

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 1, 2023

IN RE DESTYNI S. ET AL.

**Appeal from the Chancery Court for Lawrence County
No. 21-19872 Stella L. Hargrove, Judge**

No. M2022-00910-COA-R3-PT

In this case involving termination of the mother’s parental rights to her two children, the Lawrence County Chancery Court (“trial court”) determined that seven statutory grounds for termination had been proven by clear and convincing evidence. The trial court further determined that clear and convincing evidence demonstrated that termination of the mother’s parental rights was in the children’s best interest. The mother has appealed. Discerning no reversible error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ARNOLD B. GOLDIN, J., joined.

Ben Bush, Summertown, Tennessee, for the appellant, Christine C.

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

OPINION

I. Factual and Procedural Background

This case focuses on Destyni S. and Julyus S., the minor children (“the Children”) of Christine C. (“Mother”) and Justin S. (“Father”). The Children, who were born in Boston, Massachusetts, were twelve and three years of age, respectively, and residing in Lawrence County, Tennessee, with their parents when the Lawrence County Juvenile Court (“juvenile court”) entered an “Ex Parte Bench Order” on October 19, 2020, placing the Children in the protective custody of the Tennessee Department of Children’s

Services (“DCS”). The juvenile court had issued an attachment requiring Mother to appear after she had failed to have Destyni present for truancy court. When Mother appeared upon execution of the attachment, she failed a drug screen, testing positive for methamphetamine, amphetamine, benzodiazepine, and buprenorphine. The court noted that Mother may have had a prescription for buprenorphine. Mother subsequently testified during the termination trial that Father had forced methamphetamine into her during intimate relations. Mother also acknowledged that the Children, particularly Destyni, had witnessed Father’s dragging Mother across the house by her hair on more than one occasion.

In response to the juvenile court’s bench order, DCS filed a petition alleging that the Children were dependent and neglected as to both parents due to educational neglect and drug exposure. DCS also averred that Mother was “moving from motel to motel,” did “not have the means to care for the children,” and was on supervised probation after entering a guilty plea on criminal charges. DCS further averred that Father had departed the state and expressed an intent not to return.¹ Additionally, DCS gave notice in its petition of its intent to seek a finding of severe abuse due to Julyus’s having tested positive for amphetamine and methamphetamine.

Following a hearing, the juvenile court entered an order on April 26, 2021, adjudicating the Children dependent and neglected as to both parents pursuant to Tennessee Code Annotated §§ 37-1-102(b)(13)(B), (F), and (G). Although the juvenile court found that Destyni was not severely abused, it further found that Julyus was severely abused by both parents pursuant to Tennessee Code Annotated § 37-1-102(b)(27)(E), which provides a severe abuse definition of “[k]nowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child.”

Prior to filing the petition for termination of parental rights, DCS developed three permanency plans involving Mother, spanning November 13, 2020, the date the first plan was developed, through August 2, 2021, the date of the third plan’s development. Each

¹ Father responded to the dependency and neglect petition via a form stating that he was residing in Boston but wished to participate in the court proceedings. Trial testimony from DCS case workers and documentation from Suffolk County, Massachusetts, indicated that Father was incarcerated in Massachusetts for several months while the Children were in protective custody. However, by the time of the termination petition’s filing, DCS was unable to locate Father and subsequently obtained the trial court’s permission to serve Father with the petition via publication. During the termination trial, DCS requested a default judgment against Father, and the court heard evidence regarding both parents. At the close of trial, the court terminated the parental rights of Father as well as Mother. Inasmuch as Father has not appealed the termination of his parental rights to the Children, we will confine our analysis to those facts relevant to Mother’s appeal.

permanency plan had been ratified by the juvenile court and was presented by DCS as part of the juvenile court record during the termination trial. Mother's responsibilities set forth in the first plan included undergoing an alcohol and drug assessment and following all resultant recommendations, submitting to random drug screens, refraining from using alcohol and non-prescribed medications, refraining from associating with others who were actively under the influence of or selling drugs, avoiding any further criminal charges, undergoing a mental health assessment and following all resultant recommendations, signing a release of information with the mental health provider, visiting the Children regularly, obtaining and maintaining safe and reliable income, obtaining and maintaining housing for four consecutive months and providing proof of same to DCS, paying household utilities on time, refraining from allowing any illegal activity in the home, participating in age-specific parenting education classes, completing domestic violence classes, completing homemaker education classes with maintenance of minimal housekeeping standards, providing proof of reliable transportation, notifying the family services worker within three days of any address or phone number change, and paying child support in accordance with the Tennessee Child Support Guidelines.

Mother's responsibilities in the subsequent permanency plans remained substantially similar. However, upon a motion filed by the court-appointed guardian *ad litem*, attorney Amy L. Schisler ("GAL"), the juvenile court entered an order suspending Mother's visitation with the Children on April 5, 2021, prior to development of the second permanency plan. In its order suspending visitation, the juvenile court found that suspension was in the best interest of the Children because Mother was "not compliant with any steps on the Permanency Plan ratified on January 25, 2021." The juvenile court directed that Mother's visitation would be suspended until she complied with plan requirements of (1) submitting to and passing routine drug screens, (2) complying with a mental health assessment and beginning to follow resultant recommendations, and (3) complying with a new alcohol and drug assessment and beginning to follow resultant recommendations. In its April 26, 2021 order adjudicating the Children dependent and neglected, the juvenile court directed that visitation would "remain as previously ordered," maintaining the suspension of Mother's visitation until she complied with the three steps outlined in the prior order.

During the termination trial, DCS presented Mother's mental health records from Centerstone in Lawrenceburg, Tennessee, and her substance abuse assessment and treatment records from Health Connect America in Pulaski, Tennessee ("HCA"). Mother completed two alcohol and drug assessments during the pendency of this case. The first was with HCA on October 26, 2020, and Mother was diagnosed with a mild substance use disorder. The resultant recommendations included attending intensive outpatient therapy ("IOP"), remaining substance free, and complying with the responsibilities of her permanency plans. Mother did complete multiple sessions of IOP with HCA, receiving a

“Certificate of Completion” dated April 14, 2021, and was discharged from IOP on April 27, 2021, with a recommendation to “attend aftercare as able to do so.” However, while participating in IOP, Mother, although testing negative for controlled substances four times on April 21, July 9, November 16, and December 28 of 2021, also tested positive several times as summarized below:

November 18, 2020:	marijuana and benzodiazepines
January 13, 2021:	benzodiazepines
February 24, 2021:	marijuana and methamphetamine
March 3, 2021:	benzodiazepines
March 17, 2021:	benzodiazepines (faint line)

On April 15, 2021, Mother failed to appear for a hair follicle drug screen.

Mother’s discharge summary from IOP included a recommendation that she attend an “aftercare” program. However, according to an HCA progress note, Mother soon stopped attending the aftercare program, claiming that she had left because another person in the class had lied about her. Mother voluntarily admitted herself to a rehabilitation center, Mirror Lake Recovery Center (“Mirror Lake”), on May 29, 2021, but departed five days later. Mother acknowledged at trial that she, not the doctors at Mirror Lake, decided that she no longer needed treatment because she was not what she termed in “active addiction.” Mother subsequently tested positive for unprescribed substances on three occasions prior to her next alcohol and drug assessment:

June 2021:	marijuana
August 9, 2021:	methamphetamine, amphetamine, and marijuana (nailbed screen)
September 14, 2021:	benzodiazepines and marijuana

According to a subsequent HCA progress note, Mother had refused to undergo a hair follicle screen on April 26, 2022. Mother testified, however, that she had not refused the hair follicle screen and had only expressed to HCA staff that she was tired of having her hair pulled for screening.

Mother underwent a second alcohol and drug assessment on May 3, 2022. Although this assessment was presented to the trial court as part of Mother’s HCA records, Mother acknowledged that she had not provided a copy of it to DCS. The assessor recommended that Mother continue with outpatient services. Mother testified that the assessor had told her “just to do aftercare and to continue doing what I was doing and staying drug free.”

At the time of the third permanency plan's ratification, Mother's visitation was still suspended. In its order ratifying the third permanency plan, entered on September 22, 2021, the juvenile court found that Mother had not been in substantial compliance with the previous plans, stating: "Specifically [Mother] continues to incur criminal charges, fail drug screens, and is not compliant with alcohol and drug treatment/services. Additionally she does not have safe & stable housing." A fourth permanency plan was developed subsequent to the filing of the termination petition and ratified by the juvenile court on March 10, 2022. DCS also noted in this plan that Mother's visitation continued to be suspended. It is undisputed that Mother's last visit with the Children occurred on March 26, 2021.

Prior to the Children's removal into protective custody, Mother had incurred a shoplifting charge on April 8, 2020, and a Class D felony charge of burglary, other than a habitation, related to an incident occurring at a Walmart on September 24, 2020. She pled guilty to the burglary charge on February 25, 2021, and was sentenced to two years of probation. Subsequent to the Children's removal, Mother incurred a criminal charge of possession of methamphetamine in April 2021 and was issued a felony probation warrant. According to her probation officer, Cile Conce, who testified during trial, Mother entered guilty pleas to theft and possession of drug paraphernalia charges on January 19, 2022, and was currently serving a three-year cumulative sentence of probation with a full expiration date of January 24, 2024.

DCS filed its petition to terminate the parental rights of Mother and Father to the Children in the trial court (chancery court) on September 13, 2021. As relevant on appeal, DCS alleged statutory grounds against Mother of (1) abandonment by failure to visit in the four months preceding the filing of the petition, (2) abandonment by failure to support in the four months preceding the filing of the petition, (3) abandonment by failure to provide a suitable home, (4) substantial noncompliance with the permanency plans, (5) persistence of conditions leading to removal of the Children, (6) severe child abuse as found in the juvenile court's adjudicatory order, and (7) failure to manifest an ability and willingness to assume custody of and financial responsibility for the Children. DCS further alleged that it was in the Children's best interest for Mother's parental rights to be terminated. Upon Mother's filing of an affidavit of indigency, the trial court appointed counsel to represent her and appointed Ms. Schisler to continue as the Children's GAL.

The trial court conducted a bench trial on June 1, 2022. DCS called Mother as an adverse witness and also presented testimony from Melissa Saxon, who had served as a DCS family service worker and child protective services investigator on the case; Bianca Cathey, who had served as the most recent DCS family service worker assigned to the case; Officer Conce; and R.W., the Children's foster mother ("Foster Mother"). DCS also presented the juvenile court dependency and neglect and permanency plan records,

as well as Mother's Centerstone and HCA records. Foster Mother's and DCS workers' testimonies demonstrated that the Children had been in the same foster home since their placement in protective custody and that the Children were flourishing in the placement. Foster Mother further testified that she and her wife, L.W. (collectively, "Foster Parents"), desired to adopt the Children.

In addition to her own testimony, Mother presented testimony from a friend, S.D., who had attended church with Mother and had been assisting her with transportation. Mother also presented an affidavit, stipulated to by DCS, that had been executed by Dr. William Bartz, Mother's suboxone treatment physician, on May 31, 2022. Mother testified generally that she had fulfilled all requirements of the permanency plans. However, she provided scant documentation of having completed requirements, particularly those related to employment, stable housing, mental health and substance abuse treatment, and child support payments. Mother testified that she had begun consulting Dr. Bartz for suboxone treatment after deciding that a therapist she had been seeing at HCA was not a "good fit" for her. According to Dr. Bartz's May 2022 affidavit, Mother had been seen in his office for "several months" and had "attended her meetings, and appointments." Dr. Bartz opined that Mother had "shown a great deal of improvement with her coping skills, job skills, and overall mental wellbeing."

In a final order entered on June 22, 2022, the trial court determined that statutory grounds existed to terminate the parental rights of both parents. As to Mother, the court found that she was not a credible witness and that DCS had proven all seven alleged statutory grounds by clear and convincing evidence. Specifically regarding the effect of the suspension of Mother's visitation rights, the court determined that "the pathway to restore [Mother's] right to see her children was clear" but that Mother had "failed to do so." Noting Dr. Bartz's affidavit, the court determined that it "reflect[ed] no specific information as to treatment [of Mother] during the statutory period" related to the abandonment ground of failure to visit, was not accompanied by proof of urine drug screen results, and gave the impression that Mother's "treatment with Dr. Bartz was recent, and clearly not within the statutory period." Upon finding that all twenty of the statutory best interest factors provided in Tennessee Code Annotated § 36-1-113(i) weighed in favor of termination, the court determined that, by clear and convincing evidence, termination of Mother's parental rights was in the Children's best interest. Mother timely appealed.

II. Issues Presented

Mother presents four issues on appeal, which we have restated slightly as follows:

1. Whether the trial court erred by finding that DCS had satisfied its burden of proof by clear and convincing evidence.
2. Whether the trial court erred by finding that terminating Mother's parental rights was in the best interest of the Children.
3. Whether the trial court erred by terminating Mother's parental rights based on the "grounds" of potential substantial harm to the Children.
4. Whether the trial court created unfair prejudice that substantially outweighed the probative value by allowing irrelevant evidence and not allowing Mother's counsel to lay the grounds for an objection.

Mother does not expressly raise an issue or issues concerning the specific seven statutory grounds found by the trial court. Mother's first issue is essentially a statement of the standard of review in parental rights termination cases. In her argument section for this issue, Mother focuses on the two statutory grounds of abandonment by failure to visit and by failure to financially support the Children. In her argument for the third issue listed above, Mother cites a statutory ground involving the potential of substantial harm to a child that is applicable only to putative fathers and was not alleged or found by the trial court in the instant action. *See* Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv). However, the trial court did properly consider "a risk of substantial harm to the physical or psychological welfare" of the Children as an element of the statutory ground of failure to manifest an ability and willingness to personally assume legal and physical custody of or financial responsibility for the Children, *see* Tenn. Code Ann. § 36-1-113(g)(14), and the court's finding regarding this element appears to be what Mother is questioning.

"Appellate review is generally limited to the issues that have been presented for review." *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012) (citing Tenn. R. App. P. 13(b)). However, our Supreme Court has instructed that in parental rights termination cases, this Court must "review thoroughly the trial court's findings as to each ground for [parental rights] termination and as to whether termination is in the child's best interests" *In re Carrington H.*, 483 S.W.3d 507, 525 (Tenn. 2016). Noting this precept, DCS has raised the following additional issue, which we have restated slightly:

5. Whether the trial court erred in determining that statutory grounds existed to terminate Mother's parental rights to the Children.

We will therefore consider each of the statutory grounds found by the trial court, as well as the evidentiary issue raised by Mother, before proceeding to review the trial court's best interest analysis.

III. Standard of Review

In a termination of parental rights case, this Court has a duty to determine “whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court’s findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness unless the evidence preponderates against those findings. *See* Tenn. R. App. P. 13(d); *see also In re Carrington H.*, 483 S.W.3d at 523-24; *In re F.R.R., III*, 193 S.W.3d at 530. Questions of law, however, are reviewed *de novo* with no presumption of correctness. *See In re Carrington H.*, 483 S.W.3d at 524 (citing *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009)). The trial court’s determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

“Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions.” *Keisling v. Keisling*, 92 S.W.3d 374, 378 (Tenn. 2002). It is well established, however, that “this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). As our Supreme Court has explained:

The parental rights at stake are “far more precious than any property right.” *Santosky [v. Kramer]*, 455 U.S. [745,] 758-59 [(1982)]. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger and of [“]severing forever all legal rights and obligations of the parent or guardian of the child.” Tenn. Code Ann. § 36-1-113(1)(1); *see also Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is “final and irrevocable”). In light of the interests and consequences at stake, parents are constitutionally entitled to “fundamentally fair procedures” in termination proceedings. *Santosky*, 455 U.S. at 754; *see also Lassiter v. Dep’t of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated “fundamentally fair procedures” is a heightened standard of proof—clear and convincing evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental

parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.* 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

* * *

In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97.

In re Carrington H., 483 S.W.3d at 522-24. “[P]ersons seeking to terminate [parental] rights must prove all the elements of their case by clear and convincing evidence,” including statutory grounds and the best interest of the child. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010).

IV. Evidentiary Issue

Mother contends that the trial court erred by overruling her counsel’s objection to purportedly irrelevant evidence presented during Ms. Cathey’s testimony without allowing Mother’s counsel to lay the groundwork for the objection, allegedly creating unfair prejudice substantially outweighing the probative value of the evidence. Mother posits that based on one exchange during the GAL’s questioning, this Court should reverse the trial court’s decision to terminate her parental rights and remand this case for a new trial. DCS contends that Mother has failed to demonstrate how the “fleeting exchange” she challenges prejudiced the trial court’s ultimate decision to terminate Mother’s parental rights to the Children. Upon careful review of the record, we discern no reversible error in the trial court’s overruling of the objection at issue.

Tennessee Rule of Evidence 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Jernigan v. Paasche*, 637 S.W.3d 746, 756 (Tenn. Ct. App. 2021). All

Mother's Counsel: I'd object.

GAL: Well, I mean, I'm just asking if she knows.

Trial Court: All right.

Mother's Counsel: I don't know that she does the IOP is my objection.

Trial Court: What?

Mother's Counsel: I don't know that Ms. Cathey does IOP. The question is about people showing up and what they do in IOP. I don't believe that's her job.

Trial Court: Well, you need to lay a foundation for how she might know that, [GAL].

GAL: [Ms. Cathey], what did you do previous to working for the Department of Children's Services?

Ms. Cathey: I worked at Health Connect.

GAL: And how long did you work at Health Connect?

Ms. Cathey: Like, four years.

GAL: So are you familiar with their IOP program?

Ms. Cathey: Yes, ma'am.

GAL: Are you familiar with the completion and graduation of the IOP?

Ms. Cathey: Yes, ma'am.

GAL: Have people showed up and gone to IOP but – and completed the amount of classes they were supposed to complete and still be addicted because they don't pass drug screens?

Mother's Counsel: I'm going to object.

Ms. Cathey: Yes.

Trial Court: Overruled. You said yes.

GAL: So even though you complete a program because you showed up, does that mean you graduated?

Ms. Cathey: No, ma'am.

(Emphasis added.) On appeal, Mother specifically challenges the trial court's overruling of her counsel's objection to the underlined statement above.

At the outset, we note that in the context of the entire exchange, it appears that Mother's counsel did state at least a partial basis for his objection. Prior to the trial court's direction that a foundation must be laid for how Ms. Cathey would have general knowledge of the IOP program, Mother's counsel had objected to the GAL's question: "Have you ever known of people to show up and go to IOP but not graduate or not" Mother's counsel then stated that his objection was based on his not knowing whether Ms. Cathey "does IOP," explaining further: "The question is about people showing up and what they do in IOP. I don't believe that's her job." The GAL proceeded to ask questions regarding Ms. Cathey's experience with IOP, and Ms. Cathey testified that she had previously been employed by HCA for four years and was familiar with the IOP program. When the GAL asked the question: "Have people showed up and gone to IOP but – and completed the amount of classes they were supposed to complete and still be addicted because they don't pass drug screens," she was essentially restating the prior question after the groundwork had been laid, albeit with the addition of asking if people completing IOP sometimes still failed drug screens. When the trial court overruled the objection, the ruling appears to have been based on an assumption that Mother's counsel was restating the prior objection to Ms. Cathey's knowledge of the IOP program. On appeal, Mother primarily objects to the portion of the question concerning failed drug screens, and we agree that the trial court, somewhat understandably, did not afford Mother's counsel the opportunity during testimony to explain a further objection to that portion of the question.

As to relevance, Mother argues that the GAL's "general" question concerning people who attend IOP classes and yet may fail drug screens was not specific to Mother's situation and "require[d] an assumption that could lead the trier of fact to determine that [Mother] would not have been able to pass a drug screen while finishing an IOP." We do not find that the generality of the question rendered it irrelevant inasmuch as the question asked for information regarding the IOP program that Mother had completed and the

effect of completing the program on individuals who were similarly situated to Mother in this regard. Stated another way, the GAL's question inquired whether people who complete an IOP program are guaranteed to remain drug free, and the answer, of course, is that there can be no such guarantee. Given that Mother had completed an IOP program and subsequently tested positive for illicit substances, the question was relevant to establish "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Tenn. R. Evid. 401.

This issue then narrows to whether the GAL's question regarding individuals who complete an IOP program and yet fail drug screens caused such a danger of unfair prejudice in the trial court's evaluation of the facts that any probative value was outweighed. *See* Tenn. R. Evid. 403. We determine that it did not. The trial court made no general findings in its final order concerning individuals who complete IOP and then fail drug screens. Specific to Mother, the trial court found that she had "completed IOP in April, 2021" while further finding that she "continues to fail drug screens including a nail bed test for meth, amphetamines and THC [marijuana]." These factual findings were supported by the evidence of Mother's drug screens conducted in June, August, and September of 2021, all subsequent to Mother's April 2021 completion of IOP. Neither the trial court's oral ruling nor its final order contained any indication that the court based these findings on Ms. Cathey's testimony that she had observed other individuals who failed drug screens after completing IOP.

We therefore conclude that to the extent that the trial court should have allowed Mother's counsel to explain his objection to the GAL's expanded question, such error was harmless. Mother is not entitled to relief on this issue.

V. Statutory Grounds

Tennessee Code Annotated 36-1-113 (Supp. 2022) lists the statutory requirements for termination of parental rights, providing in relevant part:

- (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4

* * *

- (c) Termination of parental or guardianship rights must be based upon:
 - (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
 - (2) That termination of the parent's or guardian's rights is in the best interests of the child.

The trial court determined that the evidence clearly and convincingly supported a finding of seven statutory grounds to terminate Mother's parental rights: (1) abandonment through failure to visit the Children; (2) abandonment through failure to financially support the Children; (3) abandonment through failure to provide a suitable home; (4) substantial noncompliance with the reasonable requirements of the permanency plans; (5) persistence of the conditions leading to removal of the Children; (6) failure to manifest an ability and willingness to assume custody of the Children; and (7) specifically concerning Julyus, severe abuse. We will address each statutory ground in turn.

A. Statutory Abandonment

Concerning statutory abandonment, Tennessee Code Annotated § 36-1-113(g)(1) provides, as relevant to this action:

- (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
 - (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred; . . .

Regarding the definition of abandonment applicable to the first two grounds at issue here, Tennessee Code Annotated § 36-1-102(1) (Supp. 2022) defines abandonment in pertinent part as:

- (A)(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading 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[.]

1. Failure to Visit the Children

Within the argument section of her appellate brief addressing the issue of whether DCS “satisfied its burden of proof,” Mother contests the trial court’s findings regarding the statutory ground of abandonment. Citing the abandonment definition quoted above, which is applicable to both failure to visit and failure to support, Mother conflates the two throughout her argument. We note at the outset that abandonment through failure to visit and abandonment through failure to support each constitutes a separate statutory ground for termination of parental rights. *See, e.g., In re Adoption of Angela E.*, 402 S.W.3d 636, 641-42 (Tenn. 2013) (determining that the record did not support the ground of abandonment based on failure to support but did support the ground of abandonment based on failure to visit).

Although not stated directly concerning the statutory ground of failure to visit, Mother appears to argue that DCS did not carry its burden of proof to establish that her failure to visit was willful. However, as the trial court noted in its final order, Mother did not raise the affirmative defense of lack of willfulness in regard to either the ground of failure to visit or the ground of failure to support.² In her reference to the elements that must be proven to establish failure to support, Mother relies upon an opinion of this Court, *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004), that was decided pursuant to a prior version of the statute under which the petitioner did have to prove willfulness as an element of both the failure to visit and the failure to support grounds. The current version of the statutory abandonment definition, effective at the time of the instant petition’s filing, provides in relevant part:

For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian’s failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence

² Under certain circumstances, this Court has deemed lack of willfulness as to failure to visit or support to have been tried by implied consent, pursuant to Tennessee Rule of Civil Procedure 15.02, when the parent clearly presented evidence at trial regarding lack of willfulness without objection from the petitioner. *See, e.g., In re Elijah F.*, No. M2022-00191-COA-R3-CV, 2022 WL 16859543, at *6 n.7 (Tenn. Ct. App. Nov. 10, 2022); *In re Lauren F.*, No. W2020-01732-COA-R3-PT, 2021 WL 5234712, at *8 (Tenn. Ct. App. Nov. 10, 2021). In this case, however, the trial court expressly stated in its final order that Mother had not raised the affirmative defense of lack of willfulness, and we find no indication in the record that the defense was tried by implied consent for either ground.

of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure[.]

Tenn. Code Ann. § 36-1-102(1)(I). *See In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *13 (Tenn. Ct. App. July 15, 2019) (“Under Tenn. Code Ann. § 36-1-102(1)(I), willfulness is an affirmative defense; thus, the burden is upon [the parent] to establish that his [or her] failure to [visit or support] was not willful.”).

The trial court found that clear and convincing evidence demonstrated Mother’s failure to visit the Children during the four months preceding the filing of the termination petition. As the trial court found in its final order, the four-month statutory determinative period for purposes of abandonment by failure to visit or support began on May 13, 2021, and concluded on September 12, 2021, the day prior to the filing of the termination petition (“Determinative Period”). *See In re Joseph F.*, 492 S.W.3d 690, 702 (Tenn. Ct. App. 2016) (citing *In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (explaining that the applicable four-month statutory period preceding filing of the termination petition ends on the day preceding filing)).³

In its final order, the trial court specified the following, in pertinent part, regarding the statutory ground of failure to visit the Children:

The Court is aware that [Mother’s] visitation rights were suspended by order of the Lawrence County Juvenile Court on April 5, 2021. Exhibit 4 reflects that this order is the result of a motion filed by the Guardian *ad litem* on March 22, 2021, alleging continued failed drug screens and inappropriate issues during therapeutic visitation.

The April 5, 2021, order, suspending [Mother’s] visitation rights reflects that [Mother] was not compliant with any steps on the permanency plan. The order required suspension until [Mother] complied with three specific steps of the permanency plan. These included: submitting to and passing random drug screens; complying with a mental health assessment and “beginning to comply” with recommendations of the assessment, and complying with a new drug and alcohol assessment and “beginning to comply” with new recommendations. A review was set for April 26, 2021. Then on April 26, 2021, her rights were suspended.

³ The trial court also noted the parties’ agreement that the four-month statutory period for failure to visit and support spanned May 13, 2021, through September 13, 2021. Although this agreement erroneously included the date of the termination petition’s filing, *see In re Joseph F.*, 492 S.W.3d at 702, the record indicates that neither party relied on any facts specific to the extra day.

A permanency hearing was held on September 22, 2021. The juvenile court addressed compliance and progress of [Mother] under the permanency plan of May 11, 2021, and found as follows: “She continues to incur criminal charges; she continues to fail drug screens; she is not [compliant] with Alcohol and Drug (A&D) treatment and services, and she does not have safe and stable housing.”

[Mother] testified that she “absolutely worked the permanency plans.” The record does not support her testimony. In fact, the record reveals that [Mother] never substantially worked the permanency plans. She testified that she “did everything on the list of the order of April 5, 2021 . . . that “she did everything, but (received) no visits still.” The record does not support this. The record shows that [Mother] remained defiant and tried to control and dictate the steps under the plan.

Specifically, [Mother] denies lack of [stable] housing, testifying that she submitted addresses to DCS of where she was “staying.” The record reflects that she never showed proof of stable housing and continues today to stay with different people, whom she refers to as “friends.” [Mother] testified that she underwent an alcohol and drug assessment; that no recommendations were made, and that she chose to go to treatment on her own. She testified that she attended drug rehabilitation at Mirror Lake for five (5) days, from May 29, 2021, to June 4, 2021; maintaining she was “released early;” however, she left despite recommendations to stay. She testified: “I decided I didn’t need treatment. I was not in active addiction, and didn’t want to catch COVID again. I made the decision to leave; I chose to go into treatment, and I chose to walk away. Mirror Lake wasn’t a good fit for me; I was not in active addiction.”

The record reflects that [Mother] will not accept any responsibility for the loss of her children. [Mother] admits an opioid addiction, but quantifies her addiction as “in the past.” She does not deny that she used methamphetamine for two years, and she tried cocaine. She tested positive for methamphetamine the day of removal of the children. [Mother] emphatically denies that her drug use was a valid reason for removal, in the face of her son, Julyus, testing positive.

[Mother] testified that while she did not have a new mental health assessment, she participated in alcohol and drug therapy at Centerstone; however, she contends that the provider was not a “good fit for her,” and

that she chose to engage in suboxone treatment with Dr. William Bartz. The parties stipulated to the entry of Exhibit 6, an Affidavit of Dr. William Bartz dated May 31, 2022. The affidavit fails to reflect any specific information as to “the several months” he has seen [Mother]. Dr. Bartz states that the treatment resulted in a great deal of improvement with coping skills, job skills and overall mental wellbeing. The affidavit reflects no specific information as to treatment during the statutory period. There is no proof in the record as to positive or negative urine drug screens. The Court is of the impression that [Mother’s] treatment with Dr. Bartz was recent, and clearly not within the statutory period.

Centerstone records are Exhibit 5. The only record relevant to the statutory period is an Individual Therapy Note of June 10, 2021. In that note [Mother] told the therapist she entered the drug treatment (at Mirror Lake) hoping to get help, but instead, “it made it worse.” She reported that she now has three criminal charges to deal with; two counts of shoplifting and one count of meth possession.

Collective Exhibit 7 are records of Health Connect America. There are multiple cancellations by [Mother], as well as no-shows for therapy during the statutory period. Therapy notes that are relevant to the four-month period include a session on July 9, 2021, where [Mother] maintains she has “been compliant with everything DCS has asked her to do;” stating that “she left rehab because it was not the help she needed;” she denied any substance abuse;[] and stated “there was nothing wrong with the way she was parenting her children;” and “(she didn’t understand why she has) to complete the classes.” In a therapy session on August 16, 2021, [Mother] complained she had been compliant for four months and questioned why she “had to keep having to go through services.” On August 18, 2021, [Mother] was upset about having to take a nail bed drug test because the test covered the past eight months. On September 9, 2021, [Mother] maintained she tested positive due “to touching an object that used to contain meth — and that she is doing everything she can.” Additionally, [Mother] maintained she was not the one responsible for losing custody of her children, and she denied that any drug use by her led to the loss of her children. At trial, she first testified: “I don’t have a drug problem; I am not an addict.” Later, [Mother] testified that she is a recovering addict, but not a drug addict.

The Court does not find [Mother] to be a credible witness. She has an excuse for everything that goes wrong in her life.

The record reflects that since [Mother's] visitation rights were suspended on April 5, 2021, she has made no real or sustained effort to correct the issues that led to the suspension of her rights from April 5, 2021, to the filing of the petition on September 13, 2021. The Court finds that [Mother] had the ability to work toward reunification with the children, and that appropriate services were provided to assist her.

The trial court thereby concluded that “although [Mother's] visitation rights were suspended, the pathway to restore her right to see her children was clear and that “[s]he failed to do so.” Upon thorough review, we agree with this conclusion.

It is undisputed that Mother's last visit with the Children occurred on March 26, 2021. As the trial court noted, the juvenile court initially suspended Mother's visitation with the Children in its April 5, 2021 order, setting forth the three permanency plan responsibilities Mother must fulfill for visitation to be restored: (1) submitting to and passing routine drug screens, (2) complying with a mental health assessment and beginning to follow resultant recommendations, and (3) complying with a new alcohol and drug assessment and beginning to follow resultant recommendations. The juvenile court then maintained this visitation order, inclusive of the suspension and requirements for lifting the suspension, in its April 26, 2021 order adjudicating the Children dependent and neglected.

Mother acknowledged at trial that she knew the requirements she needed to fulfill in order to visit with the Children and claimed that she had fulfilled those requirements. However, Mother failed to produce proof of negative drug screens taken during the Determinative Period, and she did not obtain an updated mental health assessment or her second alcohol and drug assessment until approximately one month prior to trial, well after the Determinative Period had ended. Although Mother testified that she had resolved her substance abuse issues, the trial court expressly found this testimony not to be credible. We emphasize that the trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d at 838.⁴

⁴ On appeal, Mother argues generally that Ms. Cathey was not the proper DCS representative to testify concerning what occurred during the Determinative Period because “she was not even the caseworker during the crucial period between May 12, 2021, and September 12, 2021.” However, Ms. Cathey testified that she took over as the family services worker on the case in June 2021, approximately one month into the four-month Determinative Period, meaning that she was the worker involved for three of the four months during the relevant time frame. Moreover, Ms. Cathey testified that she had also served as the on-call worker when the Children were taken into protective custody, had served as a child protection investigator on the case, and had reviewed notes taken by her predecessor family services worker, Ms. Saxon. Ms. Saxon testified at the beginning of trial with primary concentration on facts

In concluding that Mother abandoned the Children by failing to visit them during the Determinative Period, the trial court referenced our Supreme Court's decision in *In re Adoption of Angela E.*, 402 S.W.3d 636, for the proposition that a prior order suspending a parent's visitation rights does not preclude a finding that the parent abandoned the child by failing to visit. In *Adoption of Angela E.*, the father "had not exercised parenting time with the children for almost three years," and "had taken no steps to have his parenting time reinstated despite language in the August 2002 order providing that he could petition the trial court 'for a hearing at his earliest convenience.'" *Id.* at 642. Applying the prior version of the statute wherein proof of willfulness was a required element, the High Court held that "the prior order suspending Father's visitation rights did not preclude a finding that Father willfully failed to visit the children" when he "took no action to advance the petition" he had previously filed to reinstate visitation. *Id.*; see *State Dep't of Children's Servs. v. J.A.H., Jr.*, No. E2005-00860-COA-R3-PT, 2005 WL 3543419, at *5 (Tenn. Ct. App. Dec. 28, 2005) (determining that the father's failure to visit the child was willful when he knew that court-ordered drug screening with a drug-free result was "the only obstacle" to resumption of his visitation rights but he failed to undergo drug screening or schedule a substance abuse assessment).

In this case, Mother knew the tasks required of her to resume visitation but failed to complete them or demonstrate significant progress toward completing them. We therefore conclude that the evidence does not preponderate against the trial court's finding by clear and convincing evidence that Mother abandoned the Children by failing to visit them during the Determinative Period. The trial court did not err in terminating Mother's parental rights to the Children based upon this statutory ground.

2. Failure to Financially Support the Children

The trial court also found that DCS had proven the statutory ground of Mother's abandonment through failure to financially support the Children by clear and convincing evidence. The Determinative Period noted above for the ground of failure to visit, May 13, 2021, through September 12, 2021, applies to this ground as well. See Tenn. Code Ann. § 36-1-102(1)(A)(i). As noted in the previous section of this Opinion, Mother did not raise an affirmative defense of lack of willfulness. See Tenn. Code Ann. § 36-1-102(1)(I).

concerning Father because at that time, Mother's counsel had announced that Mother was considering surrendering her parental rights. Following Mother's counsel's announcement that Mother did not wish to surrender her rights, DCS presented its case more specifically regarding Mother. However, Ms. Saxon did not testify further. Given that Ms. Cathey was involved in the case throughout the Children's time in protective custody and during the final three months of the Determinative Period, we find Mother's argument unavailing.

In its final order, the trial court stated the following specific findings of fact regarding this ground:

There is no court order in the record ordering child support. There is no record of child support paid by [Mother]. [Ms. Cathey] testified that [Mother] submitted copies of two check stubs, purporting to reflect child support withheld from her check. Ms. Cathey testified that the copies of check stubs reflect neither the name of the company nor the name of the purported payee, [Mother]. There are no check stubs in the record; therefore, the Court has no way of knowing if the check stubs, if valid, reflect employment during the statutory period.

There is nothing in the record to reflect that [Mother] contributed to any necessities for the children during the statutory period.

[Mother] testified that she did not understand she had to provide proof of paying child support to DCS. The Court understands her testimony to be that child support was set by the court at \$136 per month, and \$55 every other week.⁵ She testified she was only five months behind and “not caught up quite yet.” She testified: “Child support is taken out of the pay check and goes toward child support and arrearage. I didn’t know support was ordered until September, when I realized (they) had it taken out of my check.” The Court fails to understand how a wage assignment could ever work in this case. A wage assignment works only as long as the job lasts. The record reflects multiple loss of jobs as well as periods of unemployment. She made statements to Health Connect America that she was receiving monetary assistance from [Father] in between jobs. [Mother] insists that she sent proof of employment through pay stubs to DCS, testifying: I’ve sent proof of pay stubs to [Ms. Cathey]. I have pictures of pay stubs. I sent them. I figured it was monthly. I have a lot that goes on, and when I remember, I send it.” The Court questions her credibility.

The Court finds that even if the two check stubs are legitimate and represent child support paid during the statutory period, two check stubs representing support payments over a period of four months does not rise to even token support.

⁵ The figure of \$136 in the trial court’s order appears to be a clerical error in representing Mother’s testimony. Mother testified: “Altogether, I pay 236 every month, and that’s just the regular child support, and I pay 55 extra every other week.” Mother acknowledged that the “55 extra” was for arrearages.

[Mother] testified that her last job ended a few days before trial, but that she will begin a new job with Auto Zone on June 6, 2022.

There is nothing in the record indicating that [Mother] is incapacitated or unable to work.

We determine that the record supports the trial court's findings as to this statutory ground.

Tennessee Code Annotated § 36-1-102(1)(D) (Supp. 2022) defines "failed to support" or "failed to make reasonable payments toward such child's support" as "the failure, for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child" and provides that the parent's ability to make only small payments is not a defense "if no payments were made during the relevant four-month period." Token support "means that the support, under the circumstances of the individual case, is insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B).

In support of her argument that the trial court erred in finding that she had abandoned the Children, Mother partially relies on her testimony that her wages had been garnished to pay child support. However, Mother acknowledges that she "neglected to give proof to DCS" of child support paid except for a "screenshot" of two check stubs sent to Ms. Cathey via text message approximately one month prior to trial. Although Mother claimed that these check stubs were proof that her wages had been garnished, Ms. Cathey testified that in the image sent to her, neither an employer's name nor an employee's name was visible.⁶ Mother further testified that at some point in September 2021, she "found out" that child support had been ordered in February 2021 and arranged with child support enforcement to have the funds garnished from her paycheck. As the trial court noted, no child support order is in the record. It is well settled in Tennessee, however, that every parent is presumed to have knowledge of a parent's duty to support his or her minor children regardless of whether a court order to that effect is in place. *See* Tenn. Code Ann. § 36-1-102(1)(H) ("Every parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent's legal obligation to support such parent's child or children[.]").

In sum, it is undisputed that Mother provided no proof to DCS of any child support paid during the Determinative Period and also presented no proof of such at trial. As to any items that Mother may have provided for the Children, she testified that during

⁶ No copy of the screenshot appears in the record.

her visits with the Children, she “always brought stuff to do with the kids, games to play with them” and presents for special occasions. However, as DCS emphasizes, Mother did not visit the Children during the Determinative Period and thus provided no items to the Children during the relevant timeframe.

Additionally, Mother at no time during the proceedings raised an affirmative defense of lack of willfulness based on an inability to pay. We therefore conclude that the evidence does not preponderate against the trial court’s finding by clear and convincing evidence that Mother abandoned the Children by failing to financially support them during the Determinative Period.

3. Failure to Establish a Suitable Home

The trial court further found that Mother had abandoned the Children through failure to provide a suitable home. Tennessee Code Annotated § 36-1-102(1)(A) (Supp. 2022) provides the following definition of abandonment related to this ground:

For purposes of terminating the parental or guardian rights of a parent or parents or a guardian or guardians of a child to that child in order to make that child available for adoption, “abandonment” means that:

* * *

- (ii)(a) The child has been removed from the home or the physical or legal custody of a parent or parents or guardian or guardians by a court order at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and the child was placed in the custody of the department or a licensed child-placing agency;
- (b) The juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child’s situation prevented reasonable efforts from being made prior to the child’s removal; and
- (c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians

have not made reciprocal reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department[.]

Concerning this statutory ground, the trial court specifically found in pertinent part:

The children were removed on October 19, 2020. The third permanency plan developed August 2, 2021, just prior to the filing of the termination petition on September 13, 2021, continued to require [Mother] to provide a suitable home for the children.

Issues with the home of the children when they were removed include calls to the police for burglaries, as well as calls and issues regarding actual ownership of the house. There are continuing issues of housing instability from removal of the children until trial. [Mother] remained in the same home for some time after removal of the children. Since then, she has stayed from place to place. [Mother] testified that she always updated her addresses for DCS. This is disputed by DCS. The Court does not believe [Mother].

Ms. Cathey testified it was difficult to keep up with where [Mother] was living in order to show residential stability. She testified that [Mother] never provided utility bills, leases or rental documents.

At trial [Mother] testified that she is moving to . . . Second Street in Lawrenceburg to stay with a female she met in Intensive Outpatient Treatment (IOP). Residences where she has previously resided with others include . . . Foster Avenue, Ethridge, TN, where she lived with someone named Terry, . . . McIntyre Road, St. Joseph, TN, where she lived with some female, . . . Hwy 43, Leoma, TN, where she lived with Ashley [H.], . . . North Main Street in Loretto, TN, where she lived with Eric [B.] in April of 2021, just prior to the brief rehabilitation at Mirror Lake in May of 2021. The Court is not sure of the accuracy of the names of the persons with whom she lived.

The record reflects that [Mother] has never acquired stable housing. She continues to “stay” with others and insists this is sufficient to satisfy DCS. . . .

According to [Mother], she has completed everything required of her to regain custody of her children. The Court disagrees.

In a therapy session with Connect Health America on October 7, 2021, [Mother] announced she would be moving into a new two-bedroom apartment. This never happened. On February 5, 2022, she reported she was going to move into a trailer. This never happened. On February 28, 2022, she told the therapist she would be in a home (of her own) in about a month. On March 9, 2022, she was still living with a friend in an apartment. On March 31, 2022, [Mother] told the therapist she had found a home, but had not moved in. For over two years, [Mother] has failed to obtain and maintain suitable and stable housing for a mere four consecutive months as required by the permanency plans.

Upon our review of the record, we conclude that the evidence does not preponderate against the trial court’s findings and agree that DCS presented clear and convincing evidence to establish this statutory ground of abandonment.

With respect to subsections (ii)(a) and (b) of the abandonment statute, the record reflects that the Children were removed from Mother’s custody on October 19, 2020, via the juvenile court’s *ex parte* bench order placing the Children in DCS’s protective custody upon Mother’s failure to present Destyni for truancy court and subsequent drug screen indicating positive results for methamphetamine, amphetamine, benzodiazepine, and buprenorphine. DCS then filed a petition alleging that the Children were dependent and neglected due to educational neglect and drug exposure, and DCS gave notice of its intent to seek a finding of severe child abuse because Julyus, at three years of age, had tested positive for amphetamine and methamphetamine. The juvenile court entered its order adjudicating the Children dependent and neglected and finding Julyus to be the victim of severe abuse by the parents on April 26, 2021.

Additionally, within the trial court’s best interest analysis, it expressly found that DCS had made “every effort to assist” Mother “in making a lasting adjustment for return of [her] children.” Mother does not dispute this finding, and we determine that the record supports it. DCS created three permanency plans for Mother and initially set up Mother’s therapeutic visitation with the Children prior to the entry of the juvenile court’s visitation suspension order. As indicated by Ms. Cathey’s affidavit of reasonable efforts and

testimony, DCS also facilitated parenting and homemaker services through HCA for Mother, repeatedly requested proof of Mother's housing and employment, provided multiple drug screens, and provided a housing resource guide. As DCS notes, although the four months following removal of the Children into protective custody are specified for the reasonable efforts requirement of this ground, "the statute does not limit the court's inquiry to a period of four months immediately following the removal." See *In re C.N.*, No. M2020-01021-COA-R3-PT, 2022 WL 94403, at *13 (Tenn. Ct. App. Jan. 10, 2022) (quoting *In re Jakob O.*, No. M2016-00391-COA-R3-PT, 2016 WL 7243674, at *13 (Tenn. Ct. App. Dec. 15, 2016)).

Concerning what a suitable home entails and the relationship between a parent's efforts to establish a suitable home and DCS's reasonable efforts to assist the parent, this Court has recently elucidated:

Here, we "consider[] whether a child has a suitable home to return to after the child's court-ordered removal from the parent." *In re Adaleigh M.*, No. E2019-01955-COA-R3-PT, 2021 WL 1219818, at *3 (Tenn. Ct. App. Mar. 31, 2021). To terminate parental rights under this ground, the trial court must find "that a parent failed to provide a suitable home for his or her child even after DCS assisted that parent in his or her attempt to establish a suitable home." *In re Jamel H.*, No. E2014-02539-COA-R3-PT, 2015 WL 4197220, at *6 (Tenn. Ct. App. July 13, 2015). A suitable home requires "more than a proper physical living location." *In re Daniel B.*, No. E2019-01063-COA-R3-PT, 2020 WL 3955703, at *4 (Tenn. Ct. App. July 10, 2020) (quoting *Tenn. Dep't of Children's Servs. v. C.W.*, No. E2007-00561-COA-R3-PT, 2007 WL 4207941, at *3 (Tenn. Ct. App. Nov. 29, 2007)). A suitable home entails "[a]ppropriate care and attention" for the child, *In re Matthew T.*, No. M2015-00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016), and that the home is "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). DCS must make "reasonable efforts" to assist the parent by doing more than simply providing a list of service providers. *In re Matthew T.*, 2016 WL 1621076, at *7. The Department should utilize its superior resources in assisting with establishment of a suitable home, but "[its] efforts do not need to be 'Herculean.'" *In re Hannah H.*, 2014 WL 2587397, at *9 (quoting *Dep't of Children's Servs. v. Estes*, 284 S.W.3d 790, 801 (Tenn. Ct. App. 2008)), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015); *see also In re Matthew T.*, 2016 WL 1621076, at *7. Sole responsibility does not lie with DCS, and "[p]arents must also make reasonable efforts towards achieving the goals established by the

permanency plan to remedy the conditions leading to the removal of the child.” *In re Hannah H.*, 2014 WL 2587397, at *9.

In re C.N., 2022 WL 94403, at *12.

On appeal, Mother raises no issue or argument specific to this statutory ground. She acknowledges that during the Children’s time in protective custody, she experienced “several jobs and residences.” As the trial court found, Mother testified to residing with various individuals and admitted that she never provided a lease or other proof of residence to DCS. Mother did testify that she had provided an address located in Loretto, Tennessee, as her place of residence from February 2021 to April 2021. She then testified that although she had moved twice since providing that address and had sent new addresses to Ms. Cathey, she had never transmitted any document reflecting her name on a lease. Mother’s list of places she had lived, however, included more than three residences. When questioned regarding where she was residing at the time of trial, Mother responded that she was about to relocate to Lawrenceburg, where she would be living with a woman she had met in IOP. Mother acknowledged that at the time of trial, she did not have a home suitable for the Children.

We recognize that Mother has taken some steps toward correcting the conditions that led to removal of the Children. She has completed a mental health assessment, alcohol and drug assessment, and a set of IOP treatment sessions. However, in addition to her difficulty in maintaining a stable physical home, Mother’s continued difficulty in maintaining stable employment, consistently passing drug screens, and providing documentation to DCS also indicate that Mother had exhibited a lack of concern for the Children to such a degree that it was unlikely that she would be able to provide a suitable home at an early date. We therefore affirm the trial court’s finding of clear and convincing evidence regarding this statutory ground of abandonment as well.

B. Substantial Noncompliance with Permanency Plans

The trial court also found by clear and convincing evidence that Mother failed to substantially comply with the statement of responsibilities set out in the permanency plans. Tennessee Code Annotated § 36-1-113(g)(2) provides as an additional ground for termination of parental rights:

- (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan pursuant to the provisions of title 37, chapter 2, part 4[.]

In its final judgment, the trial court detailed specific findings of fact concerning Mother's failure to substantially comply with the requirements of the permanency plans and what the court found to be DCS's reasonable efforts to assist Mother with compliance:

Throughout the permanency plans [Mother's] failure to sign releases and to provide necessary documentation to enable DCS to keep up with her therapy caused problems. [Mother] testified that she always provided releases. Testimony of others and the record does not support her testimony. [Mother] is not credible.

Exhibit 4 contains an Affidavit of Reasonable Efforts filed by DCS in juvenile court on September 22, 2021, that outlines the steps required of both parents to reunify with the children, and the efforts taken by each parent to accomplish the action steps. The Affidavit is important to the Court because it gives a history of what the parents were accomplishing under the steps of four permanency plans, the first one developed November 23, 2020, the second one developed May 11, 2021, and the third and fourth ones developed August 2, 2021, just prior to the filing of the petition for termination, on September 13, 2021.

The affidavit reflects the following: [Mother] is attending some mental health sessions at Centerstone. As of August, 2021, she attended sixteen sessions but missed half of the total sessions. She is attending homemaker services through Health Connect America, and completed IOP in April, 2021. She has completed two [alcohol and drug] assessments. IOP was recommended in the first assessment. She continues to fail drug screens including a nail bed test for meth, amphetamines and THC. She continues to fail screens for THC. DCS received an email stating she was high at parenting class; she was screened, and tested positive for THC. Her insurance stopped paying for the screens. She was ordered to have another assessment, and no recommendations resulted from that assessment. She entered a rehab program on May 29, 2021 and was discharged 5 days later, June 4, 2021. She failed to complete the program and left against recommendations to complete therapy. She was arrested twice in 2021, including a charge of possession of methamphetamine. From October 22, 2020, until her visitation with the children was suspended on April 5, 2021, she attended seven therapeutic supervised visits with the children. One visit was cancelled on February 12, 2021, due to her failing a drug screen, and she missed a scheduled visit on November 20, 2020. She has not provided proof of income. She has provided only two check stubs

representing deductions for child support and has an arrearage of \$1400. She does not have housing. She acquired a vehicle (which, unfortunately, will prove to be unreliable and was later totaled).

* * *

[Mother] insists she is working the steps of the plans and that regaining custody of her children is very important to her; however, she has been asked at least twice to stay off her cell phone during therapy sessions. For example, on July 9, 2021, the therapist told her to put her phone away, and noted that after that request, [Mother] did not participate in the session. It appears to the Court that when [Mother] is told to do something she doesn't want to do, she gets "her back up," becomes confrontational and refuses to cooperate. [Mother] repeatedly asked the therapists why she has to continue the classes and "go through services." On November 23, 2021, she told the therapist that the system was mistreating her. On November 17, 2021, "she had her head down and was snoring in a session."

The therapist noted that on March 11, 2022, [Mother] was texting during a session. She told the therapist that "everyone is trying to set her up for failure." On March 31, 2022, the therapist noted that [Mother's] participation in the session was poor, and that she spoke only when spoken to and did not open up. On April 28, [2022], [Mother] complained to the therapist that DCS was lying and manipulating her entire case; that it wasn't her fault the children are in custody, and that she was tired of (drug) screens and hair follicles.

It is important to call attention to a therapy session on April 30, 2020, with Centerstone. In defense of a positive drug screen, [Mother] told the therapist that someone sabotaged her, and that her boyfriend inserted heroin and meth into her during sex. She stated that she "did" have a problem with opiates; she denied abusing any other meds or street drugs; and that she tried cocaine one time. However, included in an assessment by Health Connect America on October 26, 2020, is a summary of [Mother's] account of drug use: "Tried meth 2 years ago; didn't like it; reports she likes to sleep, and meth (sic) you don't sleep."

The action steps of all permanency plans, beginning with the first plan developed November 23, 2020, provided that [Mother] would refrain from acquiring new criminal charges. [Mother] was charged with theft by shoplifting on April 8, 2020, and burglary on September 24, 2020. She

pleaded guilty to burglary other than a habitat on February 25, 2021, and received a probated two-year sentence. By the time the second plan was developed on May 11, 2021, she had received an additional criminal charge of possession of methamphetamine on April 8, 2021, and a felony probation warrant was issued. On January 19, 2022, she entered pleas of guilty to theft and possession of methamphetamine and received a concurrent sentence of 11/29, with the 11/29 sentence running consecutively with the two-year sentence for burglary. [Mother's] probation now expires January 24, 2024. Conditions of probation include no contact with Walmart.

In finding Mother to be in substantial noncompliance with the permanency plans, the trial court did not make an explicit finding regarding whether Mother's responsibilities were reasonably related to the conditions necessitating foster care. As our Supreme Court has explained:

A trial court must find that the requirements of a permanency plan are "reasonable and related to remedying the conditions which necessitate foster care placement." Tenn. Code Ann. § 37-2-403(a)(2)(C). We hold that this finding must be made in conjunction with the determination of substantial noncompliance under § 36-1-113(g)(2).

Because the trial court made no finding regarding the reasonableness of [the parent's] responsibilities under the permanency plans, our review of this issue is *de novo*.

In re Valentine, 79 S.W.3d 539, 547 (Tenn. 2002). Accordingly, as in *Valentine*, our review of the reasonableness of Mother's responsibilities under the permanency plans is *de novo* in this case. *See id.*

As to Mother, the specific concerns at the time of the Children's removal into protective custody via the juvenile court's bench order were Mother's substance abuse, the Children's exposure to substance abuse, and educational neglect related to Destyni's truancy. In its dependency and neglect petition, DCS also identified concerns regarding Mother's housing situation and criminal record resulting in her sentence of probation and gave notice that it would seek a finding of severe abuse because Julyus had tested positive for amphetamine and methamphetamine. Domestic violence was also a concern due to Mother's reports of Father's violence against her. Upon review, we determine that the requirements and responsibilities set forth for Mother in the permanency plans were reasonably related to remedying the conditions that led to removal of the Children.

Under the first permanency plan, Mother was required to (1) undergo an alcohol and drug assessment and follow all resultant recommendations, (2) submit to random drug screens, (3) refrain from using alcohol and non-prescribed medications, (4) refrain from associating with others who were actively under the influence of or selling drugs, (5) avoid any further criminal charges, (6) undergo a mental health assessment and follow all resultant recommendations, (7) sign a release of information with the mental health provider, (8) visit the Children regularly, (9) obtain and maintain safe and reliable income, (10) obtain and maintain housing for four consecutive months and provide proof of same to DCS, (11) pay household utilities on time, (12) refrain from allowing any illegal activity in the home, (13) participate in age-specific parenting education classes, (14) complete domestic violence classes, (15) complete homemaker education classes with maintenance of minimal housekeeping standards, (16) provide proof of reliable transportation, (17) notify the family services worker within three days of any address or phone number change, and (18) pay child support in accordance with the Tennessee Child Support Guidelines. Mother's requirements under the second and third permanency plans were essentially unchanged except that due to the juvenile court's April 2021 order suspending Mother's visitation with the Children, her tasks related to visitation became fulfilling the specific permanency plan requirements that the juvenile court identified as necessary before visitation could resume. These included: (1) submitting to and passing routine drug screens, (2) complying with a mental health assessment and beginning to follow resultant recommendations, and (3) complying with a new alcohol and drug assessment and beginning to follow resultant recommendations. Our review of the evidence indicates that Mother failed to substantially comply with the above-listed requirements.

On appeal, Mother does not address this statutory ground directly. However, in support of her argument that DCS failed to prove abandonment by clear and convincing evidence and in response to the finding of abandonment through failure to visit, Mother asserts that "there is evidence that [Mother] attempted to abide by the permanency plan." In support of this assertion, Mother cites her own testimony that she underwent an alcohol and drug assessment with no resultant recommendations and that she had been making child support payments prior to trial. Mother also notes that she voluntarily attended Mirror Lake prior to discharging herself, received IOP treatment at HCA, and attended online parenting classes. Mother does not dispute, however, that, as she terms it on appeal, "there were failed [drug] test[s] during the course of this process," that Ms. Cathey was unable to obtain her second mental health assessment because Mother had not signed a release (as required by the permanency plan), that Mother "had neglected to give proof" of child support payments to DCS, and that Mother "had several jobs and residences in between losing custody of her children and the trial."

Regarding the three permanency plan requirements emphasized by the juvenile court in its visitation suspension order, Mother contends that “[w]hile it may not have been in the manner or speed that the court seemed to desire, it should not be seen that there was no action by [Mother] to retain the right to visit her children.” Whether any action at all has been taken by a parent is not the standard, however, for substantial compliance with a permanency plan. *See, e.g., In re Serenity S.*, No. E2019-00277-COA-R3-PT, 2020 WL 522439, at *13 (Tenn. Ct. App. Jan. 31, 2020) (explaining in response to the mother’s argument that “the trial court failed to give proper credit to her for the requirements and responsibilities with which she did comply” that “[t]he problem with Mother’s argument in this regard is that the overall goal of the reasonable responsibilities in Mother’s permanency plans was to remedy the reasons for the Children’s removal.”) (citing Tenn. Code Ann. §§ 36-1-113(g)(2), 37-2-403(a)(2)(C)). We determine that the trial court did not err in terminating Mother’s parental rights upon clear and convincing evidence of the statutory ground of failure to substantially comply with the permanency plans.

C. Persistence of Conditions Leading to the Children’s Removal

The trial court determined that the statutory ground of persistence of the conditions leading to removal of the Children from Mother’s custody had been proven by clear and convincing evidence. Relative to this statutory ground, Tennessee Code Annotated § 36-1-113(g)(3) (Supp. 2022) provides:

- (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[.]

In its final judgment, the trial court summarized its findings regarding this statutory ground as follows in pertinent part:

The voluminous records of DCS, Centerstone and Health Connect America set forth multiple efforts on their part to assist [Mother] in addressing her addiction, maintaining sobriety and taking steps to have the children returned to her. [Mother] insists that she accomplished everything asked of her. She denies that she failed to take advantage of the department's and the providers' efforts. The Court disagrees.

* * *

The Court finds that [DCS] has carried its burden of proof, by clear and convincing evidence, that [Mother] has failed to remedy the conditions that led to removal of the children, and that these conditions prevent the children's safe return to her care. Further the Court finds that the conditions that led to removal of her children will not be remedied at an early date so that the children can be safely returned to her in the near future, and that the continuation of the relationship between parent and children greatly diminishes the children's chances of early integration into a safe, stable and permanent home.

Upon careful review, we determine that a preponderance of the evidence supports the trial court's findings as to this statutory ground. By the time of trial, the Children had been in protective custody for over nineteen months, far longer than the statutory six-month minimum. As established through our review of the evidence respecting the statutory grounds of abandonment and substantial noncompliance with the permanency plans, the conditions that led to the Children's removal, primarily Mother's substance abuse, but also her housing instability and conduct incurring criminal charges, persisted. The trial court also found that Mother had repeatedly resisted continuing with services and had consistently blamed others for the Children's removal from her custody.

Concerning the focus of the statutory ground at issue, persistence of conditions, this Court has recently explained:

The persistence of conditions ground focuses “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,] 874 [(Tenn. Ct. App. 2005)]. 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 533, 555 (Tenn. 2015). 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).

In re Kaisona B., No. W2020-01308-COA-R3-PT, 2021 WL 4319624, at *6 (Tenn. Ct. App. Sept. 23, 2021). “Under this [persistence of conditions] ground, a parent’s inability to eliminate such conditions does not need to be willful.” *In re Braden K.*, No. M2020-00569-COA-R3-PT, 2020 WL 5823344, at *9 (Tenn. Ct. App. Sept. 30, 2020) (citing *In re Dakota C.R.*, 404 S.W.3d 484, 499 (Tenn. Ct. App. 2012)).

Mother has not raised an issue or argument specific to this statutory ground. Although we recognize, as reviewed previously in this Opinion, that Mother has completed some outpatient treatment for substance abuse and participated in some therapy, we also must take note of Mother’s failed drug screens subsequent to completing IOP and her refusal to take a drug screen near the time of trial. Furthermore, Mother incurred additional criminal charges during the pendency of this case and was unable to provide a stable living situation. Considering also the juvenile court’s finding of severe abuse due to Julyus’s exposure to methamphetamine, we must agree with the trial court in determining that it is highly unlikely the Children could be safely returned to Mother’s custody in the near future. *See In re Mya E.*, No. M2012-02323-COA-R3-PT, 2013 WL 2106839, at *8 (Tenn. Ct. App. May 13, 2013) (determining that “[i]n this case, while Father had attended two drug treatment programs, it was shown that he had returned to his use of drugs thereafter” and that “the evidence showed that Father had made some progress but fell far short of remedying the underlying causes for the Children’s removal from his custody”).

The evidence also supported a determination that continuation of the parent-child relationship would greatly diminish the Children’s chances of integration into a safe, stable, and permanent home, particularly considering Mother’s lack of progress and cooperation with DCS and the Children’s relational bond with their foster family. We therefore conclude that the evidence does not preponderate against the trial court’s

findings and agree that clear and convincing evidence established this statutory ground for termination.

D. Severe Child Abuse

The trial court further found clear and convincing evidence that Mother had severely abused Julyus. Regarding this ground for termination of parental rights, Tennessee Code Annotated § 36-1-113(g)(4) (Supp. 2022) provides:

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[.]

As relevant to this action Tennessee Code Annotated § 37-1-102(b)(27)(E) (Supp. 2022) defines “severe child abuse” as:

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; . . .

As this Court has previously explained:

[A] parent’s conduct is “knowing, and a parent acts or fails to act ‘knowingly,’ when . . . 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.”

In re H.L.F., 297 S.W.3d 223, 236 (Tenn. Ct. App. 2009) (quoting *In re R.C.P.*, No. M2003-01143-COA-R3-PT, 2004 WL 1567122, at *7 (Tenn. Ct. App. July 13, 2004)). “The most serious consequence of a finding that a parent has committed severe child abuse is that such a finding, in and of itself, constitutes a ground for termination of parental rights.” *In re Samaria S.*, 347 S.W.3d 188, 201 (Tenn. Ct. App. 2011) (quoting *State Dep’t of Children’s Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *10 (Tenn. Ct. App. Mar. 8, 2005)).

Following a hearing upon DCS’s dependency and neglect petition, the juvenile court entered an adjudicatory order on April 26, 2021, finding the Children to be dependent and neglected and finding Julyus to be severely abused as to both parents pursuant to Tennessee Code Annotated § 37-1-102(b)(27)(E). In determining that this

ground for termination of parental rights had been proven by clear and convincing evidence, the trial court expressly relied on the juvenile court's findings in its April 2021 adjudicatory order, stating that the trial court was "bound by that finding." We agree.

Tennessee Code Annotated § 36-1-113(g)(4) allows a trial court to terminate a parent's rights on the ground of severe child abuse if the parent "has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court" (emphasis added). It is well settled that a trial court may rely on a prior court order finding severe child abuse and is not required to re-litigate the issue of severe abuse at the trial to terminate parental rights. See *In re Samaria S.*, 347 S.W.3d at 201; *State, Dep't of Children's Servs. v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *10 (Tenn. Ct. App. Mar. 8, 2005). In the case at bar, the trial court properly found that the April 26, 2021 juvenile court order was *res judicata* as to the issue of whether Mother committed severe child abuse. As this Court concluded in a comparable situation:

Because Mother did not appeal the trial court's finding of severe child abuse within the time allowed by law, the order became a final order and the finding of severe child abuse is *res judicata*. Thus, the trial court did not err in finding that Mother has committed severe abuse for purposes of terminating her parental rights.

In re Serenity S., No. W2014-00080-COA-R3-PT, 2014 WL 6612571, at *6 (Tenn. Ct. App. Nov. 24, 2014). We therefore affirm the trial court's determination that this statutory ground for termination was proven by clear and convincing evidence.

E. Failure to Manifest an Ability and Willingness to Assume Custody of or Financial Responsibility for the Children

The trial court also found clear and convincing evidence to support termination of Mother's parental rights pursuant to Tennessee Code Annotated § 36-1-113(g)(14) (Supp. 2022), which provides:

A parent or guardian 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 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[.]

Our Supreme Court has explained the following with regard to this ground for termination of parental rights:

Two prongs must be proven by clear and convincing evidence to terminate parental rights under this statute: (1) the parent or legal guardian failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child; and (2) placing the child in the parent's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

In re Neveah M., 614 S.W.3d 659, 674 (Tenn. 2020).

As to the first prong, our Supreme Court has instructed:

[S]ection 36-1-113(g)(14) places a conjunctive obligation on a parent or guardian to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child. If a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest either ability or willingness, then the first prong of the statute is satisfied.

Id. at 677 (citing *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, at *13 (Tenn. Ct. App. June 20, 2018)). Concerning the “substantial harm” requirement of the second prong, this Court has observed:

The courts have not undertaken to define the circumstances that pose a risk of substantial harm to a child. These circumstances are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier “substantial” indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

In re Maya R., No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at *8 (Tenn. Ct. App. Apr. 4, 2018) (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001) (footnotes omitted in *Maya R.*)).

In the instant action, the trial court found regarding this statutory ground as to Mother in pertinent part:

Any manifestation of an ability and willingness to assume legal and physical control or financial responsibility of the children on the part of [Mother] has been on her terms. [Mother] wants to control and dictate the

terms of reunification with her children, and becomes angry, confrontational, and at times shuts down, when her terms are questioned and not accepted.

She has no home of her own but insists that wherever she might be staying is sufficient to satisfy DCS; she is able bodied, but moves from job to job, failing to provide even token support for her children; she accepts no responsibility for the loss of her children; and she refuses to accept that her drug use contributed greatly to the loss of her children. She blames others for the loss of the children and for positive drug screens. The Court finds that placing the children in her legal and physical control would pose a risk of substantial harm to their physical and psychological welfare.

The Court finds that [Mother] has always had the ability to attempt to overcome the obstacles that prevent her from assuming custody and financial responsibility of the children. She has failed to do so.

The Court finds that [DCS] has carried its burden of proof, by clear and convincing evidence, that [Mother] has failed to manifest an ability and willingness personally to assume legal and physical custody or financial responsibility of her children, and that placing the children in her legal and physical control would pose a risk of substantial harm to the children's physical or psychological welfare.

Upon careful review, we determine that clear and convincing evidence supported the trial court's conclusions as to this ground.

Regarding the first prong in the instant action, the trial court found that DCS had proven by clear and convincing evidence that Mother had not manifested an ability and willingness to personally assume legal and physical custody of the Children or financial responsibility for the Children. The trial court specifically found that at the time of the termination petition's filing, Mother had not demonstrated the ability and willingness to establish a stable home, steady employment, a consistently drug-free environment, or reintegration into the Children's lives through compliance with the requirements of the permanency plans. The evidence presented at trial supports these findings. We agree that DCS met its burden regarding this prong.

The second prong of this statutory ground requires DCS to prove by clear and convincing evidence that placing the Children in Mother's legal and physical custody would pose a risk of substantial harm to the Children's physical and psychological welfare. As noted previously, Mother appears to be challenging the trial court's finding

concerning this prong in her issue concerning the potential of substantial harm to the Children. While acknowledging Mother's "past history of illegal drug use" and Julyus's November 2020 positive drug screen, Mother asserts that in presenting evidence of the potential for substantial harm, DCS relied too heavily on Foster Mother's testimony concerning the health of the Children when they came into her care. Foster Mother testified that when the Children came into her home in October 2020, both seemed small in stature. She stated that Julyus suffered from facial blisters and constipation, both of which she opined had been caused by his exposure to methamphetamine. Both conditions had been alleviated with treatment. Foster Mother also testified that Destyni was "pretty standoffish" when she first arrived but would now seek physical affection and loved attending school when she had not wanted to attend before.

Mother's argument focuses on the fact that Foster Mother testified relative to Julyus's health concerns when she was admittedly not a medical expert and acknowledged that she could not be certain of the cause of Julyus's facial blisters. We find this argument unavailing. In determining that there would be a significant risk of substantial harm to the Children if they were returned to Mother's custody, the trial court summarized Mother's instability throughout the pendency of this action, unwillingness to accept responsibility for the untenable situation the Children were living in at the time of removal, and difficulties demonstrating that she could remain drug free. DCS has demonstrated that if the Children are returned to Mother's custody, a substantial risk exists that they would again be exposed to the physical and psychological risks of illegal drugs, educational neglect, and instability. Moreover, Mother's argument completely fails to take into account the Children's psychological welfare. In its best interest analysis, the trial court credited Foster Mother's testimony that Destyni initially expressed amazement that her foster family sat down to dinner together every night and that no one was going to jail at Christmastime. Unrefuted testimony demonstrated that the Children were thriving in their current living situation, were making strides in their academic progress, and were involved in many activities with their foster family.

The evidence does not preponderate against the trial court's finding that placing the Children into Mother's custody would pose a risk of substantial harm to the Children's physical and psychological welfare. Accordingly, we affirm the trial court's determination by clear and convincing evidence regarding this statutory ground for termination of Mother's parental rights.

V. Best Interest of the Children

When a parent has been found to be unfit by establishment of at least one statutory ground for termination of parental rights, as here, the interests of parent and child diverge, and the focus shifts to what is in the child's best interest. *In re Audrey S.*, 182

S.W.3d at 877; *see also In re Carrington H.*, 483 S.W.3d at 523 (“The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination.” (quoting *In re Angela E.*, 303 S.W.3d 240, (Tenn. 2010))). Tennessee Code Annotated § 36-1-113(i) provides a list of factors the trial court is to consider when determining if termination of parental rights is in a child’s best interest. This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that termination is in a child’s best interest. *See In re Carrington H.*, 483 S.W.3d at 523; *In re Audrey S.*, 182 S.W.3d at 878 (“The relevancy and weight to be given each factor depends on the unique facts of each case.”). Furthermore, the best interest of a child must be determined from the child’s perspective and not the parent’s. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

Tennessee Code Annotated § 36-1-113(i)(1) (Supp. 2022) lists the following factors for consideration:

- (A) The effect a termination of parental rights will have on the child’s critical need for stability and continuity of placement throughout the child’s minority;
- (B) The effect a change of caretakers and physical environment is likely to have on the child’s emotional, psychological, and medical condition;
- (C) Whether the parent has demonstrated continuity and stability in meeting the child’s basic material, educational, housing, and safety needs;
- (D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
- (E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
- (F) Whether the child is fearful of living in the parent’s home;
- (G) Whether the parent, parent’s home, or others in the parent’s household trigger or exacerbate the child’s experience of trauma or post-traumatic symptoms;

- (H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
- (I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
- (J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;
- (K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
- (L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
- (M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;
- (N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
- (O) Whether the parent has ever provided safe and stable care for the child or any other child;
- (P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

- (Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child’s basic and specific needs and in which the child can thrive;
- (R) Whether the physical environment of the parent’s home is healthy and safe for the child;
- (S) Whether the parent has consistently provided more than token financial support for the child; and
- (T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

The statute further provides: “When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child’s best interest.” Tenn. Code Ann. § 36-1-113(g)(i)(2).

Under the previous statutory scheme utilizing nine similar best interest factors, our Supreme Court instructed regarding the best interest analysis as a whole:

These statutory 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 Carrington H., 483 S.W.3d at 523 (citing In re Audrey S., 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005)). Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” In re Kaliyah S., 455 S.W.3d [533,] 555 [(Tenn. 2015)] (citing In re Audrey S., 182 S.W.3d at 861). “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. When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” In re Audrey S., 182 S.W.3d at 878. Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. Id. “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child. . . .” Tenn. Code Ann. § 36-1-101(d) (2017).

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. In re Audrey S., 182 S.W.3d at 878. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. White v. Moody, 171 S.W.3d 187, 193-94 (Tenn. Ct. App. 2004). Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. See In re Audrey S., 182 S.W.3d at 878. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated. In re Carrington H., 483 S.W.3d at 523. “[D]epending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.” In re Audrey S., 182 S.W.3d at 878 (citing White v. Moody, 171 S.W.3d at 194). But this does not mean that a court is relieved of the obligation of considering all the factors and all the proof. Even if the circumstances of a particular case ultimately result in the court ascribing more weight—even outcome determinative weight—to a particular statutory factor, the court must consider all of the statutory factors, as well as any other relevant proof any party offers.

In re Gabriella D., 531 S.W.3d 662, 681-82 (Tenn. 2017).

In its final judgment, the trial court made detailed findings regarding the best interest factors and concluded that “all twenty relevant factors” weighed in favor of terminating Mother’s parental rights to the Children. Upon our thorough review of the evidence presented, we conclude that clear and convincing evidence established that termination of Mother’s parental rights was in the Children’s best interest.

Factors (A), (C), and (J), are related by reason of their emphasis on the Children’s stability and safety. The trial court found that factor (A) “weigh[ed] heavily in favor of termination” upon contrasting the living situation the Children had been in at the time of removal with their progress in their foster home. The court stated that it found “this [foster] placement to be the best it [had] ever seen.” Recognizing, for example, that at the time of removal, Destyni had “[a]t the young age of twelve” “seen a lot of violence between her mother and father” and “had a great deficiency in reading skills,” the court found that at the time of trial, Destyni was “making great academic strides in middle school” and had “learned how to express her feelings.” Considering that at the time of removal, Julius was “wild and hyperactive,” experiencing “night terrors, was not potty trained, and had severe blisters on his face and lips,” the court found that at the time of

trial, Julyus had been diagnosed with and was being treated for attention deficit hyperactivity disorder (“ADHD”), had done “well in pre-school and will start kindergarten next school year.” The court found that it was “time for the children to experience stability and continuity of placement.”

Relatedly, concerning factor (C), the trial court concluded that Mother had “failed to demonstrate continuity and stability in meeting her children’s basic material, educational, housing and safety needs” upon finding that Mother had “never demonstrated stability in housing for herself and the children,” “worked sporadically,” “not financially supported the children,” “refused medical treatment for Julyus’ severe ADHD,” and “refused to cooperate with DCS and providers to place herself in a position to meet the children’s needs.” Regarding factor (J), the court determined that Mother had “been afforded opportunities and multiple resources to provide safe and stable care for the children” and had failed to “demonstrate[] such a lasting adjustment of circumstances, conduct or conditions to make it safe and beneficial for the children to be in [her] home.” The evidence presented supports the trial court’s findings regarding these statutory factors.

Pertaining to factor (B), the trial court found that “a change of caretakers and physical environment would be devastating to these children, emotionally, psychologically, and in every other way.” The evidence preponderates in favor of this finding. The Children had bonded well with Foster Parents and a foster sibling, who was approximately the same age as Destyni. Mother acknowledged at trial that Foster Parents had taken excellent care of the Children, thanking them, and Destyni had written a letter to Mother expressing her desire to be adopted by Foster Parents. The Children were both making progress academically, and Foster Mother described many daily and special activities the family participated in together.

On appeal, while not addressing specific best interest factors, Mother contends that DCS failed to prove that termination of her parental rights was in the Children’s best interest by clear and convincing evidence because at the time of trial, she testified that she was about to move into a residence she could “name with specificity” and was about to begin new employment “to be closer to her children.” Mother acknowledges her “spotty job history” and “several residences” during the pendency of this case. We find Mother’s argument to be unpersuasive. In contrast to the stable home the Children desperately needed, Mother was positioned to begin a new job again and set to relocate to a new living situation again with an individual she had met through a treatment program who was unknown to the Children.

The trial court, identifying several failed drug screens during the pendency of this action, also found that Mother was resistant to receiving additional assistance from

service providers. We emphasize that we must defer to the trial court's repeated findings in its final order that Mother's testimony was not credible. *See Jones*, 92 S.W.3d at 838. Even fully crediting Mother's testimony regarding her new residence and new employment, however, we find these attempts to establish stability at the time of trial to be "too little, too late." *See, e.g., In re A.W.*, 114 S.W.3d 541, 564-47 (Tenn. Ct. App. 2003) (affirming the trial court's finding that the parent's improvements made since the filing of the termination petition were "too little, too late.>"). Regarding factor (B), we conclude that returning the Children to Mother's custody would have rendered a deleterious effect on the Children's well-being. Additionally, the trial court found as to factor (R), concerning the physical environment of the parent's home, that Mother had not demonstrated to the court that she had an appropriate home at the time of trial. Considering Mother's testimony that she was about to move and her lack of documentation regarding her living situation, we determine that the evidence also preponderates in favor of this finding.

Factors (D), (E), (H), and (I) are related due to their emphasis on parental attachments and relationships. With respect to factor (D), the trial court found that the Children did "not have a secure and healthy parental attachment" to Mother and that there was "no reasonable expectation" that Mother could "create such attachment." As to factor (E) and Mother's visitation with the Children, the court found that in failing to meet the requirements for reunification set forth in the visitation suspension order, Mother had "chose[n] the path of resistance to assistance by DCS, service providers, the court system, the Guardian *ad litem* and the foster parents." Concerning factor (H), the court found that the foster home was "the first stable home the children [had] ever known," stating: "These children are where they need to be; in the home of a loving family and extended family, who love them, understand their needs and take care of their every need." Likewise, regarding factor (I), the court determined that "Destyni [had] developed an emotionally significant relationship with another child in the home of the foster parents" and that "[t]he children continue to create significant relationships with members of the foster parent[s'] extended family." The evidence preponderates in favor of these findings, and we agree with the trial court's decision to weigh these factors in favor of terminating Mother's parental rights to the Children.

Factors (F) and (G) relate to the Children's previous experiences in the parent's home and any trauma resulting from those experiences. The court found as to factor (F), whether the Children feared living in Mother's home, that Mother did "not have an appropriate home for the children." The court further found that factor (G) "weigh[ed] greatly in favor of termination" because "[n]either child need[ed] to risk being exposed to further violence between their mother and father." The court pointed out that Destyni had "seen, and remember[ed], domestic violence in the home of her parents." These findings are supported by the evidence.

Factors (K) and (L) both concern services and assistance offered to Mother. With respect to factor (K), the trial court found that Mother “engaged in services and programs to the extent that she considered necessary” but that she “fought DCS and providers all the way, and failed to take advantage of services to assist her in making a lasting adjustment of circumstances, conduct and conditions to assist her to reunify with her children.” The court thereby weighed factor (K) “greatly in favor of termination.” Certainly, Mother did not take advantage of all services available to her given that she failed to provide DCS with proof of child support payments, housing, and the assessments required for her visitation suspension to be lifted. Mother also refused at least two drug screens during the pendency of the case. However, Mother did complete initial mental health and alcohol and drug assessments, and she did attend IOP sessions and some domestic violence and parenting classes. We therefore conclude that factor (K) should have been weighed neutrally. Concerning factor (L), the court rightly weighed this factor in favor of termination, noting DCS’s efforts to assist Mother in making a lasting adjustment.

Factors (M), (P), and (Q) all relate to Mother’s actions to meet the Children’s needs. We agree with the trial court’s determination that all three of these factors weigh in favor of termination of Mother’s parental rights. With respect to factor (M), the court found that Mother had not “addressed the circumstances, conduct or conditions that made an award of custody unsafe and not in the children’s best interest.” Mother’s continued difficulty in consistently passing drug screens, erratic job history, and inability to secure a safe and appropriate home for the Children all illustrated her lack of urgency in addressing the circumstances, conduct, and conditions that led to the Children’s removal from her care. These facts also apply to factor (P), whether Mother demonstrated an understanding of the basic needs required for the Children to thrive, and (Q), whether she demonstrated the ability and a commitment to creating a home that would meet the Children’s needs. Considering the abandonment grounds proven in this action, as the trial court noted, Mother had abandoned the Children “by failing to visit, to financially support them, and to provide a suitable home for them.”

The trial court also weighed factor (O) in favor of terminating Mother’s parental rights, finding that Mother had not “ever provided safe and stable care for the children.” The evidence preponderates in favor of the court’s finding. With respect to factor (S), the court found that Mother’s “contributions fail[ed] to arise to the level of even token support.” Although Mother testified that she had begun paying child support out of her paychecks in the fall of 2021, she provided no proof of these payments to DCS except for two unidentifiable check stubs sent via text message. The evidence also does not preponderate against this finding.

In finding that factor (T) weighed against maintaining Mother's parental rights, the trial court stated that it was "concerned about the emotional and mental fitness of [Mother]." The court explained:

[Mother] remains untrusting of, and combative with, anyone trying to help her be a better parent; she says she is addressing her "past addiction," but she provides no recent negative drug screens to the Court. She "talks the talk" but fails to demonstrate proof of stability in her life.

Moreover, the trial court determined that factor (N) "weigh[ed] greatly in favor of termination" because "[t]he exposure of the children to methamphetamine, the educational neglect of Destyni, and the conditions in which the children were living when removed" constituted "emotional and psychological abuse and neglect of the children." These findings were supported by the evidence as well.

In sum, although the evidence did not fully support the trial court's conclusions related to factor (K), the trial court's findings that all other best interest factors weighed in favor of termination were supported by clear and convincing evidence. We therefore affirm the trial court's determination by clear and convincing evidence that termination of Mother's parental rights to the Children was in the Children's best interest.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's judgment. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment terminating Mother's parental rights to the Children and collection of costs assessed below. Costs on appeal are assessed to the appellant, Christine C.

s/ Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE