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IN RE C.H.E.H.

No. E2007-01863-COA-R3-PT

COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE

2008 Tenn. App. LEXIS 89

January 15, 2008, Assigned on Briefs
February 21, 2008, Filed

PRIOR HISTORY: [*1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part and Reversed in Part; Case Remanded. Appeal from the Juvenile Court for Hamilton County. No. 213,501. Suzanne Bailey, Judge.

DISPOSITION: Judgment of the Juvenile Court Affirmed in Part and Reversed in Part; Case Remanded.

COUNSEL: Charles E. Stanbery, Jr., Chattanooga, Tennessee, for the Appellant, L.M.H.H.

Robert E. Cooper, Jr., Attorney General & Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the Appellee, Tennessee Department of Children's Services.

JUDGES: D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

OPINION BY: D. MICHAEL SWINEY

OPINION

In this termination of parental rights case, L.M.H.H. ("Mother") gave birth to her daughter, C.H.E.H., while incarcerated for prostitution and violation of probation. Mother surrendered C.H.E.H. to the Tennessee Department of Children's Services ("DCS"). DCS placed C.H.E.H. with a foster family when she was eight days old. C.H.E.H. has Down Syndrome, which causes her significant medical problems and developmental delays. DCS prepared a parenting plan for Mother when she was released from jail, [*2] but Mother made no progress on this plan because of her drug addiction and frequent incarceration. Mother was released again from jail but this

time into the Family Way program, a substance abuse program for mothers. Shortly thereafter, DCS prepared a second permanency plan for Mother, and Mother did make progress on its requirements. Mother currently is participating in drug counseling through Family Way and has not failed a drug screen since starting the program. Mother has obtained a job, has an apartment where two of her other children reside with her, has completed a parenting assessment, and has participated in therapy sessions. DCS filed a petition to terminate Mother's parental rights to C.H.E.H. in February of 2007. Following a trial, the Trial Court terminated Mother's parental rights based upon four grounds for termination. Mother appeals. After careful review, we reverse the judgment of the Trial Court as to the termination of Mother's parental rights under Tenn. Code Ann. § 36-1-113(g)(1) for willful failure to visit and willful failure to support the Child and Tenn. Code Ann. § 36-1-113(g)(2) for substantial noncompliance with the permanency plans. We affirm the remainder [*3] of the Trial Court's judgment terminating Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3).

OPINION*I. Background*

Mother gave birth to C.H.E.H. on July 12, 2005, while Mother was incarcerated for prostitution and violation of her probation. Two days later, DCS took custody of C.H.E.H. at Mother's request. The Trial Court granted temporary custody of the infant to DCS, who subsequently placed C.H.E.H. with a foster family when she was eight days old. At the time C.H.E.H. was conceived, Mother was a prostitute and, as a result, Mother stated that she did not know the identity of C.H.E.H.'s father. She also was addicted to drugs, particularly crack and methamphetamine. A medical examination revealed that C.H.E.H. was born with Down Syndrome, a genetic ab-

normality that has resulted in severe developmental delays and medical problems for C.H.E.H.

DCS completed a permanency plan for Mother with the dual goals of reunification and adoption. Mother signed the permanency plan on September 1, 2005, after being released from jail. The plan identified several actions that Mother needed to complete, including completing an alcohol and drug abuse assessment; submitting to random [*4] drug screening; completing a parenting assessment, anger management classes, and domestic violence counseling; finding employment; and obtaining suitable housing. The Trial Court approved the plan on November 23, 2005. However, Mother admitted that she did not even remember what was in the plan because she was impaired by drugs at the time.

Mother made no progress on this permanency plan during the next several months. She was incarcerated again shortly after her release from jail. Following a hearing on March 30, 2006, at which Mother failed to appear, the Trial Court entered an order finding C.H.E.H. to be dependent and neglected and awarding custody of the child to DCS, *nunc pro tunc* to July 14, 2005.

Mother has an extensive history of drug abuse, dating back to the age of seven. She testified that she quit using drugs in February of 2006 while she was in jail. Mother was released from jail again in July 2006 to participate in the Family Way furlough program as an alternative to incarceration. Family Way is a drug treatment program for mothers who have been clean at least 30 days. The program provides housing, drug counseling, and other services to help participants overcome their [*5] drug addiction and live independently. Mother resides in her own apartment provided by Family Way.

Mother was released into the Family Way program on July 5, 2006. Six days later, she contacted Sparka Perry, the DCS case manager responsible for C.H.E.H.'s case, to let Ms. Perry know that she was out of jail and in the Family Way program. Ms. Perry stated that Mother stayed in contact with her from that point on. Ms. Perry drafted a revised permanency plan ("the Revised Plan") for Mother to complete. The requirements of the Revised Plan were similar to those outlined in the initial permanency plan. Mother signed the Revised Plan on August 24, 2006, and the Trial Court approved this plan a few days later.

Since her enrollment in the Family Way program, Mother has regained custody of two of her other children, ages 8 and 11, and also gave birth to a boy who was seven months old at the time of trial. ¹ Mother testified that she recently sent her 8-year-old son to live with Mother's mother because he had severe behavioral problems. ² The other two children still reside with Mother in an apartment provided by Family Way. She is responsi-

ble for paying rent based on her income, and her name [*6] is on the lease.

1 Mother's parental rights to a fifth child, the oldest of her children, were terminated before she gave birth to C.H.E.H.

2 A Family Way employee testified that the coordinators of Family Way required Mother to send the child to a relative due to his disruptive behavior.

Mother works part-time at a fast-food restaurant. Mother admitted that after she is released from Family Way, she likely will have to work two jobs to support herself and her children. ³ Mother stated that if she obtains custody of C.H.E.H., she would have to hire a babysitter or find a special needs daycare to take care of the child while she is at work. Mother, however, had not attempted to locate such a facility before trial. Mother testified that she believes she is capable of caring for C.H.E.H. as well as her other children and denied that the stress of those responsibilities might prompt her to begin using drugs again. At the time of the June 11, 2007, trial in this matter, Mother had been drug-free for nearly a year and a half. Mother began paying child support when she got a job, approximately three months before trial. She completed her anger management classes the week before trial. Mother has [*7] exercised supervised visitation with C.H.E.H., as permitted by DCS.

3 Mother testified that she is only allowed to have one job while she is in the Family Way program.

Despite considerable progress by Mother in both her lifestyle changes and the requirements of the Revised Plan, DCS filed a petition to terminate Mother's parental rights on February 8, 2007. ⁴ A trial of this matter was conducted on June 11, 2007, at which time the Trial Court found by clear and convincing evidence that grounds existed for the termination of Mother's parental rights to C.H.E.H. and that the termination of Mother's parental rights was in the best interest of C.H.E.H. Mother appeals.

4 A previous petition to terminate Mother's parental rights to C.H.E.H. was dismissed by the Trial Court after it found that DCS filed the petition before the deadlines for some of Mother's requirements under the Revised Plan had passed.

II. Discussion

The issues raised by Mother on appeal are restated as follows:

1. Whether the Trial Court's ruling that Mother's parental rights should be terminated pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3) was supported by clear and convincing evidence.

2. Whether the Trial [*8] Court was correct in finding, by clear and convincing evidence, that termination of Mother's parental rights was in the best interest of C.H.E.H.

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

In *Department of Children's Services v. D.G.S.L.*, this Court discussed the relevant burden [*9] of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). "However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). [*10] Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)....

Dep't of Children's Servs. v. D.G.S.L., No. E2001-00742-COA-R3-JV, 2001 Tenn. App. LEXIS 941, 2001 WL 1660838, at *6 (Tenn. Ct. App. E.S., Dec. 28, 2001). Clear and convincing evidence supporting any single ground will justify a termination order. *See In re Valentine*, 79 S.W.3d at 546.

Evidence was introduced at trial regarding the medical and developmental problems experienced by C.H.E.H. and the therapy provided for her; Mother's lifestyle, drug rehabilitation, mental health, and parenting abilities; C.H.E.H.'s life with her foster parents; and the observations of DCS case workers and others involved with C.H.E.H. and Mother.

Dr. Jane Catterton, C.H.E.H.'s pediatrician, testified regarding C.H.E.H.'s medical and developmental problems resulting from Down Syndrome. She stated as follows:

[C.H.E.H.] has numerous colds and has frequent ear infections and frequent, very serious, respiratory problems, requires a lot of antibiotics and a lot of [*11] follow-up visits. The child has developmental delays, like most children who have Down syndrome. The child has required speech therapy and physical therapy, occupational - will require a great deal of occupational therapy, but mainly, physical therapy, and a lot of developmental ser-

vices. And she's enrolled in Tennessee Early Intervention Services.

She also sees an [sic] a specialist who is monitoring, making sure - there's certain diseases that children with Down syndrome are prone to get, and the specialist sees her on a regular basis.

Dr. Catterton also described the type of caretaker a child with Down Syndrome, such as C.H.E.H., would need:

This child, first of all, is going to have to go to special education. The child's going to have to go to a lot of physical therapy. The child's going to have to have speech. And, therefore, this child is going to have to have somebody who is going to be there, be regular, be able to get up and go to all of these lessons and not say, oh, I don't feel like doing that anymore. Some of my parents do that. They just don't feel like doing it anymore, so they don't go. They just stop taking them.

And the child is, also, going to have behavioral problems, [*12] you know. In the next 10 or 12 years you're going to have a child who is going to be big and heavy and going to have the mind of a 2 year old. And that's going to be a problem to take care of. They don't get bigger and smarter, they just get bigger in many ways. Sometimes they get, you know - I mean there is progress. There is progress made. But it's discouragingly slow

Dr. Catterton testified that caring for C.H.E.H. would be a significant challenge and "this is going to try anybody's patience." Dr. Catterton did not rule out the possibility that C.H.E.H. could be placed into special daycare or with a qualified babysitter while a parent was at work, although such a situation might be difficult to locate. However, she was adamant that whoever parented C.H.E.H. "cannot be drugged, cannot be impaired. This is going to have to be a woman who is mentally tough and very stable." Dr. Catterton later added, "They can't have a mental illness, because they don't have time for that."

C.H.E.H. is receiving several types of therapy to assist her in her development. Connie Smith, service coordinator for the Tennessee Early Intervention System in

Chattanooga, testified that C.H.E.H. receives [*13] service coordination, family training, speech therapy, and physical therapy. Ms. Smith stated that C.H.E.H.'s foster parents have been very involved in the services provided to C.H.E.H. and that their dedication has helped C.H.E.H. progress:

I would say that [C.H.E.H.] is functioning higher, on a higher level, than most of the children with Down syndrome on my caseload, and I think it's because of the parent involvement. I think that's a very important part of a child being successful, whether they're disabled or not disabled, is parent involvement.

Ms. Smith added that C.H.E.H. likely would regress "if she wasn't worked with constantly on the same level she is now." However, Ms. Smith stated that the same services would be available to C.H.E.H. whether she was living with foster parents or Mother.

Ms. Smith has met with Mother twice. The first time was in juvenile court when Mother signed the papers giving permission for C.H.E.H. to receive services from the Tennessee Early Intervention System. The second time was at an annual meeting to review C.H.E.H.'s progress. Ms. Smith said that Mother was invited to the meeting, but that she arrived late and did not ask any questions about the [*14] services being provided to C.H.E.H. or her particular needs.

Patricia Jo Smolen, a speech language pathologist at Speech Language Reading Center, has been giving C.H.E.H. speech and language therapy. Ms. Smolen has provided parent education for C.H.E.H.'s foster parents as well. Ms. Smolen testified that C.H.E.H. has a half-year delay in her development, but C.H.E.H. currently is learning sign language to help her communicate with others. Ms. Smolen stated that parent involvement is crucial to C.H.E.H.'s progress:

I only see [C.H.E.H.] twice a week, and so if the parents - basically, my therapy is parent education and modeling to the parents what they need to do, because the parents are with the children 24/7. I'm just with them for an hour. I can't make them progress. . . .

If the parent is not involved, my job is pointless. I can't make the progress. The children cannot retain the information from one therapy session to the next, and I would never make progress.

Ms. Smolen testified that parent participation in her therapy sessions with C.H.E.H. is mandatory, and parents even are required to complete homework. She also stated that C.H.E.H. may require therapy for the rest of her life. [*15] Ms. Smolen also testified that she had never met or been contacted by Mother regarding C.H.E.H.'s therapy.

Nancy Hall, a parent educator with the Tennessee Infant Parent Service ("TIPS"), also emphasized the importance of parent involvement in C.H.E.H.'s care and development. Ms. Hall's job is to work one-on-one with the parents of children who receive services through TIPS to help them incorporate into the home environment the information and exercises performed with the child by various therapists. Ms. Hall stated that repetition and consistency are important when working with a Down Syndrome child, because it takes longer for such children to learn new behaviors. Ms. Hall stated that C.H.E.H.'s foster parents have been very involved in C.H.E.H.'s therapy, and she could only recall twice in the past year and a half when they had cancelled an appointment with her. On the other hand, Ms. Hall recalled meeting Mother at the progress meeting described by Ms. Smith last fall, but stated that Mother had not contacted her since then to find out about C.H.E.H.'s progress or how to care for the child.

C.H.E.H.'s foster parents, D.E. and W.E., testified that they want to adopt C.H.E.H. W.E. [*16] is a stay-at-home mother, and she described her responsibilities with regard to C.H.E.H.'s therapy sessions and development:

[C.H.E.H.] has 13 appointments a month, and that is with TIPS, with speech therapy and with physical therapy. And those are consistent appointments, I try to never miss those. And then I take classes at Siskins [Hospital]. I've taken a class at Siskins, through Chattanooga State, for sign language. I am signed back up in August to go on with my sign language. A lot of time. A lot of reading. A lot of, you know, TIPS given [sic] me information, helping me. A lot of research on my own, also. I'm involved in Chattanooga Down Syndrome Society.

When asked whether she could do all of the above activities if she also worked outside the home, W.E. responded, "I don't know where there would be time, honestly." W.E. stated that during Mother's visitations with C.H.E.H., Mother did not attempt to learn how to care

for her daughter. She testified about those visitations as follows:

Q. And during those visitations, did [Mother] try to learn how to help her daughter?

A. The one issue, I brought some medication to show [Mother] at one time, because [C.H.E.H.] does have a lot of [*17] medications. And then the one time was changing her clothes, and she couldn't maneuver her to change those clothes. [C.H.E.H.] is - she gets very frustrated in situations and you have to know how to deal with that or she can be very hard to handle.

Q. Did [Mother] try to deal with that situation?

A. She handed her to me.

Q. [Mother] saw the things you were doing with her; is that correct?

A. Yes. Yes, I shared with her. Yes.

Q. And all the different - you tried to tell her the educational, the medical, and whatever, did she ask you questions about how do I do that?

A. No.

Q. Did she ever initiate I want to learn to do something for [C.H.E.H.] with you?

A. I never heard her say that, no.

Q. Or anything like that?

A. No.

Dr. Bertin Glennon performed a parenting assessment on Mother on December 6, 2006. Dr. Glennon stated that Mother is an "outgoing loner" who talks as a means of keeping people away. Dr. Glennon also testified that Mother is very uncomfortable with criticism and failure. She also has difficulty dealing with long-term plans and tends to make decisions based primarily on her feelings instead of logic. Dr. Glennon stated that Mother also showed a very high degree of defensiveness and [*18] rage. Overall, Dr. Glennon diagnosed Mother with posttraumatic stress disorder. He also stated that he saw evidence of some dissociative behaviors from Mother.

Dr. Glennon stated that Mother's dissociative behaviors could cause him to have concern about her ability

to take care of a child with Down Syndrome. He also stated that the stress of caring for a Down Syndrome child, as well as other small children, could cause Mother to suffer significant mental problems or revert to drug use, which could threaten the safety of a child in her care. Dr. Glennon also stated, "I think people with [Mother's] situation and her diagnosis, it is very important, very, very, very important that she have a support system and that support system be ongoing." [*19] Dr. Glennon testified that Mother had a good chance of succeeding as a parent if she had an ongoing support system, meaning a support system for the rest of her life. He said that the Family Way program provided a good support system for Mother and that she had seemed to be making great adaptations and doing well when he saw her in December of 2006. Dr. Glennon also stated that Mother likely would need long-term therapy to deal with her mental issues.

Mother was hospitalized in January of 2007 after suffering a mental breakdown. She testified that she was not sure what caused the episode, except that she had been up for a couple of days drinking a lot of coffee. Mother stated that she had been on medication since that time, and that it "seems to level me out pretty well." Mother conceded that she has stopped taking her medications before, and that she has tried to quit using illegal drugs before but then returned to her addiction. However, Mother did state that this is the first time she has entered a treatment or rehabilitation program to deal with her drug problem.

Dr. Alice Greaves began conducting therapy sessions with Mother in February 2007. Dr. Greaves said that during Mother's [*20] first appointment with her, Mother "said some mildly paranoid things," but that for the rest of their appointments together, Mother was "very much in control and of herself [sic], and clear and normal." Dr. Greaves stated that "as long as [Mother] has been on medication, she has been fine." She stated that Mother had very good interaction with her baby boy, but stated that her middle son has behavioral problems. Dr. Greaves stated that the boy has been diagnosed with attention deficit hyperactivity disorder and post traumatic stress disorder and that he is manipulative and throws tantrums as a means of controlling situations. Dr. Greaves expressed concern about Mother's ability to parent C.H.E.H., stating as follows on direct examination:

Q. Based on what you've seen of [Mother] and her ability to control her children, would you have any concerns about this woman's ability to manage a Down syndrome child?

A. Well, we talked about that very issue together, and we have a little difference of opinion on it. I told [Mother] that if she was able to gain control in the household of her two older sons, and they would begin to accept her as the authority and to - I mean, you know, of course [*21] most children are going to give you a little trouble and defy their parents at sometimes, which is to be expected. But that if she could gain control of the household and get the boys on track and not allow the younger one to manipulate her into letting him stay home from school because he was afraid or whatever, that, then, I would be supportive of her gaining - getting [C.H.E.H.] back. But that I thought, you know, there was a little way to go yet.

Q. Have you so far seen her able to do that?

A. No.

Q. Do you have concerns about this woman's ability to manage a special needs mentally and physically handicapped and retarded child?

A. Given the fact that the household, at the present time, can become chaotic pretty quickly because of the boys' behavior, interactions with each other, as well as their own ability to create chaos by themselves, I wouldn't want to put a child, who is going to need a lot of attention and a lot of patience, into that situation. No, I don't think that with the other two children being so difficult to manage right now, I don't think she could do it right now.

Mother's father, W.H., testified that although he does not think Mother will return to her former drug [*22] addiction, he doubts Mother's ability to care for a child with Down Syndrome. W.H. stated, "Right now [Mother] is trying so hard and has improved so much in this program. I [k]now she has every desire to raise this child, but I just, you know, I don't - right now I just don't think that she can"

Stephanie Bynum, Mother's case manager at Family Way, testified that Mother had just started on the third level of the Family Way program shortly before trial. She may be in the Family Way program for another year

as she works to complete the four stages of the program. If Mother fails to complete the Family Way program, she must return to jail. However, Ms. Bynum testified that Mother was doing well in the program. She has not tested positive for drugs during the time that she has been in the Family Way program, and she participates in drug counseling on a regular and frequent basis. Ms. Bynum stated that the Family Way staff would do whatever was necessary to help Mother care for C.H.E.H. if the child was returned to Mother's custody. Ms. Bynum admitted that the program had never had a Down Syndrome child housed at its facility before, but she stated that a former participant did have [*23] a child with autism, and so she understood that a higher level of care would be required.

A. Grounds for Termination

The Trial Court terminated Mother's parental rights pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3), which provide:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

(2) There has been substantial non-compliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3) 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(s) or guardian(s), 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(s) [*24] or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early in-

tegration into a safe, stable and permanent home;

Tenn. Code Ann. §§ 36-1-113(g)(1)-(3).

There are several definitions of abandonment contained within Tenn. Code Ann. § 36-1-102. The definitions of abandonment relied upon by DCS and found by the Trial Court in this case are:

(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(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed [*25] child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

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

The Trial Court found clear and convincing evidence of all four grounds for termination as alleged by

DCS. However, in its appellate brief, DCS conceded that the record did not establish that Mother earned any income in the four months before the Petition was filed. As a result, DCS is not pursuing on appeal abandonment [*26] by willful failure to support as a ground for termination. Therefore, we reverse this portion of the Trial Court's judgment. We will now consider the remaining three grounds for termination as found by the Trial Court.

1. Failure to Substantially Comply with Permanency Plan

The Trial Court found that Mother had not substantially complied with her permanency plan pursuant to Tenn. Code Ann. § 36-1-113(g)(2). Among the numerous requirements of the Revised Plan were the following: complete an alcohol and drug assessment and follow the recommendations of the assessment; submit to random drug screening; complete a parenting assessment and follow the recommendations of the assessment; resolve all legal issues; complete anger management classes; attend domestic violence counseling; "obtain suitable housing that includes [Mother's] name on the contract and keep for a period of three month[s]" and, if discharged from treatment, immediately seek housing with her name on the lease; find employment that "allows for her to financially care for self and child"; apply for assistance with the Department of Human Services; pay child support; sign releases so DCS can obtain information; and arrange for [*27] transportation to her appointments related to the permanency plan; and complete her court-ordered sentence at Family Way. The expected completion date for all of these actions was September 26, 2006, approximately one month after Mother signed the Revised Plan on August 24, 2006.

Diana Sutton, who succeeded Ms. Perry as C.H.E.H.'s case worker at DCS, testified regarding Mother's progress on the Revised Plan. Ms. Sutton testified that the only requirements of the Revised Plan that Mother had not completed were obtaining stable housing and completing a drug treatment program. Ms. Sutton testified as follows regarding her opinion about the unsuitability of Mother's housing through Family Way:

Q. Now, and you say it's not stable housing because [Mother]'s in the Family Way program; is that correct?

A. Correct.

Q. So what's the difference between getting housing through Family Way, for instance, or getting it through Section 8 or any other government program?

A. That's just temporary housing, Family Way.

Q. Well, unless you own a house, any housing is temporary, unless you own?

A. Excuse me?

Q. Unless you own, any house is temporary. She's going to be there another year. If someone was in an apartment [*28] -

A. That's just temporary housing. That's just going through a program, and that's just temporary.

Q. Right. But any time you rent, if you rent somewhere, that's temporary too?

A. Well, that's different. I mean, being in a program renting housing and being out on your own in the community is more permanent than being in a program.

Q. Is it like a policy in your department?

A. No.

Q. Okay. I just don't understand what the difference would be between housing at Family Way or living in the projects would be. We give kids back to the parents that are in the projects.

A. Well, that's more of a permanent setting than temporary.

Ms. Perry also pointed out that Mother was currently in a drug treatment program, which was an additional requirement of the Revised Plan that she had not yet completed.

Although this issue was not addressed by the Trial Court in its opinion, we disagree with Ms. Sutton's assertion that Mother's housing situation at Family Way does not meet the requirements of suitable housing under the Revised Plan. Mother is paying rent, and her name is on the lease. We agree with Mother's counsel that this situation is not unlike other parents who receive government assistance in paying [*29] for their housing. Mother should not be penalized because she is participating in a drug treatment program that requires housing through the program.

In finding that Mother failed to substantially comply with the requirements of the permanency plans DCS established for her, the Trial Court focused on the fact that Mother did not complete a parenting assessment until

approximately five months after she was released from jail into the Family Way program. It also noted that the other major requirement of the permanency plans - that Mother complete an alcohol and drug assessment - was mandatory for Family Way participants.

We find that the Trial Court erred in concluding that Mother had failed to substantially comply with the requirements of her permanency plans. While it is true that Mother did not make any progress toward the first plan, the evidence at trial shows that Mother has made considerable efforts to complete the requirements under the Revised Plan. The only requirement that has not been completed is the drug treatment program. However, Mother has been enrolled in the Family Way program for more than a year, and she has been clean and sober for all of that time. While it is true [*30] that she will not complete the program for possibly another year, we do not find that her decision to enroll in a long-term, more comprehensive substance abuse program should be a reason to find her in substantial noncompliance with the terms of the Revised Plan. Mother also completed her parenting assessment before DCS filed its petition to terminate Mother's parental rights. While this was approximately two and a half months after her deadline for doing so under the Revised Plan and five months after her release from jail, we do not consider her delay unreasonable, as Mother also was combating her drug addiction and trying to establish a clean, law-abiding life for herself at the time.

Furthermore, DCS allowed Mother little more than a month to complete all of the requirements of the Revised Plan. Mother signed the plan on August 24, 2006, and the "Expected Achievement Date" for her actions was September 26, 2006. This was so despite the fact that Mother's case worker knew that she was enrolled in the Family Way program and knew or should have known that Mother would not complete the program in the next month because participants typically remain in the program for two years. Although [*31] we agree that the public policy of this State is to avoid leaving children in the limbo of foster care any longer than necessary, we also believe that parents must be given, as realistic under the specific facts of each case, a real opportunity to make adjustments to their lifestyle to regain custody of their children. Given the significant requirements of Mother's Revised Plan, perhaps DCS should have given Mother more than a month to complete these requirements.

For these reasons, we hold that the Trial Court erred in finding by clear and convincing evidence that Mother had failed to substantially comply with the terms of permanency plans, as set forth in Tenn. Code Ann. § 36-1-113(g)(2). Accordingly, we reverse this portion of the Trial Court's judgment.

2. Abandonment

The Trial Court found by clear and convincing evidence that Mother had abandoned C.H.E.H. as defined in Tenn. Code Ann. § 36-1-102(1)(A)(ii). It appears from the record that Mother was incarcerated for a substantial part of the four months following C.H.E.H.'s removal from Mother's custody. Indeed, Mother was incarcerated at the time of the child's birth and requested that DCS take custody of the infant almost immediately [*32] because she could not care for C.H.E.H. while in jail. No evidence was presented regarding Mother's living conditions until she was released from jail in July of 2006 to participate in the Family Way program. Also, DCS offered no evidence of efforts it made to help Mother obtain suitable housing at any time. Mother's circumstances in this case are similar to the facts we discussed in *In re K.E.R.*, as follows:

The record shows that the circumstances of K.E.R.'s birth gave DCS little choice other than to remove the infant from Mother's care. There is also no evidence that Mother made any effort to obtain suitable housing in the four months after removal. But in light of her incarceration, such efforts might not have been possible. Also, it is unclear whether the Department made any efforts to help Mother procure housing during this particular period. Thus, we do not believe the record contains clear and convincing evidence of abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(ii).

In re K.E.R., No. M2006-00255-COA-R3-PT, 2006 Tenn. App. LEXIS 525, 2006 WL 2252746, at *7 (Tenn. Ct. App. M.S., Aug. 3, 2006). Given the nearly identical facts in this case, we, too, find that the record lacks clear and convincing evidence [*33] of abandonment by failure to provide a suitable home.

Furthermore, Mother has made considerable efforts to provide a suitable home, not just for C.H.E.H., but for three of her other children who have lived with her in recent months. Mother has quit taking drugs and enrolled in an intensive substance abuse treatment program, she pays rent for an apartment provided through Family Way, and she has obtained employment to help support herself and her children. Mother also has visited with C.H.E.H. on a regular basis, missing only two scheduled visitation appointments.

As a result, we do not find that Mother "made no reasonable efforts 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 [Mother] will be able to provide a suitable home for the child at an early date." We hold that the evidence preponderates against the Trial Court's finding of abandonment by failure to provide a suitable home as a ground for the termination of Mother's parental rights, and we reverse this portion of the Trial Court's judgment.

3. Persistent Conditions

The Trial Court, however, also found that DCS had proven the requirements of Tenn. Code Ann. § 36-1-113(g)(3) [*34] as a ground for termination. Under this subsection, the following elements must be established by clear and convincing evidence:

(3) 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(s) or guardian(s), 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(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home; . . .

Tenn. Code Ann. § 36-1-113(g)(3). The parties do not dispute that C.H.E.H. was removed from Mother's custody more than six months ago. Since she was eight days old, C.H.E.H. has been in the care of two foster parents who hope to adopt her. Thus, we agree that the continuation of Mother's relationship with [*35] C.H.E.H. greatly diminishes the child's opportunity to integrate into a safe, stable, and permanent home.⁵

⁵ We note that the foster parents testified that if they were permitted to adopt C.H.E.H., they would be willing to allow Mother to visit with C.H.E.H. occasionally if she maintains a healthy, drug-free lifestyle. However, this does not mean that C.H.E.H.'s opportunity for a permanent life

with her foster parents would be unaffected by Mother retaining her parental rights. We also point out that, should the foster parents adopt C.H.E.H. at some point in the future, they have no legal obligation to permit visitation by Mother or any of her family.

We realize that Mother has made significant progress in improving her life in the past year and a half. The reasons which prompted C.H.E.H.'s removal largely have been remedied - namely, Mother's incarceration and drug use. However, we agree with the Trial Court that other conditions exist which are likely to lead to the neglect or abuse of C.H.E.H., and that these conditions are unlikely to be remedied in the near future. We are most concerned with Mother's mental health and her ability to care for this child with Down Syndrome.

The Trial [*36] Court described Mother's efforts at learning to parent C.H.E.H. as follows:

All of the professionals and the foster parents testified that maximizing [C.H.E.H.]'s development requires numerous appointments each month for her to see various therapists and physicians and special classes and training in parenting a Down's Syndrome child. Nancy Hall, Tennessee Infant Parent Services Parent Educator, testified that [Mother] was made aware of the types of support [C.H.E.H.] required. The Mother showed up for a meeting regarding [C.H.E.H.]'s progress last year, but was so late that she missed most of the meeting. Ms. Hall stayed after the meeting to specifically talk with [Mother] about [C.H.E.H.] She and the other professionals involved with [C.H.E.H.]'s care testified that Mother has never contacted them to ask questions about the Child's progress or to attempt to learn how to care for her.

[Mother] testified that she does not know what is required to care for [C.H.E.H.], but that she can do it as well as the foster parents. Her actions, however, show that she has chosen not to find out how to parent [C.H.E.H.] By her own admission, in addition to the meeting that she attended last year, [*37] her only effort to learn how to parent [C.H.E.H.] is contacting the Siskin Hospital for assistance. She has made no significant effort to learn how to parent this special Child.

We agree with the Trial Court's assessment of Mother's parenting ability as to C.H.E.H. Mother has had difficulty parenting one of her sons and recently sent him to live with a relative because of his behavioral problems. Mother knows nothing about C.H.E.H.'s needs or the care she requires. C.H.E.H. has at least 13 regular appointments each month for therapy and other services, and it is imperative to her progress that her caretaker attend these meetings and work with C.H.E.H. at home to reinforce the lessons taught during those appointments. Mother made one phone call to Siskins Hospital to learn about Down Syndrome, but she has not followed up or enrolled in any classes to learn how to communicate with C.H.E.H. or how to care for the child's special needs. We realize that Mother may have been unaware that she could contact C.H.E.H.'s service providers to get more information about her daughter's needs, but for this child's sake, we cannot accept that as an excuse for her not doing more to learn about C.H.E.H. [*38] and her development. Furthermore, Mother has no plan for taking care of C.H.E.H. while Mother is at work. Mother stated that she would enroll the child in daycare or hire a babysitter, but conceded that it would be difficult to find a caretaker qualified to care for a Down Syndrome child and that she had not attempted to locate such a caretaker yet.

C.H.E.H.'s pediatrician and therapists emphasized the importance of C.H.E.H. having a stable, mentally tough, responsible parent who is committed to helping C.H.E.H. develop to her fullest extent. Parenting this child is a 24-hour commitment which most likely will continue throughout her life, not just until the age of 18, as with most other children. Dr. Glennon stated that Mother would need therapy for at least several years to deal with her own mental issues. In addition, Mother's therapist expressed concern about her ability to parent a Down Syndrome child, given her inability to control one of her other "normal" children. We are mindful of the fact that Mother experienced a mental breakdown in January of 2007, approximately six months before trial, which required her to be hospitalized for several days. Although Mother has testified [*39] that she is now on medication to control her mental problems, she also has admitted to stopping her medication before without the consent of her doctor.

Dr. Glennon testified that Mother would need a strong support system to be a good parent to C.H.E.H., and no evidence was presented that Mother has such a long-term support system. Dr. Glennon stated that the Family Way program was a good support system, but that arrangement will continue only for another year at the most, and Mother then will be on her own. Mother testified that her family would serve as her support system, but her own father testified that he did not think she

could handle the responsibilities of parenting C.H.E.H. Mother also stated that her sister, a nurse, would help care for C.H.E.H. if necessary, but then admitted that her sister also had probably used drugs. We do not believe Mother has the type of support system envisioned by Dr. Glennon necessary to help her cope with the stresses of what would be her everyday life parenting C.H.E.H. after she leaves Family Way.

While Mother has made tremendous strides in her life recently, we find that the evidence is clear and convincing that conditions exist which likely [*40] would subject C.H.E.H. to neglect or abuse, should she be returned to Mother's custody, and that these conditions are not likely to be remedied at an early date. We affirm the Trial Court's finding of this ground for termination pursuant to Tenn. Code Ann. § 36-1-113(g)(3).

B. Best Interest of C.H.E.H.

Having found that one ground for termination of Mother's parental rights to C.H.E.H. exists, we now examine whether termination of Mother's parental rights is in the child's best interest.

C.H.E.H.'s foster parents, D.E. and W.E., have cared for C.H.E.H. since she was eight days old and want to adopt her. W.E. is a stay-at-home mother who dedicates a substantial amount of her time to caring for and working with C.H.E.H. D.E. has a full-time job, but also participates in C.H.E.H.'s therapy sessions and other activities as his schedule permits. The service providers who testified about their therapy sessions with C.H.E.H. and her foster parents spoke in glowing terms of the foster parents' involvement in C.H.E.H.'s development. They also stated that, aside from one meeting last fall to which Mother arrived late, Mother had not attempted to learn about the services provided to C.H.E.H. or [*41] how to care for the child.

Ms. Perry testified that, during the time she was C.H.E.H.'s case worker, she could not have recommended that C.H.E.H. be returned to Mother. Ms. Perry stated as follows:

The child is in a - she has been, since she was eight days old in a foster home that she is so bonded with. That's all she knows as her mother and father. . . . The child has special needs. She's just thriving and successful where she is. I wouldn't suggest moving her from where she is.

Mother has never been C.H.E.H.'s caretaker, as the infant was removed from her custody when C.H.E.H. was two days old. During Mother's supervised visits with

C.H.E.H., the child's foster mother testified that Mother did not attempt to learn how to care for C.H.E.H. or to do any of the tasks Mother saw her perform for the child. Although Mother testified that she wants another opportunity to parent C.H.E.H., we agree with the Trial Court that the evidence is clear and convincing that it is in C.H.E.H.'s best interest for Mother's parental rights to be terminated, thereby clearing the way for her to be adopted by her foster parents.

III. Conclusion

After careful review, we reverse the judgment of the Trial Court [*42] only as to the termination of Mother's parental rights under Tenn. Code Ann. § 36-1-113(g)(1) for willful failure to visit and willful failure to support C.H.E.H. and Tenn. Code Ann. § 36-1-113(g)(2) for substantial noncompliance with the permanency plans. We affirm the remainder of the Trial Court's judgment terminating Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3), and remand for collection of costs. Costs on appeal are taxed against the Appellant, L.M.H.H., and her surety, if any.

D. MICHAEL SWINEY, JUDGE