

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 3, 2016

IN RE CANDACE J., ET. AL.

**Appeal from the Juvenile Court for Rutherford County
No. 14C91 Donna Scott Davenport, Judge**

No. M2015-01406-COA-R3-PT – Filed March 11, 2016

This is a termination of parental rights case. The Tennessee Department of Children’s Services (“DCS”) filed a petition seeking to terminate the mother’s parental rights with respect to the minor child. The juvenile court found that statutory grounds existed to terminate the mother’s parental rights upon its finding by clear and convincing evidence that the mother (1) abandoned the child by her willful failure to visit, (2) abandoned the child by her willful failure to provide a suitable home, (3) failed to substantially comply with the requirements of the permanency plans, and that (4) the conditions that led to the child’s removal still persisted. The juvenile court further found by clear and convincing evidence that termination of the mother’s parental rights was in the child’s best interests. Having thoroughly reviewed the record and considered the arguments presented on appeal, we affirm the juvenile court’s judgment in all respects.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which BRANDON O. GIBSON, and KENNY ARMSTRONG, JJ., joined.

Brandon M. Booten, Murfreesboro, Tennessee, for the appellant, Danielle J.

Herbert H. Slatery, III, Attorney General and Reporter; Meghan Murphy Assistant Attorney General, for the appellee, State of Tennessee, Department of Children’s Services.

OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

The child at issue in this case, S.D.J., was born to Danielle J. (“Mother”) and Bobby D. (“Father”) in May 2011.¹ Mother and Father were never married. Father was homeless throughout the pendency of this case, and his whereabouts are unknown.

In April 2013, S.D.J. was residing with Mother in an apartment on Sloan Street in Murfreesboro, Tennessee. That month, DCS received a referral raising concerns about Mother’s ability to care for S.D.J. A subsequent investigation revealed that Mother’s apartment was environmentally neglected and in “a condition of squalor.”² DCS workers reported that Mother was under the influence of various pain medications to the point that she was groggy and had difficulty standing. Mother admitted that she may have taken more than the amounts prescribed, and a pill count revealed that the number of pills remaining did not correspond with the prescribed dosages. Mother’s only source of income was a monthly disability check, and she did not have any reliable mode of transportation. Additionally, Mother reported that she was being evicted from the apartment and did not have a plan to obtain subsequent suitable housing.

In light of Mother’s physical condition and residential instability, DCS took S.D.J. into protective custody and filed a petition in the Rutherford County Juvenile Court to have her declared dependent and neglected. Mother met with DCS workers to discuss possible placement options for S.D.J. but was unable to provide a suitable family placement. Mother reported that Father was homeless and she did not know how to contact him. As such, S.D.J. was placed in foster care where she has remained since.

On April 17, 2013, DCS developed a permanency plan with goals of either returning S.D.J. to Mother or preparing her for adoption. The plan anticipated that Mother was about to be evicted from the Sloan Street apartment and would be homeless. Accordingly, the permanency plan’s primary desired outcome was for Mother to demonstrate the ability to provide a safe and stable home for S.D.J. Under the permanency plan, Mother was required to complete routine visits with a primary care physician and an eye doctor and submit letters

¹ In cases involving a minor child, it is this Court’s policy to redact names to protect the child’s anonymity. In this case, we will redact the names of individuals related to the child and will refer to those individuals by their given name and the first letter of their surname. Additionally, we refer to the minor child using her initials.

² Christina Moody, Investigations Coordinator for DCS, testified: “the home smelled of urine The crib was full of belongings, clothes. There was clothes everywhere. There were bags of trash everywhere. There were small items in the floor to where [S.D.J.] could get into such as pill bottles that had pills inside”

from each addressing whether it was safe for her to drive; participate in a psychological evaluation, medication management counseling, therapeutic, in-person visitations, and family counseling; submit a household budget and a plan to obtain safe and reliable transportation; comply with homemaker services; and to obtain safe and stable housing and to show proof of her lease. The permanency plan was updated in October 2013, April 2014, and October 2014, but each retained substantially the same requirements.³

From the start, Mother's in-person visitations with S.D.J. were contingent on her ability to pass random urine drug screens.⁴ DCS family services worker Alexandra Brislin ("Brislin") was assigned to the family and testified at length about her efforts to assist Mother in completing the random drug screens. Brislin testified that when she was assigned the case in April 2013, she did not know where Mother was living. Brislin tried to call the cell phone number Mother provided three times during that month but was never able to contact her. In May 2013, Brislin tried to call Mother eight more times to request that Mother submit to a drug screen. When Mother returned one of the calls, Brislin learned that Mother was living in a local homeless shelter. Nevertheless, Mother insisted that she could not come in for a drug screen. Brislin tried to call Mother at least fourteen times in June, July, and August 2013 to request that Mother submit to a drug screen but was rarely successful in reaching her. In July 2013, Mother returned one of the calls but again stated that she could not come in for a drug screen. In August 2013, Mother called to inform Brislin that she had moved into an apartment on Mercury Boulevard with a friend. During the same call, Mother told Brislin that she did not have transportation to come in for drug screens because her friends would charge her \$10 to \$20 for a ride. Brislin testified that she discussed the availability of public transportation with Mother and also informed Mother that she would come to Mother's residence for the drug screens. Nevertheless, Mother did not submit to a drug screen in August 2013.

On August 9, 2013, the juvenile court conducted a hearing on DCS's dependency and neglect petition. Despite having notice, Mother failed to appear for the hearing; Brislin and other DCS representatives were present. The juvenile court entered an order adjudicating S.D.J. dependent and neglected based on Mother's residential instability, her physical

³ The April 2014 and October 2014 permanency plans added the requirement that Mother complete routine visits with a neurologist to address her seizures, migraines, and light sensitivity. They also required Mother to submit a letter from the neurologist addressing whether it was safe for her to drive.

⁴ The source of the drug screen requirement is not clear from the record. While none of the permanency plans contain such a requirement, the requirement may have been imposed by the juvenile court in its preliminary dependency and neglect order, which was not included in the record before us. Whatever the case may be, Mother acknowledged at trial that she was required to submit to drug screens as a prerequisite to exercising in-person visitation with S.D.J.

condition, and her inability to provide appropriate supervision while under the influence of drugs.

In September 2013, DCS decided to allow Mother to begin visitation with S.D.J. despite the fact that Mother had not submitted to a drug screen. Brislin testified that the decision was reached because at that time DCS was concerned with whether Mother was taking prescribed medications, as prescribed, rather than any illegal drug use. Accordingly, Mother had monthly in-person visitation with S.D.J. from September 2013 through December 2013.

However, Mother's monthly in-person visitations with S.D.J. were short-lived. In January 2014, Mother cancelled the scheduled visitation, reporting that she had been having seizures and was not feeling up to it. Following the cancelled visitation, Brislin lost contact with Mother for a period of time. Contact was reestablished in March 2014 when Mother called Brislin to give her a new phone number. By that time, Mother had moved out of the Mercury Boulevard apartment and into a house on Mount Tabor Road. Despite the fact that contact with Mother had been reestablished, Brislin informed Mother that in-person visitation with S.D.J. would not resume until Mother passed two consecutive random drug screens. Although she did not elaborate, Brislin testified that the drug screen requirement was reinstated due to increased concerns that Mother was using drugs other than those prescribed.

With the drug screen requirement back in place, Brislin continued her efforts to conduct a random drug screen with Mother. On March 17, 2014, Brislin went to Mother's house and asked her to take a drug screen, but Mother advised Brislin that she was not able to provide a urine sample. On April 17, 2014, Brislin asked Mother to come in for a drug screen, but Mother declined, saying that she did not want to get out in the bad weather. Finally, on April 21, 2014, Mother submitted to her first random drug screen and tested negative for all substances. Mother needed to pass one more drug screen to have in-person visitation with S.D.J. reinstated.

Despite having passed the first of two needed drug screens needed to resume in-person visitation with S.D.J., Mother did not become any more cooperative with Brislin's efforts. When Brislin contacted Mother on May 6, 2014, and asked that she come in for a second random drug screen, Mother insisted that she could not come in because she did not have transportation. When Brislin offered to drive to Mother's house or meet her at another location, Mother declined and stated that she did not want to do a drug screen that day. When Brislin tried again on May 12, 2014, Mother initially refused but later arrived at Brislin's office after Brislin informed her that her refusal to submit to a drug screen would be counted as a failed test. Nevertheless, Mother again advised that she was not able to provide

a urine sample when Brislin tried to administer the drug screen, and therefore no drug screen was taken.

Communication between Mother and Brislin in the months that followed was sporadic at best. On June 20, 2014, Mother called Brislin and agreed to submit to a second drug screen, testing positive only for pain medication that she was prescribed. In July and August 2014, the two spoke occasionally, mostly regarding Mother's psychological evaluation. DCS provided funding for the psychological evaluation in July 2014, and Mother left a voicemail for Brislin on August 18, 2014 to let her know that she had completed it. Brislin tried to call Mother several times in the weeks that followed and also tried to visit her at home but was not able to establish contact. On October 13, 2014, Brislin spoke to Mother about her responsibilities under the permanency plans and outlined everything Mother still needed to do to get S.D.J. back.

On October 24, 2014, DCS filed a petition in the juvenile court seeking to terminate both Mother's and Father's parental rights to S.D.J.⁵ The factual allegations in the petition asserted five separate grounds for terminating their parental rights: (1) abandonment by willful failure to visit, (2) abandonment by willful failure to support, (3) abandonment by failure to provide a suitable home, (4) substantial noncompliance with a permanency plan, and (5) the persistence of conditions that led to the children's removal. *See* Tenn. Code Ann. § 36-1-113(g)(1)–(3) (2014); Tenn. Code Ann. § 36-1-102(1)(A)(i)–(ii). The petition also alleged that termination of both Mother's and Father's parental rights would be in S.D.J.'s best interest because neither parent would be able to provide her with a safe and stable home, and S.D.J.'s foster parents had indicated a desire to adopt her.

While the petition to terminate Mother's parental rights was pending in juvenile court, Brislin continued working with her to assist her in meeting her requirements under the permanency plans. In December 2014, Mother informed Brislin that she had moved out of the Mount Tabor Road house and had been living in a house on Murfree Avenue with her cousin for several months. On December 10, 2014, Mother submitted to another drug screen; she tested positive for several medications that she was prescribed but also tested positive for tetrahydrocannabinol ("THC").⁶ In January and February 2015, Brislin and Mother exchanged voicemails, but Brislin was not successful in obtaining a drug screen. In March 2015, Mother submitted to another drug screen, this time testing positive only for

⁵ DCS's petition also sought to terminate Mother's parental rights as to her daughter from a prior relationship, Candace J. Later, however, DCS announced a nonsuit of the petition with regard to Candace J. because she turned eighteen during the pendency of the juvenile court proceedings.

⁶ THC is a marijuana metabolite that is stored in fat cells and can be detected in the body up to thirty days after smoking marijuana. *Interstate Mech. Contractors, Inc. v. McIntosh*, 229 S.W.3d 674, 677 (Tenn. 2007).

medications that she was prescribed. Around the same time, Mother moved out of the Murfree Avenue house and moved into a house on Byrd Avenue with a friend. The arrangement was short-lived, however, and Mother moved back into the women's homeless shelter several weeks later. In May 2015, Mother moved out of the homeless shelter and into the Regal Inn, where she was sharing a room with another friend at the time of trial.

The juvenile court held a bench trial on the petition to terminate Mother's and Father's parental rights on May 19 and 20, 2015. The court heard testimony from several witnesses including Mother and Brislin. Father was not present at the trial and did not participate in the termination proceedings.

Mother testified at trial regarding her compliance with the permanency plans. Mother testified that she had completed routine visits with a primary care physician and an eye doctor and submitted a letter from her eye doctor stating that it was safe for her to drive. She testified that she submitted a household budget at one time, and that she had a lease for the Mount Tabor residence. Mother also testified that she had a safe and reliable transportation plan but had not submitted it to DCS yet. Mother also testified that she had completed the psychological evaluation in August 2014 and tried to comply with the psychologist's recommendations. Mother acknowledged that she had not exercised visitation with S.D.J. since December 2013 due to her inability to pass consecutive drug screens, but she insisted that transportation difficulties caused her failure to submit to drug screens. Mother testified that she had asked if Brislin could come to her house to administer drug screens, and Brislin said no. With regard to her failed drug screen in December 2014, Mother insisted that she never took THC and did not know how it got into her system. Finally, Mother testified that she and her current roommate planned to move out of the Regal Inn and get an apartment together in three to four months.

Next, Brislin testified regarding her efforts to assist Mother in meeting the requirements of the permanency plans and Mother's progress towards that goal. Brislin testified in great detail regarding her efforts to contact Mother since being assigned to the case in April 2013 and stated that communication had always been the biggest barrier between the two and had not improved over time. Brislin testified that although Mother submitted a household budget to DCS, she did so at a time when she was living in a homeless shelter and therefore did not list any expenses. Brislin testified that although DCS provided Mother with budget forms, Mother never submitted another budget plan reflecting her ability to support S.D.J. financially. Brislin also acknowledged that Mother submitted a lease while she was living at the Mount Tabor house, but testified that Mother did not submit any other proof of her living arrangement at any of her other residences. Brislin testified that Mother's failure to submit proof of stable housing prevented DCS from providing funding for homemaker services. Brislin also testified that although DCS applied for funding for

Mother's psychological evaluation in April 2013, it was not able to obtain funding for more than a year because Mother would not provide the appropriate documentation from her insurance provider. Finally, Brislin disputed Mother's testimony that Brislin never offered to come to Mother's house for drug screens and recounted several occasions on which she offered to do so and Mother declined.

The juvenile court also heard testimony regarding S.D.J.'s best interests. Brislin testified that S.D.J. was born premature with several medical concerns and was diagnosed with hyperthyroidism in 2011. Brislin testified that S.D.J. requires speech therapy to address certain medical issues. She also testified that S.D.J. has hip, knee, and ankle issues on her left side that affect her walking and require periodic visits to a physical therapist. Brislin testified that S.D.J. has an obvious bond with her foster parents and that the foster parents are very involved in her therapy. S.D.J.'s foster mother, Tonya Y. ("Foster Mother"), testified that S.D.J. has been living in her home since she was removed from Mother's custody in April 2013. Foster Mother testified that she works at S.D.J.'s school and that S.D.J. receives speech and physical therapy at the school. Foster Mother testified that if Mother's parental rights were terminated, she would be willing and able to adopt S.D.J. Both Brislin and Foster Mother testified that Mother called to speak with S.D.J. almost every day. Foster Mother testified that the calls started about three months after S.D.J. came into her care and usually lasted less than five minutes, though they sometimes lasted longer depending on S.D.J.'s mood. Finally, Mother testified that it would not be in S.D.J.'s best interests to terminate her parental rights. Mother testified that she loves S.D.J. and is able to care for her.

On June 26, 2015, the juvenile court entered an order terminating Mother's and Father's parental rights. The juvenile court found that clear and convincing evidence established that each parent's parental rights were subject to termination for (1) abandonment by willfully failing to visit the child during the four month period immediately preceding the filing of the petition to terminate, (2) abandonment by failing to provide a suitable home for the child, (3) substantial noncompliance with the permanency plan, and (4) the persistence of conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(g)(1)–(3). Additionally, the juvenile court found clear and convincing evidence that Father's parental rights were subject to termination for abandonment by willfully failing to support the child during the four month period immediately preceding the filing of the petition to terminate. Tenn. Code Ann. § 36-1-113(g)(1). Finally, the juvenile court found that DCS presented clear and convincing evidence that termination of Mother's and Father's parental rights was in S.D.J.'s best interests.

Mother filed a timely notice of appeal to this Court on July 22, 2015. Father did not appeal the juvenile court's decision.

II. ISSUES

Mother presents the following issues on appeal, as we have restated them:

1. Whether the juvenile court erred in finding, by clear and convincing evidence, the existence of grounds for terminating Mother's parental rights.
2. Whether the juvenile court erred in finding, by clear and convincing evidence, that termination of Mother's parental rights would be in S.D.J.'s best interests.

III. STANDARD OF REVIEW

“A biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the due process clauses of the federal and state constitutions.” *In re J.C.D.*, 254 S.W.3d 432, 437 (Tenn. Ct. App. 2007) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578–79 (Tenn. 1993)); *In re Audrey S.*, 182 S.W.3d 838, 860 (Tenn. Ct. App. 2005). Although a parent's right is fundamental and superior to the claims of other persons and the government, it is not absolute. *In re J.C.D.*, 254 S.W.3d at 437. A parent's right “continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination.” *Id.*; see also *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004).

In Tennessee, proceedings to terminate parental rights are governed by statute. A party seeking to terminate parental rights must prove two things. First, the party must prove the existence of at least one of the statutory grounds for termination.⁷ Tenn. Code Ann. § 36-1-113(c)(1); *In re Angela E.*, 303 S.W.3d 240, 251 (Tenn. 2010). Second, the party must prove that terminating parental rights is in the child's best interests.⁸ Tenn. Code Ann. § 36-1-113(c)(2); *In re Angela E.*, 303 S.W.3d at 251. In light of the fundamental rights at stake in a termination proceeding, the grounds for termination and best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1); *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). Clear and convincing evidence “establishes

⁷ The statutory grounds for terminating parental rights are listed in Tennessee Code Annotated section 36-1-113(g). The petitioner needs only to establish the existence of one of the statutory grounds to support a termination. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

⁸ The factors to be considered in a “best interests” analysis are listed in Tennessee Code Annotated section 36-1-113(i).

that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d at 653.

In light of the heightened burden of proof in parental termination cases, a reviewing court must modify the customary standard of review set forth in Tennessee Rule of Appellate Procedure 13(d). First, we review the lower court’s specific factual findings de novo with a presumption of correctness unless the evidence in the record preponderates otherwise. Tenn. R. App. P. 13(d); *In re Taylor B.W.*, 397 S.W.3d 105, 112 (Tenn. 2013). Second, we must determine whether the facts, as found by the lower court or as supported by a preponderance of the evidence, amount to clear and convincing evidence that the elements necessary to terminate parental rights have been established. *In re Taylor B.W.*, 397 S.W.3d at 112; *In re Bernard T.*, 319 S.W.3d at 596–97. Whether the facts are sufficient to support termination of parental rights is a conclusion of law, which we review de novo with no presumption of correctness. *In re R.L.F.*, 278 S.W.3d 305, 312 (Tenn. Ct. App. 2008), *overruled on other grounds by In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015); *see also In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007) (citing *In re Valentine*, 79 S.W.3d at 548).

In part, the juvenile court’s ruling was based on its assessment of the credibility of witness testimony presented at trial. Unlike appellate courts, trial courts are able to observe the manner and demeanor of witnesses as they testify. *In re M.A.R.*, 183 S.W.3d 652, 661 (Tenn. Ct. App. 2005) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999)). Thus, when the resolution of an issue depends on credibility and the weight given to witness testimony, the trial court is in a far better position than this Court to resolve it. *In re Jacobe M.J.*, 434 S.W.3d 565, 569 (Tenn. Ct. App. 2013). Accordingly, we will not re-evaluate the juvenile court’s assessment of witness credibility absent clear and convincing evidence to the contrary. *In re M.A.R.*, 183 S.W.3d at 661 (citing *Wells*, 9 S.W.3d at 783).

IV. DISCUSSION

GROUND FOR TERMINATION

Clear and convincing evidence of any one of the twelve statutory grounds for termination of parental rights listed in Tennessee Code Annotated section 36-1-113(g) is sufficient to support an order terminating parental rights where termination is in the best interests of the child. *In re Audrey S.*, 182 S.W.3d at 862. Nevertheless, although only one of the statutory grounds must be established to terminate parental rights, this Court must consider the lower court’s findings with regard to each ground for termination and as to whether termination is in the child’s best interests regardless of whether the issue is raised on appeal. *In re Carrington H.*, No. M2014-00453-SC-R11-PT, 2016 WL 363993, at *20, ---

S.W.3d ---- (Tenn. Jan. 29, 2016). The juvenile court relied on four statutory grounds in terminating Mother's parental rights: (1) abandonment by willful failure to visit, (2) abandonment by failure to make reasonable efforts to provide a suitable home, (3) substantial noncompliance with a permanency plan, and (4) persistence of conditions. *See* Tenn. Code Ann. § 36-1-113(g)(1)–(3). We will address the sufficiency of the juvenile court's findings with regard to each.

Abandonment-Willful Failure to Visit

In 1995, as part of a comprehensive revision of Tennessee's adoption statutes, the Tennessee General Assembly consolidated the grounds for termination of parental rights into a single statute: Tennessee Code Annotated section 36-1-113(g). *In re Audrey S.*, 182 S.W.3d at 862. The statutory ground most frequently relied on to terminate parental rights is abandonment. *Id.* There are five statutory definitions for abandonment as a ground for the termination of parental rights listed in Tennessee Code Annotated section 36-1-102(1)(A). The juvenile court determined that Mother abandoned S.D.J. under the first and second statutory definitions: willful failure to visit and failure to make reasonable efforts to provide a suitable home.

The juvenile court found that Mother abandoned S.D.J. by her willful failure to visit the child. Tennessee Code Annotated section 36-1-102(1)(A)(i) provides that abandonment may be established by showing that:

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

“Willfully failed to visit” is defined as “the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.” Tenn. Code Ann. § 36-1-102(1)(E). Additionally, “token visitation” means visitation that, “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(1)(C).

The petition to terminate Mother's parental rights was filed on October 24, 2014. Mother concedes that she did not visit S.D.J. in person during the four-month period

immediately preceding that date. Nevertheless, she argues that the juvenile court erred in concluding that she abandoned S.D.J. by willfully failing to visit because she spoke with S.D.J. on the phone almost every day. Mother contends that the testimony of her phone conversations with S.D.J. raises substantial doubts about the correctness of the juvenile court's conclusion and demonstrates that her failure to visit S.D.J. was not willful. In response, DCS maintains that the phone calls were merely token visitation and were insufficient to establish visitation or substantial contact.

“[T]elephone calls are not generally a substitute for in-person visitation for the purposes of determining whether a parent has willfully abandoned a child.” *In re Kaiden T.*, No. M2014-00423-COA-R3-PT, 2014 WL 7149215, at *6 (Tenn. Ct. App. Dec. 15, 2014) (citing *In re Adoption of Marissa O.R.*, No. W2013-01733-COA-R3-PT, 2014 WL 2475574, at *14–15 (Tenn. Ct. App. May 30, 2014); *In re Keri C.*, 384 S.W.3d 731, 747–52 (Tenn. Ct. App. 2010)). Nevertheless, Tennessee Code Annotated section 36-1-102(1)(C) requires us to consider the “the circumstances of the individual case” to determine whether Mother’s phone conversations with S.D.J. constitute more than token visitation. See *In re Ciara D.*, No. M2014-01229-COA-R3-PT, 2014 WL 6680696, at *6–7 (Tenn. Ct. App. Nov. 25, 2014) (holding that Father’s phone contact with the children constituted more than token visitation where in-person visitation was not feasible). The circumstances of this case are that Mother’s in-person visitation with S.D.J. was suspended in January 2014 until Mother submitted consecutive favorable drug screens. Mother testified that she knew her visitation with S.D.J. would resume after she passed the consecutive drug screens. The drug screens were the only obstacle preventing Mother from having in-person visitation with S.D.J., and Brislin tried to help Mother overcome it by attempting to contact Mother numerous times for drug screens and by offering to drive to Mother’s house or meet her at another location to take the drug screens.⁹ Mother did not make the same effort in return. Mother failed to communicate with Brislin consistently or make herself available for drug screens. On several occasions, Mother refused to submit to drug screens; on others, Mother claimed she could not provide a urine sample. Moreover, S.D.J. was two years old when Mother last had in-person visitation with her and four years old during the four-month period at issue. Particularly in light of S.D.J.’s young age, we conclude that Mother’s phone conversations with S.D.J. were not a sufficient substitute for the in-person visitation that Mother could have exercised if she had appropriately prioritized the need to do so. Under the circumstances of this case, the phone conversations between Mother and S.D.J. during the relevant four-month period do not preclude the juvenile court’s finding that Mother’s failure to visit the child was willful.

⁹ Although Mother disputed Brislin’s testimony regarding the extent of her efforts to assist Mother in meeting the drug screen requirement, the juvenile court expressly afforded greater weight to Brislin’s testimony where their accounts of Brislin’s efforts conflicted. On appeal, we give great deference to the juvenile court’s assessment of the witnesses’ credibility.

We are therefore satisfied that clear and convincing evidence supports the juvenile court's decision to terminate Mother's parental rights based on this ground.

Abandonment-Failure to Provide a Suitable Home

Additionally, the juvenile court found that Mother abandoned S.D.J. by her failure to provide a suitable home. Tennessee Code Annotated section 36-1-102(1)(A)(ii) provides that abandonment may also exist when:

The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child . . . and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no 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 may be found to be reasonable if such efforts 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.

The juvenile court found that Mother made no effort to establish a suitable home for S.D.J. despite the reasonable efforts of DCS to assist her in doing so. The court then recounted Mother's failure to cooperate with various DCS efforts. Specifically, the court noted that Mother refused to permit DCS to visit places she lived to ascertain their appropriateness, failed to comply with DCS efforts to set up homemaker services, refused DCS transportation to help her look for housing, and failed to provide paperwork necessary to permit DCS to secure funding for certain services.

On appeal, Mother does not dispute that she failed to make a reasonable effort to establish a suitable home for S.D.J., nor does she dispute that DCS did make reasonable efforts to assist her in reaching that goal throughout the case. Rather, she argues that the record does not specifically establish what efforts DCS made during the specific four-month period immediately following S.D.J.'s removal from her home. Mother asserts that because there is no evidence that DCS made reasonable efforts during the relevant time period, the juvenile court erred in concluding that DCS established grounds for termination by clear and convincing evidence.

As Mother correctly points out, this Court has interpreted Tennessee Code Annotated section 36-1-102(1)(A)(ii) as directing that a reasonable efforts inquiry in this context be limited to an examination of the four-month period immediately following the child's removal from the home. *See, e.g., In re Riley C.*, No. M2015-00541-COA-R3-PT, 2016 WL 626058, at *8 (Tenn. Ct. App. Feb. 12, 2016); *In re M.A.P.*, No. E2014-02413-COA-R3-PT, 2016 WL 369399, at *5 (Tenn. Ct. App. Jan. 29, 2016); *In re Aaliyah E.*, No. E2015-00602-COA-R3-PT, 2016 WL 304627, at *6 (Tenn. Ct. App. Jan. 26, 2016). S.D.J. was removed from Mother's home on April 16, 2013. The relevant four-month period therefore spans from April 16, 2013 to August 16, 2013, and we must determine what efforts DCS made to assist Mother in establishing a suitable home for S.D.J. during that period.

On April 17, 2013, DCS developed a permanency plan with a primary goal of helping Mother establish a safe and stable home for S.D.J. Immediately thereafter, DCS personnel were somewhat constrained in their efforts to assist Mother in reaching that goal because they did not know where she was living. Brislin testified that she tried unsuccessfully to call Mother's cell phone three times in April 2013 and eight times in May 2013. Brislin testified that DCS tried to secure funding for Mother's psychological evaluation in April and May 2013 but was unsuccessful because they did not have the necessary information from Mother. Brislin testified that Mother returned two of her calls in May 2013, and, in the middle of that month, Brislin learned that Mother was living in a local homeless shelter. In June and July 2013, Brislin tried to call Mother nine times to set up a drug screen but was unsuccessful. On July 19, 2013, Brislin informed Mother that if she did not come in, she would be counted as having failed the drug screen. Nevertheless, Mother declined to come in on that date. Mother did not give any explanation for the refusal at trial. On August 9, 2013, Brislin and other DCS personnel attended the juvenile court's hearing on DCS's dependency and neglect petition. Mother failed to appear for the hearing despite having notice of it.

As this Court has noted in past cases, DCS's efforts do not need to be "Herculean." *See In re Riley C.*, 2016 WL 626058, at *8. As Tennessee Code Annotated section 36-1-102(1)(A)(ii) specifically states, DCS's efforts to assist a parent in establishing a suitable home "may be found to be reasonable if such efforts exceed the efforts of the parent or guardian toward the same goal." Having reviewed the record, we are satisfied that DCS made reasonable efforts to assist Mother in establishing a suitable home for S.D.J. in the four-month period immediately following her removal. As such, there is clear and convincing evidence to support the juvenile court's finding of failure to provide a suitable home.

Substantial Noncompliance with the Permanency Plan

The juvenile court also based its termination of parental rights on Mother's substantial noncompliance with the permanency plans established for her by DCS. Tennessee Code Annotated section 36-1-113(g)(2) provides that grounds for termination may exist when "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan" As this Court has previously explained:

Terminating parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) requires more proof than that a parent has not complied with every jot and tittle of the permanency plan. To succeed under Tenn. Code Ann. § 36-1-113(g)(2), the Department must demonstrate first that the requirements of the permanency plan are reasonable and related to remedying the conditions that caused the child to be removed from the parent's custody in the first place, and second that the parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance.

In re M.J.B., 140 S.W.3d at 656–57 (internal citations omitted).¹⁰

DCS removed S.D.J. from Mother's custody due to environmental neglect and concerns that issues with Mother's health prevented her from providing appropriate care for S.D.J. The requirements placed on Mother in the permanency plans throughout this case have consistently been directed towards remedying those conditions. Among other things, the permanency plans required Mother to submit to routine health visits and a psychological evaluation and to comply with all recommendations, obtain letters from healthcare providers regarding whether it was safe for her to drive, submit a plan to obtain safe and reliable transportation, participate in therapeutic visitations and family counseling, submit a household budget and manage her finances accordingly, comply with homemaker services, and obtain safe, stable housing and show proof of her lease. Each of the requirements was directed toward helping Mother provide a safe and stable home for S.D.J. and was, therefore, reasonably related to remedying the problems that led to her initial removal from Mother's custody. Mother does not present any argument to the contrary.

¹⁰ In past cases, this Court has stated the additional requirement that DCS must make reasonable efforts to assist the parent in meeting the requirements of the permanency plan. *See, e.g., In re Arteria H.*, 326 S.W.3d 167, 177 (Tenn. Ct. App. 2010). In 2015, however, the Tennessee Supreme Court clarified that Tennessee Code Annotated section 36-1-113 does not require proof of reasonable efforts as a precondition to termination. *In re Kaliyah S.*, 455 S.W. 3d at 554.

Mother acknowledges that she failed to comply with some of the obligations placed on her in the permanency plans. Nevertheless, she contends that the juvenile court erred in finding that her noncompliance with the permanency plans was substantial. In support of her argument, Mother cites her compliance with several requirements of the permanency plans. Specifically, she points out that she submitted a letter from her primary care physician stating that it would be safe for her to drive, completed a psychological evaluation after funding was provided by DCS, completed therapeutic visitations, submitted a household budget, and showed proof of a lease for her residence.

Although Mother made some effort to complete some of the requirements placed on her in the permanency plans, we do not conclude that she fully complied with any portion of the plan. For example, Mother submitted a letter from her primary care physician stating that it would be safe for her to drive but failed to submit such letters from her eye doctor and neurologist as required by the permanency plans. Mother completed a psychological evaluation in August 2014 but did not subsequently comply with the psychologist's recommendations as required by the permanency plans. Mother participated in therapeutic visitation with S.D.J. on four occasions in 2013 but avoided DCS requests for drug screens on numerous occasions after DCS suspended the visitations due to increased concerns of substance abuse. The household budget Mother submitted did not account for living expenses because she was living in a homeless shelter at the time; she never submitted a household budget that reflected her financial ability to provide care and a safe and stable home for S.D.J. Finally, Mother only submitted one lease to DCS despite living in roughly six different locations during the two years following S.D.J.'s removal from her custody.

Mother's failure to demonstrate the ability to provide stable housing that would be safe and appropriate for S.D.J. does not support Mother's argument that she substantially complied with the permanency plans. When S.D.J. was removed from Mother's custody, Mother was living in an apartment that had a "strong smell of urine" and was filled with bags of trash and loose garbage. Moreover, Mother informed DCS workers that she was being evicted from the apartment in three days. In light of those circumstances, the fundamental goal of the requirements in the permanency plans was to help Mother demonstrate the ability to provide a safe and stable home for S.D.J. Despite the efforts of DCS workers, there is nothing in the record to suggest that Mother was any closer to reaching that outcome at the time of trial than she was when S.D.J. was removed from her custody in April 2013. In the two years following S.D.J.'s removal, Mother lived in at least six different residences with three different acquaintances and a cousin and lived in a homeless shelter for two separate periods of time. Mother's name was on the lease at only one of the locations. At the time of trial, Mother had recently moved from the homeless shelter into a hotel room with a friend. Although Mother testified that she and the friend planned to get an apartment together in three or four months, there is nothing in the record to persuade us that the arrangement would

provide a safe and stable home for S.D.J. Mother failed to submit a household budget demonstrating her ability to provide for S.D.J. financially; failed to provide documentation so that DCS could submit funding for homemaker services; and failed to obtain safe and stable housing despite DCS efforts to help her do so. Thus, although Mother completed some of the permanency plans' requirements, in light of the foregoing, we are satisfied that there is clear and convincing evidence to support the juvenile court's finding of substantial noncompliance.

Persistent Conditions

The juvenile court also relied on Tennessee Code Annotated section 36-1-113(g)(3) as a ground for terminating Mother's parental rights.¹¹ This ground for termination, commonly referred to as "persistence of conditions," applies where:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent or parents or the guardian or guardians, still persist;

(B) 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 parents or the guardian or guardians in the near future; and

(C) 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.

Tenn. Code Ann. § 36-1-113(g)(3).

The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re Dakota C.R.*, 404 S.W.3d 484, 499 (Tenn. Ct. App. 2012)

¹¹ Mother does not challenge the juvenile court's reliance on Tennessee Code Annotated section 36-1-113(g)(3) as a ground for terminating her parental rights. Nevertheless, this Court must consider the juvenile court's findings with regard to each ground for termination regardless of whether the issue is raised on appeal. *In re Carrington H.*, 2016 WL 363993, at *20.

(quoting *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. Mar. 3, 2008)). It is focused on the results of the parent's efforts at improvement rather than the mere fact that he or she has made them. *In re Audrey S.*, 182 S.W.3d at 874. Thus, a parent's failure to remedy the conditions that led to the child's removal need not be willful. *In re Dakota C.R.*, 404 S.W.3d at 499.

In some cases, the same facts that support termination of parental rights based on substantial noncompliance with the permanency plans also support termination based on persistence of conditions despite the fact that the two grounds for termination are separate and distinct. This is because the requirements set forth in permanency plans, noncompliance with which can support termination, are often directly related to remedying the conditions that led to the child's removal, which if not remedied could also support termination. The circumstances of this case give rise to such a factual overlap.

S.D.J. was removed from Mother's home by order of a court more than a year prior to initiation of the termination proceedings due to environmental neglect and residential instability. In roughly two years between S.D.J.'s removal and the time of trial, Mother lived in at least six different residences and spent two separate stints living in a homeless shelter. Just prior to trial, Mother moved from the homeless shelter into a motel room with a friend. At trial, Mother testified that she planned to get an apartment with the friend in three or four months. There is nothing in the record to indicate that this prospective arrangement would be any more stable than Mother's previous living arrangements. Mother's inability to provide a safe and stable home for S.D.J. still persists, and there is nothing in the record to indicate that it will be remedied in the near future. Continuation of the parent-child relationship will greatly diminish S.D.J.'s chances of early integration into a safe, stable, and permanent home. Under these circumstances, we conclude that clear and convincing evidence supports the trial court's reliance on the ground of persistent conditions to terminate Mother's parental rights.

BEST INTERESTS

Next, we must consider whether termination of Mother's parental rights is in S.D.J.'s best interests. As we explained previously, once at least one of the statutory grounds for termination of parental rights has been established, the petitioner must prove by clear and convincing evidence that termination of the parent's rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c)(2); *In re Angela E.*, 303 S.W.3d at 251. Once the court has determined that the parent is unfit based on clear and convincing evidence that one or more of the grounds for termination exists, the interests of the parent and child diverge, and the interests of the child become the court's paramount consideration. *In re Audrey S.*, 182 S.W.3d at 877. Because not all parental conduct is irredeemable, the statutes governing

termination of parental rights in Tennessee recognize that terminating the parental rights of an unfit parent will not always serve the best interests of the child. *Id.* If the interests of the parent and the child conflict, however, the court must always resolve the conflict in favor of the rights and best interests of the child. Tenn. Code Ann. § 36-1-101(d). Tennessee Code Annotated section 36-1-113(i) sets forth the following list of factors to be considered when determining a child's best interests in a termination of parental rights case:

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

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Although courts should consider the factors listed in Section 36-1-113(i) to the extent that they are relevant to the particular facts and circumstances of the case, the list is “not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent’s parental rights is in the best interest of a child.” *In re M.A.R.*, 183 S.W.3d at 667. Depending on the circumstances of the case, the consideration of a single factor, or of facts outside the statutory factors, may dictate the outcome of the court’s analysis. *In re Audrey S.*, 182 S.W.3d at 878.

Mother argues that the record does not contain clear and convincing evidence that terminating her parental rights would be in S.D.J.’s best interests. In support of this assertion, Mother focuses on three of the foregoing statutory factors that she contends should not weigh against her. First, Mother asserts that she has maintained regular visitation or other contact with S.D.J. through phone conversations. *See* Tenn. Code Ann. § 36-1-113(i)(3). Second, Mother asserts that there is nothing in the record to indicate that she does not have a meaningful relationship with S.D.J. *See* Tenn. Code Ann. § 36-1-113(i)(4). Third, Mother asserts she was not required to pay child support due to her disability. *See* Tenn. Code Ann. § 36-1-113(i)(9).

Even assuming that Mother maintained a meaningful relationship with S.D.J. after she was removed from Mother’s custody, we conclude that the juvenile court appropriately considered the overall circumstances in making the best interests determination. As the juvenile court noted, Mother put little effort into improving her circumstances following S.D.J.’s removal. Despite the diligent efforts of DCS workers to assist her, Mother’s circumstances at the time of trial were virtually identical to those that existed when S.D.J. was taken into custody. Mother has not demonstrated that she has become any more capable of providing S.D.J. with a safe and stable home than she was in April 2013. Mother’s inability to obtain transportation for drug screens, in light of S.D.J.’s medical needs, raises concerns that S.D.J. would not continue to get the therapy she needs if placed in Mother’s care. Conversely, the record establishes that S.D.J. has a strong bond with her foster parents. S.D.J.’s foster parents are willing and able to adopt S.D.J. and provide her with a safe, stable, and permanent home. In light of the foregoing, we are satisfied that the record contains clear and convincing evidence that terminating Mother’s parental rights is in S.D.J.’s best interests.

V. CONCLUSION

For the foregoing reasons, we affirm the decision of the juvenile court to terminate Danielle J.'s parental rights. Costs of this appeal are assessed against the Appellant, Danielle J. Because Danielle J. is proceeding *in forma pauperis* in this appeal, execution may issue for costs if necessary.

ARNOLD B. GOLDIN, JUDGE