. She continued to use illegal drugs. And she admitted that domestic violence was present in her home throughout her marriage.

Mother argues that she made reciprocal efforts to provide a suitable home "at one time." We agree that Mother took steps to address her issues during the first four-month period. But DCS may offer "proof of reasonable efforts during **any four-month period** following a child's removal." *In re Roderick R.*, E2017-01504-COA-R3-PT, 2018 WL 1748000, at *11 n.13 (Tenn. Ct. App. Apr. 11, 2018) (emphasis in original). Mother did not make reciprocal efforts during the second four-month period despite DCS's ongoing

efforts to assist her. She refused to follow the treatment recommendations from her assessment. And she chose to remain in an abusive relationship.

We are also firmly convinced that it is unlikely that Mother will be able to provide a suitable home at an early date. At the time of trial, Mother was "right where [she] started in 2017." She had not completed inpatient treatment. She was not participating in individual counseling. She had recently been arrested on drug charges. She blamed her inertia on her relationship with Father. Yet she "could not say she would not . . . resume married life with him."

2. Substantial Noncompliance with Permanency Plan Requirements

Another ground for termination is "substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan." Tenn. Code Ann. § 36-1-113(g)(2). Before analyzing whether a parent complied with the permanency plan, the court must find that the permanency plan requirements were "reasonable and [we]re related to remedying the conditions that necessitate foster care placement." *Id.* § 37-2-403(a)(2)(C) (Supp. 2020). 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.

Here, the final order does not contain a specific finding that the plan requirements were reasonable and related to remedying DCS's concerns. But we may review the reasonableness of Mother's responsibilities under the plan de novo. *See id.*

DCS sought removal of Ethan and Avah when Mother was hospitalized for hallucinations and drug abuse. Drug abuse was the primary factor necessitating Alex's removal two years later. Mother also reported issues with her mental health and domestic violence in the home.

DCS developed multiple permanency plans in this case. The final plan, developed in March 2020, focused on the remaining barriers to family reunification. Mother was required to complete the recommendations of her most recent alcohol and drug assessment, namely inpatient drug treatment and individual counseling. She was also required to submit to random drug screens; be available for home visits; ensure that the home was clean, safe, and free of any domestic violence in front of the children; and participate in therapeutic supervised visitation. Many of these requirements carried over from previous plans. We conclude that the plan requirements were appropriate given the circumstances.

Next, we 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. A "[t]rivial, minor, or technical" deviation from the permanency plan's requirements does not qualify as substantial noncompliance. *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004).

Mother argues that the court applied the wrong standard here. The court concluded that DCS met its burden of proof on this ground "as Mother was not in substantial compliance with the permanency plan." A parent's "failure to substantially comply with the permanency plans is not . . . a ground for termination." *In re Daylan D.*, No. M2020-01647-COA-R3-PT, 2021 WL 5183087, at *8 (Tenn. Ct. App. Nov. 9, 2021). The termination statute requires clear and convincing evidence of a parent's "substantial noncompliance." *In re Jaylah W.*, 486 S.W.3d 537, 555 (Tenn. Ct. App. 2015). When determining whether a parent's noncompliance with a plan was substantial, the court must do more than "count[ ] up the tasks in the plan to determine whether a certain number have been completed." *In re Carrington H.*, 483 S.W.3d 507, 537 (Tenn. 2016). "[T]he parent's noncompliance [must be] substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met." *In re M.J.B.*, 140 S.W.3d at 656 (citing *In re Valentine*, 79 S.W.3d at 548-59; *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *12 (Tenn. Ct. App. June 3, 2003)).

It is apparent from the court's analysis that it applied the appropriate standard here. It was Mother's noncompliance with the most important plan requirements that the court found significant. In the court's view, "[t]he crux of the plans . . . centered around Mother's drug addiction and the domestic violence in the home." Mother never completed her drug treatment recommendations. And she refused to leave an abusive situation.

On appeal, Mother highlights her efforts before Alex entered foster care. She obtained the required assessments and participated in mental health services. She also completed parenting classes and homemaker services. For almost six months in 2019, she had clean drug screens. But then she relapsed.

Certainly, parents with drug addictions can "have false starts and set backs, as well as successes and, regrettably, backsliding," and we should take that into account. *In re M.J.M., Jr.*, No. M2004-02377-COA-R3-PT, 2005 WL 873302, at *11 (Tenn. Ct. App. Apr. 14, 2005), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d at 555. But "a permanency plan is not simply a list of tasks with boxes to be checked off before custody is automatically restored." *In re V.L.J.*, No. E2013-02815-COA-R3-PT, 2014 WL 7418250, at *8 (Tenn. Ct. App. Dec. 30, 2014). The plan "is an outline for doing the things that are necessary to achieve the goal of permanency in children's lives." *Id.*

Mother's efforts after her relapse fell short. She initially refused to try inpatient treatment. Although she eventually enrolled in a program, she left after only a few days. Several times in the ensuing months, she assured DCS that she was willing to try again. Yet she never did. And she remained in an abusive relationship with Father. "Improvement toward compliance should be considered in a parent's favor." *In re*

Valentine, 79 S.W.3d at 549. But here, we have the opposite.

We conclude that the evidence clearly and convincingly supports this ground for termination. Much of Mother's early progress unraveled after her relapse. She did not follow the treatment recommendations of her alcohol and drug assessment. And she prioritized her relationship with Father over her children.

3. Persistent conditions

The trial court also found termination of Mother's 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 at 871. 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. The goal is to avoid having a child in foster care for a time longer than reasonable for the parent to demonstrate the ability to provide a safe and caring environment for the child. *In re Arteria H.*, 326 S.W.3d 167, 178 (Tenn. Ct. App. 2010), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d at 555. Thus, 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:

> 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 . . .;
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> (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.

There is no dispute that at the time of trial, the children had been removed from Mother's custody for well over six months. *See* Tenn. Code Ann. § 36-1-113(g)(3)(B) ("The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard."). And the trial court found, based on Mother's own testimony, that domestic abuse, mental health issues, and drug addiction continued to persist.

But the court made no findings as to the remaining elements of this ground. The court did not address the likelihood that these conditions could be remedied at an early date or whether continuation of the parent/child relationship greatly diminished the children's chances for permanency. *See id.* § 36-1-113(g)(3)(A)(ii), (iii).

Specific findings of fact and conclusions of law are required in every parental termination case. *Id.* § 36-1-113(k); *In re Angela E.*, 303 S.W.3d at 251. Failure to comply with this requirement "fatally undermines the validity of a termination order." *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004). This Court "cannot simply review the record de novo and determine for ourselves where the preponderance of the evidence lies as we would in other civil, non-jury cases." *State v. C.H.K.*, 154 S.W.3d 586, 591 (Tenn. Ct. App. 2004) (citations omitted); *see In re Angela E.*, 303 S.W.3d at 255 (refusing to conduct de novo review in the absence of appropriate findings).

Ordinarily, we would vacate the termination decision and "remand the case to the trial court with directions to file [an appropriate order]." *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 2004). But remand is unnecessary when it would not serve the interest of any party. *Id.* It "would only further prolong these proceedings without altering the outcome." *In re Abbigail C.*, No. E2015-00964-COA-R3-PT, 2015 WL 6164956, at *14 (Tenn. Ct. App. Oct. 21, 2015). Because other grounds for termination have been established in this case, we decline to remand for additional findings on the ground of persistence of conditions. *See In re Dominic B.*, No. E2020-01102-COA-R3-PT, 2021 WL 774185, at *8 & n.12 (Tenn. Ct. App. Mar. 1, 2021); *In re Navada N.*, 498 S.W.3d 579, 594-95 (Tenn. Ct. App. 2016); *see also In re Mickeal Z.*, E2018-01069-COA-R3-PT, 2019 WL 337038, at *13 & n.8 (Tenn. Ct. App. Jan. 25, 2019) (remanding case when trial court did not make appropriate findings of fact or conclusions of law and no other grounds for termination had been established). We determine that persistence of conditions cannot support termination of Mother's parental rights to these children.

4. Severe Child Abuse

The trial court also found that DCS established severe abuse as a ground for termination of Mother's parental rights. A parent's rights may be terminated if "[t]he parent . . . 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 have committed severe child abuse against any child." Tenn. Code Ann. § 36-1-113(g)(4).

Mother contends that we should dismiss this ground because the trial court did not specify the exact definition of severe child abuse that it applied. This Court has vacated a trial court's decision to terminate parental rights on this ground when we were unable to discern the applicable definition. *See In re L.F.*, No. M2020-01663-COA-R3-PT, 2021 WL 3782130, at *12-13 (Tenn. Ct. App. Aug. 26, 2021) (vacating the trial court's decision to terminate on this ground because it was unclear "whether the trial court relied on one of the many offenses listed in definition (C) or some other definition"); *In re S.S.-G.*, No. M2015-00055-COA-R3-PT, 2015 WL 7259499, at *9-13 (Tenn. Ct. App. Nov. 16, 2015) (vacating because the "trial court's failure to include the specific statutory definitions that it relie[d] upon" precluded "meaningful review"). But a missing citation is not always fatal. *See, e.g.*, *In re Kailey A.*, No. E2021-00801-COA-R3-PT, 2022 WL 773617, at *9 (Tenn. Ct. App. Mar. 14, 2022); *In re Angelleigh R.*, No. M2020-00504-COA-R3-JV, 2021 WL 1994033, at *8 (Tenn. Ct. App. May 19, 2021); *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *9 (Tenn. Ct. App. May 15, 2009). Here, the "remainder of the order is sufficiently specific" to allow meaningful appellate review. *See In re K.H.*, 2009 WL 1362314, at *9.

We conclude that the facts amply support the trial court's finding of severe abuse. The trial court found that Mother committed severe child abuse against Alex because she smoked marijuana during her pregnancy and a drug screen on the child's umbilical cord blood was positive for marijuana. While Mother claimed that she stopped smoking when she discovered she was pregnant, the trial court did not find her testimony credible. 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).

The definitions of "severe child abuse" in subsections (A) and (E) are relevant to these facts. *See* Tenn. Code Ann. § 37-1-102(b)(27)(A), (E) (Supp. 2020); *see also In re Kailey A.*, 2022 WL 773617, at *9 (reasoning that both subsections were relevant to the allegations and evidence). These subsections define "severe child abuse" as

> (A)(i) The 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;
>
> . . .

> (E) Knowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child[.]

Tenn. Code Ann. § 37-1-102(b)(27)(A), (E).

This Court has long held that a mother's ingestion of drugs while pregnant can be considered severe abuse as defined in subsection (A). *See In re Colton B.*, No. M2018-01053-COA-R3-PT, 2018 WL 5415921, at *8 (Tenn. Ct. App. Oct. 29, 2018); *In re Benjamin M.*, 310 S.W.3d 844, 848 (Tenn. Ct. App. 2009); *In Matter of M.J.J.*, No. M2004-02759-COA-R3-PT, 2005 WL 873305, at *8 (Tenn. Ct. App. Apr. 14, 2005). "[P]renatal drug use to the point where the child tests positive for the substance at birth *is* exposure of the child to drugs." *In re Lucas L.*, No. M2020-01614-COA-R3-JV, 2022 WL 2431709, at *6 (Tenn. Ct. App. July 5, 2022), *perm. app. denied*, (Tenn. Nov. 17, 2022) (emphasis in original). These facts can also constitute severe abuse as defined in subsection (E). *See In re Jah'Lila S.*, No. W2021-01199-COA-R3-PT, 2022 WL 4362839, at *10 (Tenn. Ct. App. Sept. 21, 2022) (applying subsection (E) when it was undisputed that child tested positive at birth for marijuana and cocaine); *In re Legion S.*, No. E2021-01198-COA-R3-PT, 2022 WL 17104411, at *4 (Tenn. Ct. App. Nov. 22, 2022) (citing subsections (A) and (E) on similar facts).

5. Failure to Manifest an Ability and Willingness to Assume Custody or Financial Responsibility for the Child

Finally, the court found termination of Mother's rights appropriate under Tennessee Code Annotated § 36-1-113(g)(14). Under this ground, a parent's rights may be terminated if he or she

> [1] has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and [2] placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Tenn. Code Ann. § 36-1-113(g)(14). Both prongs must be established by clear and convincing evidence. *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020).

The trial court found that Mother was not willing to assume legal and physical custody of her children. She had "ample opportunity" to address her issues with domestic violence and drug addiction. Yet she chose to remain in an abusive relationship and continued to use illegal drugs. According to the court, Mother's conduct when she "kn[ew] her children [could] not live in such an environment," was "proof positive" of her unwillingness to assume custody.

As Mother points out, the court failed to address the second prong of the failure to manifest ground.[3] The court made no findings relevant to whether returning the children to Mother's custody "would pose a risk of substantial harm to the[ir] physical or psychological welfare." Tenn. Code Ann. § 36-1-113(g)(14). Clear and convincing evidence of both prongs is required to terminate parental rights on this ground. *In re Neveah M.*, 614 S.W.3d at 674. And we cannot conduct our own de novo review of the proof. *In re Angela E.*, 303 S.W.3d at 255.

Clear and convincing evidence supports termination of Mother's parental rights on other grounds. So a remand is unnecessary here. *See In re Navada N.*, 498 S.W.3d at 594-95. But the failure to manifest ground cannot support the termination of Mother's parental rights.

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.

Tennessee Code Annotated § 36-1-113(i) lists the factors that courts must consider in making a best interest analysis. The "factors are illustrative, not exclusive, and any party to the termination proceeding is free to offer proof of any other factor relevant to the best interests analysis." *In re Gabriella D.*, 531 S.W.3d 662, 681 (Tenn. 2017). 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.

The trial court concluded that terminating Mother's parental rights was in the children's best interest. In reaching that conclusion, the court considered a list of twenty best interest factors, which became effective in 2021. *See* 2021 Tenn. Pub. Acts 509 (ch. 190). When the petition was filed, Tennessee Code Annotated § 36-1-113(i) listed nine factors bearing on the best interest determination. *See* Tenn. Code Ann. § 36-1-113(i) (Supp. 2020).

But the court's use of the wrong factors does not necessarily constitute reversible error. *See In re Bralynn A.*, No. M2021-01188-COA-R3-PT, 2022 WL 2826850, at *9

[3] DCS suggests that the court addressed the substantial harm prong when it found that "Mother kn[ew] her children [could] not live in such an environment." We cannot agree. It is evident that the court's finding addressed Mother's willingness to assume custody.

(Tenn. Ct. App. July 20, 2022), *perm. app. denied*, (Tenn. Aug. 12, 2022); *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). Mother asks us to consider the evidence in light of the appropriate factors. We accede to her request "because the old factors are essentially contained within the new factors." *In re Bralynn A.*, 2022 WL 2826850, at *9; *see also In re Da'Moni J.*, 2022 WL 214712, at *23 (comparing the two versions).

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). 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 Mother. Yet Mother had shown "no serious desire" to change. She "could point to relatively few changes in her life since her children entered custody." While she availed herself of some of the offered services, she did not follow through on her recommended treatment. The evidence does not preponderate against these findings.

Mother contends that the third factor, which considers the consistency of visitation, weighs in her favor. *See id.* § 36-1-113(i)(3). The trial court found otherwise. We cannot say that the evidence preponderates against the court's finding. DCS established that the consistency of Mother's visitation dropped off after visitation went virtual in March 2020. Mother blamed her missed visits primarily on technology issues. But she rarely complained to DCS about any technology issues. When she did, the visit supervisor provided other options. Significantly, the supervisor reported that Mother cut some visits short and postponed others. Mother's last visit was two months before trial. After that, Mother stopped responding to the supervisor's calls and text messages.

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). Mother insists that this factor weighs against termination. The trial court found that Mother no longer had a "healthy and secure" relationship with the children. While Ethan and Avah initially appeared happy to see Mother, over time, they had stopped talking about her. The lengthy separation had taken a toll. We cannot say that the evidence preponderates against these findings. At trial, Ethan was six and Avah, five. They had been in foster care for three years. They still loved Mother. Multiple witnesses testified as much. But over time, the relationship between the older children and Mother had become more distant. They called Mother by her first name. And when asked to draw a picture of their family, they drew their siblings and the foster parents. Only Ethan, the oldest, remembered to add Mother to his drawing.

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 the children have been in foster care for "longer than they were ever with

Mother." They have developed a bond with their current foster family. They refer to their foster mother as "mommy." Changing the children's environment now would have a significant detrimental effect on them.

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). Mother contends this factor should weigh in her favor because there was no evidence of any abuse or neglect of the children. But this factor is not limited to abuse or neglect toward a child. It also considers abuse directed at another adult in the family. The trial court found that this factor weighed in favor of termination based on the evidence of domestic abuse.

The seventh factor looks to see whether the parent's home environment is healthy and safe. *Id.* § 36-1-113(i)(7). The court found that Mother "consistently lived in an abusive and drug riddled environment." She never followed through on the recommended addiction treatment. And she failed to remove herself from an abusive relationship. The evidence does not preponderate against these findings. Mother gave conflicting testimony about the current status of her relationship with Father. She never completed inpatient drug treatment. She was arrested on drug charges shortly before trial.

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 this factor favored termination because Mother had failed to address her mental health issues. We agree. Mother stopped attending mental health counseling in August 2019.

Lastly, the ninth factor examines the parent's child support history. *Id.* § 36-1-113(i)(9). The court found this factor weighed in Mother's favor. She had provided financial support for the children "as best as she could."

Here, the combined weight of the proven facts amounts to clear and convincing evidence that termination is in the children's best interest. At the time of the trial, Ethan and Avah had been in foster care for three years. Alex had been in custody for one year. And the foster parents, who wished to adopt, gave the children the earliest possible chance at permanency.

III.

We affirm the termination of Mother's parental rights. The record contains clear and convincing evidence to support three statutory grounds for termination of Mother's parental rights to Alex and two grounds for termination of her parental rights to Ethan and Avah. We also conclude that terminating Mother's parental rights was in the children's best interest.

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