

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 1, 2016

IN RE BAILEY W., ET AL.

**Appeal from the Juvenile Court for Fentress County
No. 14JV182 Michael Todd Burnett, Judge**

No. M2015-01576-COA-R3-PT – Filed June 10, 2016

This case involves termination of the parental rights of a mother to her four children. After investigating a report of drug exposure, the Tennessee Department of Children’s Services (“DCS”) obtained emergency temporary custody of the children. Ten months after the children were removed from the mother’s home, DCS filed a petition to terminate the mother’s parental rights on the grounds of abandonment by willful failure to support and failure to establish a suitable home, substantial noncompliance with the permanency plan, and persistence of conditions. The juvenile court found all grounds were established by clear and convincing evidence and that termination of the mother’s parental rights was in the children’s best interests. The mother appeals both the grounds for termination and that termination was in the children’s best interests. The mother also argues her due process rights were violated because the court admitted testimony by deposition. Although we conclude that the proof was less than clear and convincing that the mother willfully failed to support her children, we affirm the termination of parental rights.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and KENNY ARMSTRONG, J., joined.

Melanie Stepp Lane, Jamestown, Tennessee, for the appellant, Karissa W.

Herbert H. Slatery III, Attorney General and Reporter, and Laura E. Miller, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

Leslie Clark Ledbetter, Clarkrange, Tennessee, Guardian ad Litem.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Karissa W. (“Mother”) is the biological mother of four children, Bailey, Deon, Katelyn, and Kailey. The children range in age from nine to thirteen years. Brian W. (“Father”) is the biological father of the two youngest children and the adoptive father of the two oldest children.

After receiving a report that Mother had exposed her children to drugs, a case manager for DCS interviewed Mother at her home on September 30, 2013. Mother disclosed that she was addicted to the pain medications she had been prescribed for her chronic back pain. Mother admitted to routinely taking more pain medication than prescribed. She also explained she was taking anxiety medication. She claimed that Father illegally obtained other medications for her and took the children with him to make those purchases. Mother also stated that she had separated from Father because he physically abused her in front of the children and that she supported the family by selling her medications. Mother consented to a drug screen and tested positive for marijuana, opiates, oxycodone, and benzodiazepine. The case manager also interviewed the two oldest children who confirmed they had witnessed Father physically abusing Mother and expressed their fear of staying with Father.

DCS filed a sworn petition in the Juvenile Court of Fentress County, Tennessee, for emergency temporary custody of the children and to have them declared dependent and neglected. On September 30, 2013, the juvenile court issued a protective custody order for the children, finding probable cause to believe that the children were dependent and neglected and subject to an immediate threat of harm. *See* Tenn. Code Ann. § 37-1-128(b)(2) (2014). DCS placed the children in foster care in the home of a relative.

DCS established a permanency plan with the participation of the parents on October 9, 2013. The plan had the twin goals of returning the children to a parent or adoption. After the parents made little progress in remedying their issues, DCS developed a revised permanency plan, extending the deadline for achieving the plan objectives by another seven months. Otherwise, the two plans were identical.

The revised permanency plan identified a number of goals for the parents to achieve before they could regain custody of the children. The plan required the parents to eliminate domestic violence in the home, maintain a safe and stable home, refrain from illegal drug use, use prescription medication only as prescribed, develop and maintain a positive relationship with the children through visitation and appropriate parenting, consistently use good parenting skills, and seek treatment for mental health issues.

The plan outlined a series of action steps designed to help the parents achieve these desired outcomes. The action steps included: (1) attending parenting and domestic violence classes; (2) cooperating in scheduling evaluations for alcohol and drug abuse and mental health and following any recommendations from those evaluations; (3) signing releases of medical information to allow DCS to monitor their progress; (4) establishing a permanent home for a minimum of six months; (5) obtaining necessary household items; (6) providing proof of paid utilities; (7) submitting to home visits; (8) providing proof of a stable income; (9) undergoing drug testing and prescription medication counts; (10) and attending visitation with the children and behaving appropriately. The plan also required the parents to remain in weekly contact with DCS, maintain current contact information with DCS, and pay child support.

On April 14, 2014, at the adjudicatory hearing on DCS's petition for a declaration of dependency and neglect, Mother stipulated that the children were dependent and neglected and that the court could adopt as findings of fact, with some modifications, DCS's statement of alleged facts. With regard to Mother only,¹ the court found DCS had met its burden of proving the children were dependent and neglected and should remain in foster care. After speaking with the oldest child, Bailey, the court suspended Mother's visitation and phone conversations with him.

On July 9, 2014, DCS filed a petition to terminate the parental rights of both parents. DCS alleged multiple grounds for termination, including abandonment by willful failure to support; abandonment by failure to establish a suitable home; substantial noncompliance with the permanency plan; and persistent conditions. After several continuances, the juvenile court held the termination hearing² over two days, March 25 and April 22, 2015.

Before the hearing, DCS moved for an order declaring the family service worker assigned to the case an unavailable witness and allowing her deposition to be taken for proof. Mother opposed the motion and asked the court to continue the hearing to a later date when the witness might be available to testify in person. The court found the family service worker, due to the status of her pregnancy, unavailable within the meaning of Rule 804 of the Tennessee Rules of Evidence and ordered the parties to take her deposition for proof. The court specifically found that "the pendency of this case is having a significant impact on Bailey and that the hearing in this matter should not be postponed until after [the family service worker's] maternity leave."

¹ The juvenile court continued the adjudicatory hearing with respect to Father.

² Before the hearing, Father agreed to voluntarily surrender his parental rights to the children. The court allowed DCS to present proof as to both parents and ruled it would not terminate Father's parental rights as long as he surrendered his rights within ten days of the court's final ruling.

A. PROOF AT THE HEARING

1. Mother's Drug Abuse and Mental Health

Mother admitted that, for a number of months after the children were placed in foster care, she “overtook some of [her] medicine at the time, because [she] didn't want to think about it.” According to Mother, however, she always maintained weekly contact with the family service worker and only missed appointments when she lacked transportation. She contended the family service worker refused to help her with transportation and other services.

The family service worker attempted to schedule all the necessary appointments for Mother's evaluations, counseling, and classes. When she made an appointment, she notified Mother and offered transportation. She also reminded Mother about the appointments. In those instances in which the service provider required Mother to make the appointment, the family service worker provided Mother with the contact information and reminded her to make those calls. After the scheduled appointment dates, she contacted Mother to verify she had attended. If Mother had not attended, the family service worker tried to determine the reason and to provide a solution to overcome any obstacles Mother was experiencing.

In spite of the family service worker's efforts, Mother cancelled or missed numerous appointments. The family service worker initially scheduled Mother's psychological evaluation for December 5, 2013, but Mother did not actually have the evaluation until six months later. Mother's alcohol and drug assessment was scheduled in October 2013, but Mother did not complete the assessment until the following April. In the same vein, Mother had an initial appointment for a mental health evaluation in October 2013, which she did not attend. Mother did not submit to a mental health evaluation until the following January.

Mother's delay in scheduling and completing her assessments had the foreseeable consequence of delaying her ability to follow the resulting recommendations. After her psychological evaluation, Mother was diagnosed with “major depressive disorder, PTSD, substance abuse dependency, somatization³ and [a mild form of depression].” Based on these diagnoses, the examiner recommended that Mother have individual psychotherapy at a mental health center, take anger management classes, have a physician monitor her prescription drug use, and submit to pill counts. The examiner explained Mother's mental health issues had negatively impacted her ability to parent her children.

³ The examiner explained an individual with a somatic disorder is continuously concerned with her health status and physical problems and this health focus affects her social interactions and self-image.

Mother had her initial mental health evaluation at Cumberland Mountain Mental Health Center (“Cumberland”) in January 2014. She was diagnosed with PTSD, agoraphobia, and mild depression. She refused the recommendation for individual therapy and requested medication management and case management services. The case manager attempted to work with Mother on obtaining stable housing and learning to cope with anxiety, but Mother was removed from case management several months later for repeated failure to contact the case manager. Although the medical management examiner recommended psychotherapy for her PTSD, Mother either cancelled or did not show for her psychotherapy appointments throughout 2014.

Two months before the termination hearing, Mother had a second mental health assessment at Cumberland. This time, Mother agreed to therapy and attended one session by the time of the hearing. However, Mother failed to sign the required release form, so the family service worker could not monitor Mother’s progress at Cumberland.

Mother’s alcohol and drug abuse assessment recommended residential inpatient treatment.⁴ Mother never completed this recommendation because she would need to cease using narcotic pain medication to enter treatment. Mother claimed she needed the narcotic pain medication because of her back condition.

Mother’s imaging studies on her spine reveal “diffuse degenerative changes with loss of disc height and disc desiccation along with posterior disc bulging.” Mother’s neurosurgeon opined her imaging studies are “virtually unchanged” from two years earlier. While clinically Mother’s condition remained stable, her pain complaints increased.

Even though Mother’s medical condition might have supported her complaints of pain, her past experience with narcotic pain medication made her a poor candidate for narcotics. She had been designated at high risk for opioid misuse. In July 2014, a nurse practitioner at a pain clinic informed Mother that she would only receive interventional procedures for pain relief because she had failed drug screens. Mother never returned to that pain clinic. In November 2014, another pain clinic discharged Mother for failure to report for a requested pill count.

The family service worker scheduled urine drug screens and hair follicle drug testing to monitor Mother’s drug use. On several occasions, Mother did not appear for her scheduled drug screens, and she failed at least five. Mother admitted to taking narcotic

⁴ Mother’s attorney objected to the admission of the recommendations contained in the alcohol and drug abuse assessment as hearsay. The juvenile court overruled the objection and allowed the family service worker to testify about what Mother told her concerning the assessment’s recommendations. Mother’s statements that she needed to complete a residential inpatient program for prescription drug abuse were treated as an admission by a party opponent. *See* Tenn. R. Evid. 803(1.2).

medications without a prescription. Mother's drug screens since June 2014, however, were only positive for substances for which Mother had a prescription. Mother's last drug screen prior to the termination hearing was on December 5, 2014.

The family service worker used pill counts to verify Mother was taking her prescription medication properly. She told Mother to bring her pill bottles to every meeting and appointment, even if the bottles were empty, so that the family service worker could count the pills. On seven occasions, Mother failed to bring her pill bottles as requested. Of the four times she brought her pill bottles, she was short on her pill count twice. Mother explained she had been overmedicating herself. Mother's last pill count was in October 2014. The family service worker attempted to perform a pill count in December 2014, but Mother again failed to bring her pill bottles.

A pharmacist who filled Mother's prescriptions for narcotic pain medications between June and December 2014 expressed concern about the amount of medication Mother was taking. He testified Mother told him she overmedicated. He related a phone call he received from Mother's boyfriend on a Sunday when the pharmacy was closed. The boyfriend requested that the pharmacy be opened so that Mother could have her pain medication refilled. Based on the information relayed by the boyfriend regarding Mother's condition, the pharmacist recommended that the boyfriend call for emergency help.

At the hearing, Mother testified she threw away her remaining prescription pain medications in February 2015 and started taking suboxone, another narcotic pain medication, for her chronic pain. Mother claimed she now takes her prescription medication only as prescribed, but she anticipated taking suboxone for the foreseeable future to deal with her pain. Mother had not signed a release allowing DCS to monitor her treatment at the suboxone clinic.

2. Domestic Violence and Parenting

Mother completed domestic violence classes in July 2014, which included an anger management component. Mother also completed parenting classes in April and May 2014.

The family service worker arranged for therapeutic visitation, which is visitation supervised by a qualified professional who also provides parenting advice. The therapeutic visitation supervisor explained Mother struggled with appropriately parenting multiple children. While the younger children greeted her warmly and appeared to have a bond with her, Mother would often argue with Bailey, and in April 2014, the court suspended Mother's contact with him.

Mother's parenting skills improved from January to November 2014, but then Mother began missing visits, and her parenting skills digressed. Mother fell asleep during one visit

in December 2014 and missed two scheduled visits during March 2015. The visitation supervisor would not recommend unsupervised visitation for Mother because of her inconsistent parenting.

3. Mother's Income and Housing

While in the past Mother had worked at a nursing home, fast food establishments, and a daycare, she claimed her back condition prevented her from working. Also contributing to her struggles, Mother did not graduate from high school. After the children were removed, Mother applied for disability, and while her application was pending, Mother's attorney advised her not to work. Ultimately, Mother's disability application was denied in January 2015. Thereafter, she applied for jobs. However, as of the day of the hearing, she did not have fulltime employment.

Mother did have some income and sources of support. She testified that she made approximately \$200 per month from babysitting and house cleaning, but she never provided DCS with any proof of income. On occasion, she received some child support from the biological father of her two older children. Mother participated in the Supplemental Nutrition Assistance Program for food assistance. Her father and friends also provided her with additional money when needed. Mother testified her monthly expenses were approximately \$330, which consisted primarily of rent and utilities. Mother paid no child support while her children were in foster care.

Mother's lack of income impacted her ability to find a suitable home for her children. Mother lived with friends and relatives for almost a year after the children were placed in foster care. Much of that time, Mother lived with her current boyfriend at the home of his sister. Mother testified that public housing was not an option because she and Father had been "kicked out" of public housing and that it would be three years before she could get in again. The family service worker helped Mother complete a budget and apply for housing assistance, but because Mother could not show sufficient income to make rent payments, her assistance application was denied.

Mother's landlord testified Mother began renting a trailer from him in August 2014. Mother lived with her current boyfriend. In December, after a problem with the electrical service to the trailer, Mother moved to another rental property owned by the same landlord. The landlord admitted that Mother was behind in her rent payments at the time of the hearing. He also revealed that part of Mother's rent is usually paid by her boyfriend's mother. The boyfriend's mother testified that she often paid Mother's rent and utilities.

Even after Mother moved into the rented trailer, she did not notify the family service worker of her new address until several months later. The family service worker attempted to perform a home visit at Mother's rental home in October, but Mother would not allow her

entry, claiming she was still unpacking. During the pendency of this case, Mother provided two receipts for partial rent payments and three for utilities. Although Mother testified she moved to a different rental property in December, the family service worker claimed that she was never able to conduct a home visit because Mother had not provided her current address.

Mother testified she rented her own residence for nine months, properly notified the family service worker of her address, and produced the required proof of paid rent and utilities. She admitted, however, at the hearing that she was temporarily living with the mother of her boyfriend again because a water pipe was broken at her rental home.

4. The Children

Several witnesses testified about the children's reports of domestic violence and drug use in their former home. The children reported their parents had violent fights at home and often used drugs. Before being removed from the home, Bailey assumed the responsibility for getting his siblings to school and providing meals. At times, he took whatever money he could find in their home to buy food. When fights broke out between his parents, he took his siblings to a neighbor's house for safety and sometimes tried to break up the fights himself.

After initially placing the children with an aunt and uncle, DCS moved the children to the home of their paternal grandparents. All of the children have anger issues, and Kailey has developmental and cognitive delays. Bailey and Kailey receive therapy. Grandmother testified that the children's behavior had improved during their time in her home, but she observed that the children became upset after visits and phone conversations with Mother. Grandmother expressed a desire to adopt all of the children. As of the date of the hearing on the petition to terminate, only the three younger children still lived with Grandmother; Bailey was moved to a separate foster home due to behavioral issues.

Since entering foster care, Bailey was diagnosed with ADHD, PTSD, and adjustive disorder. He was physically aggressive with his siblings and other children at school and often had trouble sleeping. Dr. Scott Herman, a professional counselor, attributed Bailey's behavior to his exposure to domestic violence and drug use in his home. Dr. Herman testified that children who are exposed to domestic violence at home have a tendency to have higher levels of aggression and hostility, perform poorly in school and have lower cognitive functioning. Dr. Herman opined that prolonging Bailey's time in foster care would increase the risk of adverse behaviors and that returning Bailey to a chaotic home life could cause his problems to worsen.

To address his issues, Bailey was receiving psychotherapy. He needed continued in-depth counseling for anger management, trauma therapy, and other therapy for his self-esteem. Bailey was on the waiting list for inpatient treatment. Bailey adamantly refused to communicate with Mother.

For her part, Mother described her relationship with her children as close and loving. Mother stated that foster care had traumatized her children and caused their current behavioral issues. In the words of Mother, “they’ve traumatized the kids so bad that none of them—they don’t want to see me.”

B. JUVENILE COURT ORDER TERMINATING MOTHER’S PARENTAL RIGHTS

On June 25, 2015, the juvenile court issued a final order terminating Mother’s parental rights to the children. The court found DCS had proven all four grounds for termination by clear and convincing evidence. The court specifically stated Mother was not a credible witness. After reviewing the statutory factors, the court also found that it was in the children’s best interests to terminate Mother’s parental rights. On appeal, Mother argues the juvenile court erred in its analysis of the grounds for termination and the children’s best interest. She also contends she was denied due process because the family service worker involved in her case was permitted to testify by deposition.

II. ANALYSIS

Termination of parental rights is one of the most important decisions courts make. As noted by the United States Supreme Court, “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). Terminating 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.” Tenn. Code Ann. § 36-1-113(l)(1) (Supp. 2015).

A parent has a fundamental right, based in both the federal and State constitutions, to the care and custody of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putman v. McCloud*, 921 S.W.2d 170, 174-75 (Tenn. 1996); *In re Adoption of a Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). While fundamental, parental rights are not absolute. The State may interfere with parental rights, through judicial action, in some limited circumstances. *Santosky*, 455 U.S. at 747; *In re Angela E.*, 303 S.W.3d at 250.

Our Legislature has identified those situations in which the State’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth the grounds upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g) (Supp. 2015). Termination proceedings are statutory, *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004), and parental rights may be terminated only where a statutory ground exists. Tenn. Code Ann. § 36-1-113(c)(1) (Supp. 2015); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

To terminate parental rights, a court must determine by clear and convincing evidence the existence of a statutory ground for termination and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). This heightened burden of proof is one of the safeguards required by the fundamental rights involved. *See Santosky*, 455 U.S. at 769. The heightened burden serves “to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights.” *In re Bernard T.*, 319 S.W.2d 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.” *Id.* at 596 (citations omitted). Unlike the preponderance of the evidence standard, “[e]vidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable.” *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005).

On appeal, we review the trial court’s findings of fact *de novo* on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. In termination proceedings, “the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court’s conclusions of law *de novo* with no presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993). We “review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal.” *In re Carrington H.*, 483 S.W.3d 507, 525 (Tenn. 2016), *petition for cert. filed sub. nom. Vanessa G. v. Tenn. Dep’t of Children’s Servs.*, (U.S. Apr. 22, 2016) (No. 15-1317).

A. DUE PROCESS

As an initial matter, Mother challenges the juvenile court’s order finding that the family service worker was an unavailable witness and directing that her deposition be taken for proof. Mother argues her inability to question the family service worker at the termination hearing denied her due process of law. *See* U.S. Const. amend. XIV § 1; Tenn. Const. art. 1, § 8. “In light of the interests and consequences at stake, parents are constitutionally entitled to fundamentally fair procedures in termination proceedings.” *In re Carrington H.*, 483 S.W.3d at 522 (citing *Santosky*, 455 U.S. at 754). While “due process” has never been precisely defined, inherent in the phrase is a requirement of “fundamental fairness.” Delineating what “fundamental fairness” encompasses in a given situation requires a consideration of relevant case law and an assessment of the interests at stake. *Lassiter v.*

Dep't of Soc. Servs., 452 U.S. 18, 24-25 (1981).

In deciding whether due process required the family service worker to be present at the termination hearing, we must balance “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Lassiter*, 452 U.S. at 27. Both the parent and the State have an interest in an accurate and just decision in a termination case. *Id.* at 27-28. The State has an additional interest in ensuring the children at issue are placed in a permanent home as quickly as possible. *See* Tenn. Code Ann. § 37-2-401(a) (2014) (stating the legislative intent to protect children “from needless prolonged placement in foster care”). While a parent might seek to postpone a termination hearing in order to remedy circumstances that led to a child’s removal, the State seeks to provide a permanent home for the child at an early date.

Admitting a deposition under these circumstances⁵ did not increase the risk of an erroneous decision, and we conclude there was no due process violation. Mother had the opportunity to confront and question the witness in both a discovery deposition and in the subsequent deposition for proof. The portions of the family service worker’s deposition testimony admitted by the court were largely related to the family service worker’s interactions with Mother, and Mother had the opportunity to rebut that testimony with her own testimony.

B. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

The juvenile court found four separate grounds for termination of Mother’s parental rights. Mother challenges each of the grounds on appeal.

1. Substantial Noncompliance with Permanency Plan

The court found Mother had not substantially complied with the permanency plan. Parental rights may be terminated when “[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan” Tenn. Code Ann. § 36-1-113(g)(2). Before analyzing whether a parent complied with the permanency plan, the court must find that the permanency plan requirements that the parent allegedly failed to satisfy are “reasonable and related to remedying the conditions which necessitate foster care placement.” *In re Valentine*, 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C) (2014)).

The children were removed from the home because of domestic violence and drug abuse. During Mother’s initial interview with DCS, she admitted to substance abuse and

⁵ The juvenile court found the witness unavailable because the late stage of her pregnancy made her physically unable to be present at the hearing. Tenn. R. Evid. 804(a)(4).

mental health issues. She also disclosed she often sold her prescription medications to pay the family's bills. Shortly after the children were removed, Mother lost her residence because she could no longer pay the rent. Mother was required to be evaluated and seek treatment for substance abuse, mental health issues, parenting concerns, anger management, and domestic violence. She was also required to maintain a suitable home and have a stable income. We agree with the juvenile court that Mother's responsibilities in the plan were reasonably related to remedying the issues that caused the removal of the children.

If the permanency plan requirements are reasonable, the court must then determine if the parent's noncompliance was substantial. *Id.* at 548-49. The unsatisfied requirements must be important in the plan's scheme. *Id.* A "[t]rivial, minor, or technical" deviation from the permanency plan's requirements does not qualify as substantial noncompliance. *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). Improvements in compliance are construed in favor of the parent. *In re Valentine*, 79 S.W.3d at 549.

The juvenile court found Mother had not completed the following requirements: (1) maintain a safe home for six months; (2) provide proof of paid utilities; (3) maintain current contact information with DCS; (4) provide proof of income; (5) comply with pill counts; (6) pass drug screens; (7) follow the recommendations from the alcohol and drug assessment; and (8) complete a psychological evaluation in a timely manner. Mother contends she complied with all requirements of the permanency plan except proof of income. The record does not support Mother's claims.

The juvenile court specifically found that Mother, her boyfriend, the boyfriend's mother, and Mother's sister were not credible witnesses. We will not overturn the court's credibility assessment on appeal "absent clear and convincing evidence to the contrary." *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011). The proof in this record is that Mother failed to address her mental health issues, establish a suitable home, submit to home visits, obtain stable income, complete pill counts, remain in weekly contact with DCS, or complete a residential treatment program for drug abuse. These responsibilities were substantial in light of the plan's overall goals.

"[A] permanency plan is not simply a list of tasks with boxes to be checked off before custody is automatically restored. Rather, it is an outline for doing the things that are necessary to achieve the goal of permanency in children's lives." *In re V.L.J.*, No. E2013-02815-COA-R3-PT, 2014 WL 7418250, at *8 (Tenn. Ct. App. Dec. 30, 2014). "[P]arents must complete their responsibilities in a manner that demonstrates that they are willing and able to resume caring for their children in the long-term, not on a month-to-month basis." *Id.* Mother had well over a year to achieve substantial compliance with the permanency plan. Mother's lack of cooperation with DCS evidences an unwillingness to make the necessary changes to resume caring for her children. When viewed in the context of the amount of time and resources Mother had available to her, her progress on her responsibilities in the plan fell

short of what was necessary.

2. Persistence of Conditions

The juvenile court also found Mother's parental rights should be terminated based on persistence of conditions. Parental rights may be terminated after a child has been removed from the home for six months and (1) "[t]he 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 . . . still persist;" (2) "[t]here is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent . . . in the near future;" and (3) "[t]he continuation of the parent . . . and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home." Tenn. Code Ann. § 36-1-113(g)(3). Each of the statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d at 550.

In determining that conditions persisted which prevented the return of the children to Mother, the juvenile court found Mother was still abusing drugs, she had no income, she had not completed the recommendations from her alcohol and drug abuse assessment, and she has not addressed her mental health issues. The juvenile court also noted she missed a number of her appointments and did not finish her evaluations in a timely manner.

Mother contends the juvenile court's reliance on her delay in obtaining treatment is in error because at the time of the hearing she had received treatment. Persistence of conditions 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 at 874. With that focus in mind, this record reveals conditions remaining at the time of the hearing that would cause the children to be subjected to further abuse or neglect. Mother had unreliable and insufficient income and could not live in her own home because of a broken water pipe. She was relying on the generosity of friends and family to pay her bills. She had only attended one therapy session to address the mental health issues that negatively affected her ability to parent. Her parenting skills were in decline, and she was still taking narcotic pain medication.

We next consider the likelihood that these conditions will be remedied such that the child can be safely returned to the parent in the near future. Tenn. Code Ann. § 36-1-113(g)(3)(B). Based on this record, we conclude there is little likelihood Mother will remedy these conditions in the near future. By the time of the hearing, eighteen months had elapsed since the removal of her children. During that time, Mother's progress toward establishing a safe and caring environment for her children could best be described as fitful. While we have no doubt she loves these children, she has not sufficiently advanced in her ability to care for them.

Finally, we conclude prolonging this case will greatly diminish the chances the children will have a safe and stable home at an early date. These children have been in foster care since September 30, 2013, and they are tiring of the meetings and appointments associated with being in foster care. Given the unlikelihood Mother will remedy her issues in the near future, we conclude DCS met its burden of proving all three elements of this ground for termination.

3. Abandonment by Failure to Support

The juvenile court also found Mother had abandoned her children by her failure to provide any child support while they have been in foster care. “Abandonment is defined as the willful failure to visit, to support, or to make reasonable payments toward the support of the child during the four-month period preceding the filing of the petition to terminate parental rights.” *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013); *see also* Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2015). Here, because the petition was filed on July 9, 2014, the relevant four month period is March 8, 2014, to July 8, 2014. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014) (concluding that the day before the petition is filed is the last day in the relevant four-month period).

Whether a parent failed to support a child is a factual question, but whether the failure was willful for the purposes of the parental termination statute is a question of law. *In re Malaki E.*, M2014-01182-COA-R3-PT, 2015 WL 1384652, at *6 (Tenn. Ct. App. Mar. 23, 2015). Mother agrees she has not paid child support but argues her failure to pay was not willful.

“The element of willfulness has been held to be both a statutory and a constitutional requirement.” *In re C.T.B.*, No. M2009-00316-COA-R3-PT, 2009 WL 1939826, at *4 (Tenn. Ct. App. July 6, 2009). “Failure to visit or support a child is ‘willful’ when a person is aware of his or her duty to visit or support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so.” *In re Audrey S.*, 182 S.W.3d at 864.

The financial ability, or capacity, of a parent to pay support must be considered in determining willfulness. If the failure to pay child support is due to financial inability, then a parent has not willfully failed to support the child. *In re Aaron E.*, No. M2014-00125-COA-R3-PT, 2014 WL 3844784, at *6 (Tenn. Ct. App. Aug. 4, 2014). In making a willfulness determination, the court must review a parent’s means, which includes both her income and available resources for purposes of support. *See In re Adoption of Angela E.*, 402 S.W.3d at 641.

We conclude that the evidence was less than clear and convincing that Mother willfully failed to support her children. The juvenile court found Mother was capable of

working, and her excuse of disability was insufficient. Willful unemployment can equate to a willful failure to support. *In re Austin D.*, No. E2012-00579-COA-R3-PT, 2013 WL 357605, at *11-12 (Tenn. Ct. App. Jan. 30, 2013). However, even if we accept as true that Mother's back pain did not preclude her from working, there were other factors preventing her from finding employment. During the applicable four month period, Mother apparently lived with various friends and family members. Further complicating her job prospects, Mother did not have a high school education, and she had been out of the work force during her marriage to Father.

4. Abandonment by Failure to Establish a Suitable Home

The juvenile court also found that Mother had abandoned her children by failing to provide a suitable home. Tenn. Code Ann. § 36-1-102(1)(A)(ii). A child has been abandoned under this statutory definition if the child has been removed from the home of a parent as a result of a finding that the child was dependent and neglected, and “for a period of four (4) months following the removal, the department . . . has made reasonable efforts to assist the parent . . . to establish a suitable home for the child, but . . . the parent . . . ha[s] made no reasonable effort[] to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that [the parent] will be able to provide a suitable home for the child at an early date.” DCS's efforts to assist the parent “may be found to be reasonable if such efforts exceed the efforts of the parent . . . toward the same goal.” Tenn. Code Ann. § 36-1-102(1)(A)(ii). In reviewing this ground for termination, we consider the actions of DCS and Mother from September 30, 2013, to January 30, 2014.

During those four months, the family service worker helped Mother complete a budget and an application for housing assistance from DCS. The family service worker also offered to provide transportation to the public housing authority and help with the application. Mother's actions, on the other hand, frustrated DCS attempts to find suitable housing. Mother admitted she overmedicated during this period so that she would not have to face her problems. Although Mother claimed the family service worker did not make any effort to assist her, again the juvenile court did not find her testimony credible. In addition, the family service worker often had difficulty locating Mother. Their main point of contact was by telephone. However, according to the family service worker, Mother often did not answer her phone, switched phone numbers, or failed to return phone calls.

Mother's delay in seeking treatment also frustrated the efforts to establish a suitable home. A “suitable home” means more than adequate “physical space.” *In re A.D.A.*, 84 S.W.3d 592, 599 (Tenn. Ct. App. 2002). A suitable home also “requires the presence of a care giver who can supply the care and attention [a child] needs.” *Id.* Thus, a parent's compliance with the statement of responsibilities in the permanency plan is “directly related to the establishment and maintenance of a suitable home.” *In re Matthew T.*, No. M2015-

00486-COA-R3-PT, 2016 WL 1621076, at *7 (Tenn. Ct. App. Apr. 20, 2016). Mother made no effort to address her mental health or substance abuse issues during this time period. The family service worker scheduled multiple appointments, but Mother repeatedly cancelled them or failed to appear. The proof in this record supports the conclusion Mother failed to provide a suitable home for her children by January 30, 2014.

Beyond reasonable efforts by DCS and a lack of reasonable effort by the parent, DCS must also show Mother has demonstrated a lack of concern for her children such that it appears unlikely she will be able to provide a suitable home at an early date. Tenn. Code Ann. § 36-1-102(1)(A)(ii). Mother argues she is making sufficient progress in meeting the goals in the permanency plan such that DCS has not met its burden of proof on this element. In evaluating the evidence on this ground, we may consider Mother's more recent behavior. *In re Joshua S.*, No. E2010-01331-COA-R3-PT, 2011 WL 2464720, at *18 (Tenn. Ct. App. June 16, 2011). Mother has rented a home, applied for employment, and completed domestic violence, parenting, and anger management classes. On the other hand, her current home is unlivable because a water pipe is broken, she has only begun addressing her mental health issues, she has no plans to stop taking narcotic pain medication, and she has shown a distinct lack of cooperation with DCS. For the same reasons discussed previously, we conclude Mother is unlikely to be able to provide a suitable home at an early date.

C. BEST INTERESTS OF THE CHILDREN

Having found DCS has proven more than one ground for termination of Mother's parental rights, we turn to the issue of whether termination is in the best interests of the children. The focus of the best interest analysis is on what is best for the child, not what is best for the parent. *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005). Tennessee Code Annotated section 36-1-113(i) (2010)⁶ lists nine factors that courts may consider in

⁶ The relevant statutory factors include:

- (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

making a best interest analysis. Not every factor enumerated in the statute applies to every case because the facts of each case can vary widely. *In re William T.H.*, No. M2013-00448-COA-R3-PT, 2014 WL 644730, at *4 (Tenn. Ct. App. Feb. 18, 2014).

Here, we conclude DCS has proven termination of Mother's parental rights is in the children's best interests. While Mother has made some progress, she has failed to make such an adjustment that it would be safe to return the children to her care, and it appears unlikely she will do so in the near future. Her progress in remedying her multiple issues has been erratic. She lacks the income to support these children. Her ongoing mental health issues adversely affect her ability to parent. Although Mother has consistently visited the younger children, her relationship with Bailey may be damaged beyond repair. The children were traumatized by the abuse and neglect of their parents, and they are benefiting from the more structured environment in the foster home. Grandmother desires to adopt them, and they have a strong relationship with her. The children have expressed a desire to be normal children, free from the demands of foster care. These children have spent over two years in foster care. They deserve a permanent home.

III. CONCLUSION

We conclude DCS failed to meet its burden of proving that Mother willfully abandoned her children by failure to support. Nonetheless, the record contains clear and convincing evidence to support terminating Mother's parental rights on the remaining three grounds relied on by the juvenile court and to support the court's conclusion that terminating Mother's parental rights is in the children's best interest. Therefore, we affirm the decision to terminate parental rights.

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.

W. NEAL MCBRAYER, JUDGE