

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 12, 2014

IN RE MALAKI E.

**Appeal from the Juvenile Court for Montgomery County
No. TPCV133571 Kenneth R. Goble, Judge**

No. M2014-01182-COA-R3-PT - Filed March 23, 2015

This appeal arises from the termination of Mother's parental rights. When the child was four months old, he was placed in the custody of the Tennessee Department of Children's Services' for lack of supervision and drug exposure. A permanency plan was created shortly thereafter, but less than one year later, the Department petitioned to terminate Mother's parental rights. Following a trial, the juvenile court terminated Mother's parental rights on the grounds of: (1) abandonment for failure to support; (2) abandonment for failure to provide a suitable home; and (3) persistent conditions. Mother appeals the juvenile court's determination on all three statutory grounds, the court's finding that termination was in the child's best interest, and several other court rulings. We affirm.

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

W. NEAL MCBRAYNER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Elizabeth D. Rankin, Clarksville, Tennessee, for the appellant, Andrea E.

Herbert H. Slatery III, Attorney General and Reporter, and Kathryn A. Baker, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Malaki E.¹ was born out of wedlock to Andrea E. (“Mother”) in August 2012. On December 16, 2012, law enforcement officials found Mother “passed out and unresponsive” in a public restroom. Mother had difficulty speaking and standing up. She could not tell responders what type of medication she was taking. At the time, Mother had Malaki and an older child² in her care. Malaki was immediately placed in the State’s protective custody. Mother was transported to the hospital and did not regain consciousness until the following day. On December 17, 2012, Mother was arrested for traffic offenses as well as child abuse and neglect.

This incident generated a referral to the Tennessee Department of Children’s Services (“Department” or “DCS”) for lack of supervision and drug-exposed child. The Department developed an initial permanency plan, with Mother’s participation, dated January 11, 2013, with the concurrent goals of returning Malaki to Mother and placing Malaki with a relative. The permanency plan imposed several requirements on Mother: (1) complete an alcohol and drug assessment by mid-February 2013 and follow all recommendations; (2) sign a release of information to the Department by mid-February; (3) submit to random drug screens; (4) participate in all meetings regarding Malaki’s permanency; (5) notify the Department upon locating acceptable housing; (6) identify legal means of income and provide documentation to the Department; and (7) pay child support upon order of the court, and until such time, provide for Malaki’s basic needs. In conjunction with the creation of the plan, Mother received notice that her parental rights could be terminated if she failed to comply with the plan’s requirements.

According to the Department, Mother’s whereabouts were unknown after January 11, 2013, when she signed the initial permanency plan, until sometime in April or May 2013. The DCS family service worker claimed that she was able to re-establish contact with Mother only after she was arrested and released from jail in May 2013. The court presiding over her criminal case offered Mother additional jail time or the opportunity to participate in a residential recovery program. Mother choose the later, enrolling in a program at A Friend of Bill’s Recovery House. She resided there from mid-May 2013 to at least mid-October 2013. Meanwhile, following a hearing on April 18, 2013, Malaki was adjudicated dependent

¹ In parts of the record, the child’s name is spelled “Malachi E.”

² This appeal relates only to Mother’s parental rights to Malaki, so further information regarding his half-sibling is omitted.

and neglected.

The Department claims the only information it received regarding Mother's recovery program were short, monthly progress reports from the recovery house. The progress reports, issued May through October, each stated in relevant part:

[Mother] is maintaining employment and meeting all her financial responsibilities at this time. She is following all rules and regulations and attending all required meetings. [Mother] works closely with her sponsor in the program and continues to be very motivated in her recovery. If there is any change in her status, we will notify you immediately.

In October, the progress report also included the following: "As well, [Mother] has been voted in as a house monitor and has stepped up her responsibilities in the house. She is a positive influence to the other ladies in the house as well."

Each standard progress report also included a short summary of the recovery house program. The report stated that each resident "MUST procure and maintain full time employment, sponsorship, and attend daily A.A. and/or N.A. meetings . . . [and] MUST pay fees weekly and assume responsibilities in the home where he lives." The report concluded that the program required at least a six month commitment and, if residents failed to meet the requirements, they would be released from the program.

According to DCS, Mother attended six-hour visits with Malaki every two weeks from May 17, 2013, to September 17, 2013, while she lived at the recovery house. On one occasion in September 2013, Mother was responsible for providing food for Malaki during a six-hour visit. When Mother was forty-five minutes late, the Department cancelled the visit because the child was hungry.

On September 17, 2013, the Department filed a petition to terminate Mother's parental rights. The Department alleged four statutory grounds for termination: (1) abandonment for failure to support; (2) abandonment for failure to provide a suitable home; (3) substantial noncompliance with the permanency plan; and (4) persistent conditions.

There is little in the record regarding Mother's contact with Malaki or DCS from September 2013 to December 2013. A March 18, 2014 court report states that the permanency plan was amended on December 27, 2013, to add adoption as an alternative goal, rather than placing Malaki with a relative. This plan required Mother to complete the following tasks: (1) undergo complete psychological evaluation and follow all recommendations; (2) submit to random drug screens and produce prescription medications

for pill count upon request; (3) maintain legal means of income; (4) develop formal and informal supports; and (5) attend therapy twice weekly and participate as a family in Al-Anon.

Mother was present for the Department meeting on December 27, 2013, and she signed the amended permanency plan.³ However, the Department alleges it again lost contact with Mother after her last visit with Malaki on January 13, 2014. On that day, Mother tested positive for opiates and oxycodone in a random drug screen.

The juvenile court conducted a trial on the petition to terminate Mother's parental rights on March 27, 2014. Mother was not present for the hearing. Only two individuals testified: a DCS family service worker and Malaki's foster parent.

On June 5, 2014, the juvenile court entered an order terminating Mother's parental rights. The court determined that the Department had failed to prove Mother's substantial noncompliance with the permanency plan by clear and convincing evidence but that grounds for termination existed under the three other statutory grounds alleged in the petition. Regarding abandonment for failure to support, the juvenile court found that:

[For the] four months preceding the filing of this petition . . . [Mother] made no payments at all, provided no support whatsoever; whether it be food, clothing, presents, anything of that nature to support the child while he was out of mother's custody. [Mother] was aware of her obligation to support her child, knew that it was a ground to terminate her parental rights and still willfully failed to support her child.

Similarly, regarding abandonment for failure to provide a suitable home, the court found by clear and convincing evidence that the Department had made reasonable efforts to assist Mother in establishing a suitable home but Mother had not made reasonable efforts toward that goal. The court also found that Mother had demonstrated a lack of concern for Malaki to such a degree that it appeared unlikely she would be able to provide a suitable home for him at an early date. The court stated:

[Mother] has not proven that she has made reasonable efforts to properly care for the child and provide a safe, stable home. [Mother] never made a suitable home available for inspection by DCS to ascertain [if] the home was safe for the child. In addition, [Mother] failed to avail herself of the services

³ The December 27, 2013 Permanency Plan is not included in the record for our review. A summary of the plan's contents is provided in a court report.

coordinated by DCS to ensure that if the child returned home, he was not subjected to the same abuse that initially led to Malaki's placement in foster care.

The court further noted that, although Mother was in a recovery program from May to October of 2013, her failure to provide a suitable home during that period was willful because her placement in the program resulted from "actions taken by her due to criminal activity."

Regarding the persistent conditions ground for termination, the court found:

The conditions that led to removal still persist and/or other conditions exist in the home that, in all reasonable probability, would lead to further abuse or neglect. [Mother] has not fully addressed her substance abuse problem and has not allowed DCS to ascertain whether or not she is drug free. [Mother] has not addressed her parenting issues nor allowed DCS to ascertain whether she can properly supervise her child. Testimony was that [Mother] has not completed a clinical assessment or attended any parenting classes. Testimony presented was that [Mother] has failed to comply with random drug screens as requested by DCS, nor has she shown any proof as to treatment for Alcohol or Drugs. [Mother] only provided DCS with a letter from Bill's House of Recovery stating that she was a resident there.

. . . [T]here is little chance that the conditions which led to the child entering custody will be remedied soon so that the child can be returned safely to the home. . . . The Court finds most notable that [Mother] did not even make the effort to appear for the hearing in this matter. In addition, she made no effort whatsoever to make her home available for inspection, or complete the classes DCS coordinated on various occasions for her.

The court also determined by clear and convincing evidence that it was in Malaki's best interest for Mother's parental rights to be terminated. The court found that Mother had not "made any adjustment of circumstances, conduct, or conditions as to make it safe and in the child's best interest to return to her care." The court stated:

[Mother's] current circumstances are entirely unverifiable at this time. It is unknown whether her home is safe and appropriate for the child to reside in and she has not addressed the concerns that led to Malaki's placement in foster care by not submitting to random drug screens, not completing the recommendations of her assessments or not completing assessments at all.

Most troubling is [Mother's] failure to appear to defend against the petition to terminate her parental rights and assist her counsel in providing information to the Court that would allow the Court to ascertain if a change of circumstances has occurred.

The court also found that Mother's failure to visit Malaki and make her home safe for him showed little concern for the child's well being. Finally, the court found that Malaki would be negatively affected by removal from his foster placement, where he is "well loved and cared for."

On June 18, 2014, Mother timely appealed the juvenile court's order terminating her parental rights.

II. ANALYSIS

Mother submits several issues on appeal for our review: (1) whether clear and convincing evidence supports the trial court's decision to terminate parental rights on the grounds of abandonment for failure to pay child support, abandonment for failure to provide suitable housing, and persistence of conditions; (2) whether clear and convincing evidence supports the trial court's determination that termination of parental rights was in the best interest of the child; (3) whether DCS provided improper notice of an amendment to the permanency plan; (4) whether the trial court improperly considered the DCS caseworker's contradictory testimony; and (5) whether any one of six alleged errors of the court constitute grounds for reversal. All but two of the six so-called errors of the trial court relate to the proof considered in connection with the grounds for termination. The other two cited errors are the trial court's denial of a continuance and a comment made by the trial judge during the proof.

The Department presents one additional issue for review: whether clear and convincing evidence supported the ground of substantial noncompliance with the permanency plan.

A. DENIAL OF MOTHER'S REQUEST FOR CONTINUANCE

"A trial court has broad discretion in the conduct of trials and the management of its docket." *Justice v. Sovran Bank*, 918 S.W.2d 428, 429-30 (Tenn. Ct. App. 1995). "This discretion extends to decisions regarding motions for a continuance." *Nagarajan v. Terry*, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003). Consequently, we do not "second guess a trial court's decision on a motion for a continuance unless the record, reviewed as a whole, shows a clear abuse of discretion or that a clear prejudicial error has been committed." *Id.*

Mother claims the trial court erred in denying her request for a continuance of the trial. Mother's attorney made the request orally on the day of the trial. As grounds for the request, Mother claims that she did not expect the trial to proceed as scheduled because a confidential court report submitted by DCS indicated the trial would take place at a later date. According to Mother's attorney, she "really was under the impression until just a few weeks ago that we weren't going forward with this today."

We see neither a clear abuse of discretion nor a clear prejudicial error in the denial of the requested continuance. The confidential court report Mother references in her request is not contained in the appellate record. Mother faults the trial court for not admitting the court report into evidence. However, a review of the record on appeal shows that Mother did not offer the court report into evidence nor did she take the reasonable precaution of filing the court report with a written motion for continuance when she learned a "few weeks" before the trial that DCS intended to proceed with the petition as scheduled by the court.⁴

B. STANDARD OF REVIEW

Termination of parental rights is one of the most serious decisions courts make. *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) ("Few consequences of judicial action are so grave as the severance of natural family ties."). 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(D)(1) (2014).

A parent has a fundamental right, based in both the federal and State constitutions, to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). Although this right is fundamental, it is 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). 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

⁴ Mother also did not seek to supplement the record with the court report. See Tenn. R. App. P. 24(a).

where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *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 that at least one of the statutory grounds for termination exists 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, and its purpose “is 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.3d 586, 596 (Tenn. 2010); *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A.*, 980 S.W.2d at 622. “Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.” *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The party seeking termination has the burden of proof. *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 in termination proceedings de novo on the record, with 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. Next, “[i]n light of the heightened burden of proof in [termination] proceedings . . . [we] must then make [our] own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim.” *In re Bernard T.*, 319 S.W.3d at 596-97. We review the trial court’s conclusions of law de novo without any presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007) (citing *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993)).

C. STATUTORY GROUNDS FOR TERMINATION

The juvenile court found that the Department had proved three statutory grounds for terminating Mother’s parental rights to Malaki: (1) abandonment for failure to support; (2) abandonment for failure to provide a suitable home; and (3) persistent conditions. Mother appeals the juvenile court’s determination on all three grounds. The Department also appeals the juvenile court’s decision on the substantial noncompliance ground.

1. Abandonment for Failure to Support

“Whether a parent failed to visit or support a child is a question of fact.” *In re Adoption of Angela E.*, 402 S.W.3d 636, 640 (Tenn. 2013). Whether such failure was willful, however, is a question of law. *Id.* (citing *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007)). The relevant time frame for consideration of the abandonment for failure to support ground is the four-month period preceding the filing of the petition. Tenn. Code Ann. § 36-1-102(1)(A)(i). Here, because the petition was filed on September 17, 2013, the relevant period is May 17, 2013, to September 16, 2013. *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).

Tennessee Code Annotated § 36-1-102(1)(A) (2010) states, in pertinent part:

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

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent or parents or guardian or guardians . . . have *willfully* failed to support *or* have *willfully* failed to make reasonable payments toward the support of the child

Tenn. Code Ann. § 36-1-102(1)(A) (emphasis added).

The plain language of the statute makes clear that a parent’s failure to pay support or visit does not lead to termination of parental rights unless the failure is willful. “The element of willfulness has been held to be both a statutory and constitutional requirement.” *In re C.T.B.*, No. M2009-00316-COA-R3-PT, 2009 WL 1939826, at *4 (Tenn. Ct. App. July 6, 2009). We have previously addressed, in some detail, the meaning of the term “willfulness” as it applies to parental termination proceedings:

In the statutes governing the termination of parental rights, “willfulness” does not require the same standard of culpability as is required by the penal code. Nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is “willful” if it is the product of free will rather than coercion. Thus, a person acts “willfully” if he or she is a free

agent, knows what he or she is doing, and intends to do what he or she is doing.

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 had no justifiable excuse for not doing so.* Failure to visit or support is not excused by another person’s conduct unless the conduct actually prevents the person with the obligation from performing his or her duty, or amounts to a significant restraint or interference with the parent’s efforts to support or develop a relationship with the child

The willfulness of particular conduct depends upon the actor’s intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person’s mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person’s actions or conduct.

In re Audrey S., 182 S.W.3d at 864 (citations and footnotes omitted) (emphasis added).

If failure to support or visit is due to circumstances outside of a parent’s control, then he or she cannot be said to have willfully abandoned the child. *In re Adoption of Angela E.*, 402 S.W.3d at 640. The financial ability, or capacity, of a parent to pay support must be considered in determining willfulness. *See, e.g., id.* at 640-41. 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.

Mother argues that the trial court erred in relying on the testimony of the DCS family service worker in evaluating both Mother’s history of support payments and her ability to pay support. “It is well-settled that a trial court’s assessment of witness credibility is entitled to great weight on appeal because the trial court saw and heard the witness testify.” *C & W Asset Acquisition, LLC v. Oggs*, 230 S.W.3d 671, 676 (Tenn. Ct. App. 2007); *see also In re M.A.R.*, 183 S.W.3d at 661. In a non-jury case, the trial judge determines the “weight, faith, and credit” of the witness’s testimony. *Oggs*, 230 S.W.3d at 676. We defer to the trial court’s determination because the trial court observes the witness’s manner and demeanor as they testify. *See, e.g., In re Audrey S.*, 182 S.W.3d at 867. Accordingly, we will not re-evaluate a trial judge’s assessment of witness credibility without clear and convincing evidence to the contrary. *See In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007).

Although we find no error in the trial court’s consideration of the testimony of the DCS family service worker, we nonetheless find that DCS failed to meet its burden of proof

on abandonment by failure to support. The testimony of the DCS family service worker did not demonstrate Mother's ability to provide support for Malaki during the applicable four month period. The record indicates only that Mother resided at the recovery house during this period, which required her to maintain full-time employment and pay program fees. Mother did not testify and nothing in the record establishes her employment income, other resources, or expenses during the relevant four month period. Without this information, we can only speculate as to Mother's capacity to provide support for Malaki. Speculation does not amount to clear and convincing evidence. *See In re Aaron E.*, No. M2014-00125-COA-R3-PT, 2014 WL 3844784, at *7 (Tenn. Ct. App. Aug. 4, 2014) (declining to find abandonment for failure to support when the trial court's finding was based only on speculation about Mother's job status). Therefore, we cannot conclude that clear and convincing evidence establishes that Mother willfully abandoned Malaki by failure to provide support.

2. Abandonment for Failure to Provide a Suitable Home

The trial court also found that Mother had abandoned Malaki by failing to provide him a suitable home. Tennessee Code Annotated § 36-1-102(1)(A)(ii) defines this type of abandonment:

The child has been removed from the home of the parent or parents or a guardian or guardians as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent or parents or a guardian or guardians to establish a suitable home for the child, but that the parent or parents or a guardian or guardians 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.

Tenn. Code Ann. § 36-1-102(1)(A)(ii) (2014).

As a threshold issue, Mother argues that DCS did not provide the assistance required by the permanency plan, so her rights cannot be terminated for failure to provide a suitable home. Mother also argues that the court should have considered Mother's conduct during the four months prior to the filing of the petition for this ground. Because the latter issue impacts our analysis of the former, we address the second issue first. Under the statute, we examine the four months following Malaki's removal from Mother's home and placement into protective custody. Tenn. Code Ann. § 36-1-102(1)(A)(ii); see *In re Jacob A.G.*, No. E2012-01213-COA-R3PT, 2013 WL 357573, at *6 (Tenn. Ct. App. Jan. 30, 2013). Therefore, in reviewing this ground for termination, we consider the actions of the Department and Mother from the date of Malaki's removal, December 16, 2012, to April 16, 2013.

Under Tennessee Code Annotated § 36-1-102(1)(A)(ii), the Department must make "reasonable efforts to assist the a [sic] parent or parents or a guardian or guardians to establish a suitable home for the child."⁵ Tenn. Code Ann. § 36-1-102(1)(A)(ii). Such efforts may be found to be reasonable "if such efforts exceed the efforts of the parent . . . toward the same goal, when the parent . . . is aware that the child is in the custody of the department." *Id.* The testimony established that Mother's whereabouts were unknown after January 11, 2013, until, at the earliest, sometime in April 2013. For the months Mother was absent, neither the trial court nor the Department had any information regarding where Mother lived, much less whether she had undertaken any efforts to provide a suitable home. Additionally, Mother knew that Malaki was in the custody of the Department. Despite this, she failed to visit Malaki or contact the Department to advise of her whereabouts. Mother was located only as a result of her arrest. Mother's actions frustrated any attempts to assist her with the establishment of a suitable home. Under these circumstances, the trial court properly found that the Department's efforts were reasonable.

Mother claims that, because DCS found the home from which Malaki was removed to be suitable for another child, Malaki already had a suitable home to which he could be returned. The DCS family service worker testified that Mother and Malaki were living with

⁵ Our Supreme Court recently concluded that proof of DCS's reasonable efforts to reunify the family is not a precondition to the termination of parental rights. *In re Kaliyah S.*, No. E2013-01352-SC-R11-PT, 2015 WL 273659, at *18 (Tenn. Jan. 22, 2015). That holding does not abrogate the requirement that DCS make "reasonable efforts to assist [the parent] to establish a suitable home for the child" under Tennessee Code Annotated §§ 36-1-113(g)(1) and -102(1)(A)(ii). See *id.* at *17, n. 32.

the father of Malaki's half-sibling at the time Malaki was removed in December 2012. That home was determined to be suitable for a child, specifically Malaki's half-sibling. However, even assuming for the sake of argument that the father of Malaki's half-sibling was willing to take in a child that was not his own,⁶ it does not follow that Malaki had 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.* The testimony of Malaki's foster mother showed that the child needed frequent medical attention and care associated with "upper respiratory things and ear infections." The foster mother also testified to the attention she devoted to Malaki's needs. In the absence of Mother or the father of Malaki's half-sibling, there could be no evidence of the care Malaki might have received in the home from which he was removed. Therefore, we find Mother's argument to be without merit.

3. Persistence of Conditions

Under Tennessee Code Annotated § 36-1-113(g)(3), parental rights may be terminated 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 a 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 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). This ground for termination of parental rights is

⁶ The father of Malaki's half-sibling does not qualify as Malaki's relative for kinship foster care under Tennessee Code Annotated § 37-2-414(b) (2014).

commonly referred to as “persistence of conditions.” *In re Audrey S.*, 182 S.W.3d at 871. The goal of the persistence of conditions ground is to avoid having a child in foster care for a time longer than reasonable for the parent to demonstrate her ability to provide a safe and caring environment for the child. *In re Arteria H.*, 326 S.W.3d 167, 178 (Tenn. Ct. App. 2010), *overruled on other grounds*, *In re Kaliyah S.*, No. E2013-01352-SC-R11-PT, 2015 WL 273659 (Tenn. Jan. 22, 2015). 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. The question before the court is “the likelihood that the child can be safely returned to the custody of the mother, not whether the child can safely remain in foster care” *In re K.A.H.*, No. M1999-02079-COA-R3-CV, 2000 WL 1006959, at *5 (Tenn. Ct. App. July 21, 2000).

Mother argues that the court should examine her conduct only during the four months preceding the filing of the petition, but that is not the appropriate time frame for the persistence of conditions ground. While other grounds for termination, including abandonment, require the court to confine its review to the four months preceding the filing of the petition, persistence of conditions is not one of them. *Compare* Tenn. Code Ann. § 36-1-113(g)(1), -102(1)(A)(i), *with* Tenn. Code Ann. § 36-1-113(g)(3). The only time frame noted in the Tennessee Code Annotated § 36-1-113(g)(3) is that the child must have been removed from the parent’s home for six months.

Here, Malaki had been removed from Mother’s home by court order for at least six months. He had been in DCS custody for nine months at the time the petition to terminate was filed, and by the time of trial, he had been in custody for fifteen months.⁷ Each of the additional statutory elements must be established by clear and convincing evidence. *In re Valentine*, 79 S.W.3d 539, 550 (Tenn. 2002). We address each element in turn.

a. Conditions that Led to Removal Still Persist

The trial court found that the conditions that led to Malaki’s removal still persist and “in all reasonable probability, would lead to further abuse or neglect.” We conclude that clear and convincing evidence supports the trial court’s determination. Malaki was removed

⁷ We are aware that the six month period specified in Tennessee Code Annotated § 36-1-113(g)(3) has been measured in different ways. In some instances, the six month period was measured from the date of removal until the time of trial. *In re Joshua S.*, No. E2010-01331-COA-R3-PT, 2011 WL 2464720, at *11 (Tenn. Ct. App. June 16, 2011); *In re A.D.A.*, 84 S.W.3d 592, 600 (Tenn. Ct. App. 2002). In other instances, the six month period was measured from the date of removal until the filing of the petition to terminate parental rights. *In re Dakota C.R.*, 404 S.W.3d 484, 499 (Tenn. Ct. App. 2012); *In re Deashon A.C.*, No. E2009-01633-COA-R3-PT, 2010 WL 1241555, at *9 (Tenn. Ct. App. Mar. 31, 2010). In this case, no matter how the period is measured, the child has been removed at least six months.

for lack of supervision and drug exposure in December 2012. In January 2013, Mother tested positive for methamphetamine, opiates, oxycodone, and benzodiazepines. Although Mother may have made progress in addressing her substance abuse problem while she resided at the recovery house, she again tested positive for oxycodone and opiates in January 2014. Mother had clearly not overcome her drug problems.

Mother's record of visiting Malaki is also troubling. Mother made no visits immediately following Malaki's removal. Only after Mother began her stay at the recovery house, some five months after the child's removal, did Mother make regular visits. Sadly, Mother's visits ceased and DCS again lost contact with Mother after January 2014.

b. Likelihood of Remediation of Conditions to Permit Return to Parent

If the trial court concludes that persistent conditions have a reasonable probability of causing the child to be subjected to further abuse or neglect, then the court is required to consider the likelihood that the 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). The likelihood of any condition being remedied is generally dependent on the efforts of both the parent or guardian and DCS. Tenn. Code Ann. § 37-1-166(a)(2) (2014); *see In re Giorgianna H.*, 205 S.W.3d 508, 518-19 (Tenn. Ct. App. 2006), *overruled on other grounds*, *In re Kaliyah S.*, 2015 WL 273659. The trial court concluded that there is little chance the conditions that led to Malaki's removal would be remedied soon. Clear and convincing evidence supports the trial court's determination.

Although DCS has attempted to direct Mother to community resources, several factors make it unlikely Mother has adequately remedied her drug use so that Malaki can safely return to her. As mentioned above, shortly before trial, Mother tested positive for oxycodone and opiates. She failed to maintain contact with DCS since January 2014. She also failed to appear at the parental termination hearing. As the trial court noted, she has not made her home available for inspection by DCS, and she has not completed the parenting classes DCS arranged for her. A six month stay in a recovery house was apparently insufficient to address Mother's substance abuse problem. Malaki can not be safely returned to Mother in the near future.

c. Continuation of Parent-Child Relationship Threatens Child's Ability to Integrate into Stable Home

At the time of trial, Malaki has not been in Mother's care for over fifteen months. Although Mother visited Malaki regularly from May to October 2013, she has not maintained visitation with him. At the time of trial, it had been nearly three months since Mother visited

Malaki. Meanwhile, Malaki has bonded well with his foster parents, who wish to adopt him. There is clear and convincing evidence that the continuation of the parent-child relationship between Mother and Malaki threatens his ability to permanently integrate into a stable familial relationship with his foster parents.

We conclude the trial court did not err in terminating Mother's parental rights based upon the ground of persistence of conditions.

4. Substantial Noncompliance with Permanency Plan

The trial court determined that the Department failed to prove by clear and convincing evidence that Mother had substantially failed to comply with the permanency plan requirements. The Department asserts this was an error.

Tennessee Code Annotated § 36-1-113(g)(2) authorizes the termination of parental rights when "there 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 the parent complied with the permanency plan, the trial 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 (citing Tenn. Code Ann. § 37-2-403(a)(2)(C)).

If the permanency plan requirements are reasonable, the court must determine if the parent's noncompliance was substantial; noncompliance is not enough to terminate a parent's rights. *Id.* at 548-49. Additionally, the unsatisfied requirement(s) must be important in the plan's scheme. *Id.* A "trivial, 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) (citing *In re Valentine*, 79 S.W.3d at 548). Improvements in compliance are construed in favor of the parent. *Id.* at 549 (citing *State Dept. of Human Servs. v. Defriece*, 937 S.W.2d 954, 961 (Tenn. Ct. App. 1996)).

Each of Mother's seven responsibilities in the initial permanency plan were reasonable and related to eliminating the problems that led to Malaki's removal. Therefore, substantial noncompliance with those requirements could serve as a basis for terminating parental rights. Two of Mother's responsibilities related to remedying her drug use. Mother was required to complete an alcohol and drug assessment by mid-February 2013 and follow all recommendations, and submit to random drug screens. Although the record does not indicate whether Mother received an assessment by February 2013, it does demonstrate that Mother received some alcohol and drug treatment from May to October 2013. The DCS family

service worker testified that she did not administer random drug screens because, “she was visiting, showing up every two weeks and being screened by Bill’s Recovery.” DCS deemed random drug screens unnecessary during this period “as [Mother] was under the scrutiny and supervision of a halfway house who does random drug screens on their own.”

Three other requirements focused on communication between the Department and Mother. Mother was required to: sign a release of information to the Department by mid-February; participate in all Department meetings regarding Malaki’s permanency; and notify the Department upon locating acceptable housing. Although late, Mother ultimately signed a release of information. The record reflects that Mother did not attend all Department meetings concerning Malaki, but she was present for the January 11 and December 27, 2013 meetings when permanency plans were developed. Finally, Mother’s communication with the Department regarding her housing was, at best, intermittent. For several months, she had no communication with DCS regarding her housing. The recovery house, either directly or through Mother, did provide progress reports, which alerted the Department to Mother’s housing status.

The final two requirements addressed Mother’s income and obligation to support Malaki. Mother was required to identify legal means of income and provide documentation to the Department, and provide for Malaki’s basic needs. Mother provided no documentation of her income. However, from May through October 2013, Mother was apparently meeting her financial obligations to the recovery house. According to the DCS family service worker, Mother only brought token payments to her visitations with Malaki.

The record demonstrates that Mother did not fully comply with the January 11, 2013 permanency plan. However, in many areas, she fulfilled the plan’s requirements. Therefore, we conclude she did not *substantially* fail to comply with her responsibilities in the permanency plan.

D. BEST INTEREST OF MALAKI

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); *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). Tennessee Code Annotated § 36-1-113(i) (2010) lists nine factors that courts may consider in 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). The juvenile court determined that it was in Malaki’s best interest for Mother’s parental rights to be terminated based on the following three factors:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

....

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

....

(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.

Tenn. Code Ann. §§ 36-1-113(i)(1), (5), (7) (2014).

The juvenile court found that Mother had not made such an adjustment of her circumstances, conduct, or conditions so as to make it safe and in the child's best interest to be in her home. *See id.* § 36-1-113(i)(1). Mother continues to struggle with substance abuse. She tested positive for oxycodone and opiates as recently as January 2014. The trial court found Mother's absence from the termination hearing as further indication of a failure to adjust her conduct. Mother also failed to maintain contact with DCS from January 2014 to the March 2014 trial. Additionally, Mother's whereabouts, income, or living arrangements were unknown at the time of trial. The DCS family service worker also testified that, in her observation of the supervised visits, Mother had not provided adequate supervision during her visitation with Malaki.

The court also found that Malaki's emotional, psychological, and medical condition would suffer if he were removed from his foster home and returned to Mother. Malaki has not been in Mother's care since December 2012. The foster mother testified that Malaki had bonded well with her family and that she and her husband wish to adopt Malaki. The DCS service worker opined that removing Malaki from his foster parents "would be very harmful to him at this point as that's the only family he's known since his placement into custody."

Finally, the trial court found that Mother had failed to make a safe home for Malaki or demonstrate that she can care for him in a safe and stable manner. Although she appeared

to make progress during her residency at the recovery house, Mother's continuing drug use and inconsistent behavior makes it unsafe for Malaki to be returned to her home. She presented no evidence at trial demonstrating that she is capable of consistently caring for Malaki in a stable and safe manner.

As noted above, the list of statutory factors to consider in a best interest analysis is not exhaustive, and we do not need to "find the existence of each enumerated factor before [we] may conclude that [termination] is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Here, we conclude there is clear and convincing evidence that the termination of Mother's parental rights is in Malaki's best interest.

E. AMENDMENT TO PERMANENCY PLAN

As an additional issue unrelated to the grounds for termination or Malaki's best interest, Mother complains about the December 2013 amendment to the permanency plan for Malaki. Specifically, Mother states the Department "failed to provide notice to the mother of the amendment of the Permanency Plan to include a goal of adoption until three (3) months after the Termination for Parental Rights Petition had been filed." Mother devotes only a single paragraph in her brief to this argument with no citation to authority. As we perceive the argument, Mother is asserting that the Department failed to provide proper notice of its intent to terminate her parental rights. This argument has no merit.

From Mother's first dealings with the Department, she was advised that her parental rights may be terminated. Mother participated in the creation of the January 2013 permanency plan. That plan stated, "[the Department] will file a petition to terminate parental rights of [Mother] . . . if there is a lack of progress towards achieving desired outcomes" The Department also provided and explained to Mother the "Criteria and Procedures for Termination of Parental Rights" on January 11, 2013. Mother signed the document, acknowledging both that she received a copy of the criteria and understood its content.

Any doubt regarding the Department's intent should have been dispelled by the filing of the petition to terminate parental rights on September 17, 2013. Mother does not claim that she was not served with the petition. If anything, adding the goal of adoption to the permanency plan should have emphasized for Mother the Department's intent to proceed with the petition to terminate parental rights absent progress toward the stated goals.

F. REMARKS BY TRIAL JUDGE

Finally, we consider Mother's argument that the trial judge "made a very inappropriate

and insensitive remark about the Mother.” In ruling on an objection by the Department, the trial judge stated that the Department could file a petition to terminate Mother’s parental rights, “[e]ven if she was making progress. She could be the picture-perfect parent after September 17, and if the Department decided to proceed with termination, they could.” In the context in which it was made, we find nothing improper in the remark. The statement merely explained that a parent’s conduct after the filing of a petition to terminate parental rights is not relevant under some statutory grounds. *See* Tenn. Code Ann. § 36-1-113(g)(1). Tennessee courts have recognized that, under some statutory grounds, a parent’s positive behavior can come “too little, too late” in a termination proceeding. *See, e.g., In re A.W.*, 114 S.W.3d 541, 546 (Tenn. Ct. App. 2003).

III. CONCLUSION

We conclude that the Department failed to meet its burden of proof to show that Mother willfully abandoned Malaki by failure to support. Nonetheless, the record contains clear and convincing evidence to support terminating Mother’s parental rights on two grounds relied upon by the juvenile court and to support the court’s conclusion that terminating Mother’s parental rights is in the child’s best interest. Therefore, we affirm the judgment of the juvenile court.

W. NEAL McBRAYER, JUDGE