

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 1, 2022

FILED 02/03/2023 Clerk of the Appellate Courts
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IN RE LANDYN B.¹

**Appeal from the Juvenile Court for Greene County
No. 21-J-29731 Kenneth N. Bailey, Jr., Judge**

No. E2022-00184-COA-R3-PT

This action involves the termination of a mother and father’s parental rights to their child. Following a bench trial, the court found that clear and convincing evidence existed to establish the following statutory grounds of termination for each parent: (1) abandonment; (2) substantial noncompliance with the permanency plans; (3) the persistence of conditions which led to removal; and (4) failure to manifest an ability and willingness to care for the child. The court also found that termination of each parent’s rights was in the best interest of the child. We affirm the trial court’s ultimate termination decision.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed in Part, Reversed in Part; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S. and CARMA DENNIS MCGEE, J., joined.

Sandy Phillips, Johnson City, Tennessee, for the appellant, Donna B.

Chase Baker, Greeneville, Tennessee, for the appellant, Garey B.

Herbert H. Slatery, III, Attorney General & Reporter; Andrée Blumstein, Solicitor General; and Amber L. Barker, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

Leslie Ellen Douthat, Greeneville, Tennessee, guardian ad litem for the minor child.

¹ This court has a policy of protecting the identity of children in parental rights termination cases by initializing the last name of the parties.

OPINION

I. BACKGROUND

Landyn B. (“the Child”) was born to Donna B. (“Mother”) and Garey B. (“Father”) (collectively “the parents”) in June 2016. The Child lived with the parents in the marital residence until December 2019, when he stayed with his older brother for a brief time while the parents were incarcerated based upon violations of probation. Upon their release, the Tennessee Department of Children’s Services (“DCS”) attempted to contact the parents but did not officially intervene until January 11, 2020, when the Child was found with an intoxicated individual, who broke into another home while the Child waited in the front yard. At that time, Mother tested positive for methamphetamine, amphetamine, and benzodiazepines. DCS entered an immediate protection order requiring Father, who was negative for all substances, to supervise Mother’s contact with the Child.

After several failed drug screens and unsuccessful attempts to meet with the parents for a team meeting, DCS petitioned for a restraining order preventing Mother from any contact with the Child until she passed two drug screens and demonstrated her cooperation with services offered through DCS. The trial court granted the petition and entered the requested restraining order on February 12, 2020, which specifically required Father to prevent any contact between the Child and Mother.

Two days later, on February 14, DCS visited the home and heard Mother arguing with an adult male in the house. DCS called law enforcement for assistance. Father arrived at the house before DCS entered. He did not have the Child with him and would not reveal the Child’s location. DCS ultimately found the Child hiding with Mother in a closet.

The parents agreed to allow the Child’s immediate placement with relatives while DCS filed its petition for removal. On February 20, 2020, the trial court granted the petition for removal and placed the Child in DCS custody with a foster family.² The court tasked the parents with a monthly child support obligation of \$5. The Child was adjudicated as dependent and neglected on June 1, 2020.

Lisa Bennett, the Child’s family service worker, developed an initial permanency plan for the parents in March 2020. Father participated in the creation of this plan; however, Mother was incarcerated and was advised of her requirements at a later time. Requirements for the parents included: (1) submit to random drug screens; (2) complete an alcohol and drug assessment and follow all recommendations; (3) submit proof of legal income; (4) maintain rent and utility payments; (5) maintain a safe home and allow home visits; (6) cooperate with terms of probation and refrain from criminal activity; (7) provide proof of transportation; and (8) participate in and bring food to visitation. Additionally,

² The Child has remained in the same home since the time of removal.

Mother was required to provide a doctor's note listing her medications and submit to pill counts. Father was required to secure a valid driver's license. The parents were also directed to pay child support as ordered by the court.

Mother's permanency plan was amended with her participation to include the same general requirements in August 2020. A second amendment occurred in February 2021, when Mother had completed her probation but held new pending charges. The amended plan included the following requirements: (1) participate in and provide food at visitation; (2) complete a relapse prevention program; (3) complete individual counseling and provide a treatment plan; (4) comply with court proceedings for pending charges; (5) provide proof of reliable transportation; (6) maintain a residence suitable for the Child; and (7) submit proof of income. The child support obligation remained and was reiterated in the plan. Likewise, Father's requirements remained largely the same but were also amended to include requirements to complete the recommendations from his alcohol and drug assessment and to attend individual counseling and family therapy. The plan was amended for a third time with the same requirements in October 2021.

On October 12, 2021, DCS filed a petition to terminate each parent's parental rights based upon the grounds of (1) abandonment; (2) substantial noncompliance with the permanency plans; (3) the persistence of conditions which led to removal; and (4) failure to manifest an ability and willingness to care for the Child.

The case proceeded to a hearing on January 11, 2022. Christopher Vance, the Child's current family service worker, testified that he was assigned to the case on July 30, 2021. He confirmed that the parents were advised of the Criteria for Termination of Parental Rights but that they refused to sign the document. He claimed that the parents visited the Child once³ in the four months prior to the filing of the termination petition. He confirmed that neither parent was incarcerated in those four months. He stated that visitation prior to the termination period was "sporadic" due to difficulties with communication and the parents' positive drug screens. He explained that the trial court withheld visitation upon a positive drug screen and that visitation would not resume until the parents provided two negative drug screens. He testified and the record confirms the following test dates and results for Father:

Test Date	Report Date	Result
March 17, 2020	March 18, 2020	Negative
March 26, 2020	March 27, 2020	Negative
June 23, 2020	June 25, 2020	Negative
July 1, 2020	July 3, 2020	Negative
September 22, 2020	September 27, 2020	Oxycodone
October 13, 2020	October 15, 2020	Negative

³ Mr. Vance testified that this visit occurred sometime in August or September 2021.

October 22, 2020	November 2, 2020	Negative
January 25, 2021	February 2, 2021	Oxycodone
March 1, 2021	March 3, 2021	Negative
March 10, 2021	March 18, 2021	Methamphetamine
March 31, 2021	April 2, 2021	Negative
April 14, 2021	April 15, 2021	Negative
April 22, 2021	May 6, 2021	Oxycodone
July 7, 2021	July 8, 2021	Negative
July 14, 2021	July 21, 2021	Hydrocodone
August 27, 2021	September 13, 2021	Negative
September 22, 2021	September 26, 2021	Negative

Mr. Vance testified and the record confirms the following test dates and results for Mother:

Test Date	Report Date	Result
February 19, 2020	February 27, 2020	Methamphetamine
May 5, 2020	May 11, 2020	Hydrocodone
May 13, 2020	May 14, 2020	Negative
June 8, 2020	June 15, 2020	Amphetamine Methamphetamine Marijuana
June 23, 2020	June 29, 2020	Methamphetamine
July 1, 2020	July 3, 2020	Negative
September 22, 2020	October 1, 2020	Marijuana Oxycodone
October 13, 2020	October 19, 2020	Marijuana
October 22, 2020	November 2, 2020	Oxycodone
November 2, 2020	November 9, 2020	Hydrocodone Oxycodone
January 25, 2021	February 2, 2021	Oxycodone
March 3, 2021	March 3, 2021	Negative
April 22, 2021	May 6, 2021	Marijuana Oxycodone
May 19, 2021	June 1, 2021	Oxycodone
July 14, 2021	July 23, 2021	Methadone
August 27, 2021	September 8, 2021	Methadone
September 22, 2021	October 6, 2021	Methadone

Mr. Vance confirmed that the parents requested the August 2021 screenings in an effort to resume visitation that had stopped due to drug use. While Mother was positive for Methadone, she provided a prescription evidencing her participation in a methadone clinic.

Mr. Vance testified that Father did not remit any payment of child support in the four months prior to the filing of the termination petition, while Mother remitted payment in a total amount of \$7 from June 2021 through October 2021, when a total payment of \$20 was required by the court in that time period, e.g., \$5 per month.⁴ He stated that Father was employed during the requisite time period at a car wash, while Mother was sporadically employed and in the process of applying for disability benefits.

Mr. Vance confirmed the requirements contained in the permanency plans for each parent. He testified that the parents had maintained a residence but that he had not completed a home visit due to scheduling issues.⁵ He recalled that the parents never answered the telephone when he called and that they sometimes responded weeks later. He stated that he offered to set up the required therapies and appointments but that the parents refused his offer to help. They also had not provided proof of transportation; however, he agreed that they had provided proof of vehicle ownership.

Relative to Father, Mr. Vance provided that Father failed to follow the recommendations from his drug assessment. He was “having issues of on and off drug usage” as evidenced by his positive drug screens. However, Mr. Vance agreed that Father’s drug screens had been clean since his last positive on July 14. He recalled recommending a treatment program. Father advised him that he would obtain the necessary paperwork but took his time to obtain his birth certificate as required for entry into a program.

Mr. Vance confirmed that Mother’s participation in the drug treatment program was inconsistent and that she also failed to follow the recommendations from her drug assessment as evidenced by her positive drug screens. Mr. Vance agreed that Mother eventually provided a prescription for her most recent positive drug screen of Methadone.⁶ He acknowledged that Mother reported her current employment with Taco Bell but had not yet provided proof of income from her employment.

Mr. Vance testified that DCS assisted the parents in completing their assessment, scheduling drug screens and visitations, held child and family team meetings to address ongoing concerns, developed permanency plans, and offered services to address each parent’s addictions. He stated that despite these efforts, the parents failed to provide support as required, maintain visitation, and to comply with requests during visitation. Further, the parents had not successfully addressed their addictions as evidenced by their inconsistent drug screen results. He confirmed that communication with Mother was

⁴ Mr. Vance agreed that the parents provided snacks during visitation; however, the snacks provided when visitations occurred were “inappropriate” due to their sugar content.

⁵ The prior case worker listed the cleanliness of the home as a positive factor. Mr. Vance did not have any concerns about the home other than the fact that he had been unable to complete a home visit.

⁶ Mother testified that she also provided a prescription for one of her Oxycodone test results.

especially difficult because she shared a telephone with Father. He stated that Mother would leave him messages, which he returned but that she would not respond further. He asserted that Mother never provided him with a different number or means of communication.

Relative to the Child, Mr. Vance testified that the Child evidenced a refusal to engage in visitation when it occurred and also exhibited behavioral issues following visitation. He provided that the Child was currently receiving therapy and medication for his behavioral issues. He stated that despite these issues, the Child is doing well in his foster home and identifies himself as part of the foster family. He confirmed that the home is a pre-adoptive placement and that the Child could attain permanency in his placement following termination.

Mother testified that she often brought coloring books, a learning tablet, toys, and snacks to visitation. She also brought clothing on occasion for birthdays and other gifts. She did not recall having a conversation with Mr. Vance concerning the snacks she provided at visitation.⁷

Mother confirmed her participation in the methadone treatment program, since July 6, 2021. She asserted that she has not used any illicit drugs since her entry into the program and that she is in the process of obtaining approval to receive her own take home dose of methadone. She is also attending group therapy sessions and individual therapy sessions on a weekly basis. She confirmed that she was released from probation on April 27, 2020. She claimed that she submitted herself to every random drug screen provided by DCS.

Mother alleged that the prior case worker, Lisa Bennett, was in the process of securing a telephone for her or, at the very least, working to give her information on how to obtain her own telephone. She asserted that she had trouble retrieving her messages from Father. She agreed that she was also responsible for not checking the telephone for her own messages from DCS, potential employers, and her attorney.

Mother confirmed that she worked at Subway from September through October 2021 and that she now works at Taco Bell. She explained that she left Subway because only one employee worked per shift, which required her to ready the food, take customer orders, and make the food for each customer. She provided that she was in the process of securing disability benefits since December 2019, when her benefits ended after 20 years of continued coverage. She was unable to remit child support due to her lack of continued employment and inability to secure her disability benefits. However, she claimed that she

⁷ Father confirmed Mother's testimony and indicated he too participated in the same manner during visitation and in bringing the items for visitation. Likewise, he denied Mr. Vance's assertion that he was advised to bring a different type of snack.

made her \$5 payment in June and that she paid \$2 in July. She alleged that \$3.23 of her wages from Subway were garnished in September and also possibly in October.⁸

Mother testified that her last visitation occurred in November 2021. She believed she still maintained a bond with the Child but indicated a desire for a closer relationship. She claimed that she could financially support the Child upon his return and stated that she and Father maintained their residence and other household bills without issue.

Father described his relationship with the Child as “very good” and expressed his love for the Child. He confirmed that he and Mother worked with the Child on his colors and other learning activities during visitation. He stated that he last visited with the Child in November 2021 and claimed that he maintained monthly visitation prior to that time.

He testified that he has worked at a local car wash for approximately five years. He works as a “detailer” approximately 40 to 50 hours from Monday through Saturday with an average weekly income of approximately \$240. He admitted that despite his consistent employment, he had not remitted child support in accordance with the court’s order. He explained that he and Mother had been struggling since her loss of disability benefits and that his income covered rent, water, electricity, car insurance, and other household responsibilities, for a total household expenditure of approximately \$700 per month. He estimated that he then paid approximately \$175 for groceries per month and \$80 per week for gas. He testified that he now has a working vehicle but that he is unable to drive himself because he does not have a valid driver’s license.

Relative to the permanency plan, Father testified that he completed his assessment and has been attending Alcoholics Anonymous meetings and that he participated in individual therapy and counseling at Camelot for four or five sessions. He is now receiving care from a methadone clinic and is taking classes each week and participating in counseling there. He agreed that he has not participated in marriage counseling as required by the plan and that he was just accepted into the methadone clinic two weeks prior to trial. He confirmed his participation in all required drug screens, with his last positive drug screen occurring on July 14, 2021. He asserted that he has maintained a residence that is safe for the Child and that he is compliant with the terms of his probation.

Following the hearing, the trial court granted the termination petition in its entirety, finding that DCS proved the statutory grounds alleged and that termination was in the best interest of the Child. This timely appeal followed.

⁸ The printout evidencing Mother’s child support payments only ran through August 25, 2021.

II. ISSUES

We consolidate and restate the issues pertinent to this appeal as follows:

- A. Whether clear and convincing evidence supports the trial court's finding of statutory grounds for termination for each parent.
- B. Whether clear and convincing evidence supports the trial court's finding that termination of was in the best interest of the Child.

III. STANDARD OF REVIEW

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right “is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions.” *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). “Termination of a person’s rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and ‘severing forever all legal rights and obligations’ of the parent.” *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(I)(1)). “[F]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

Although parental rights are superior to the claims of other persons and the government, they are not absolute and may be terminated upon appropriate statutory grounds. *See In Re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination. *In re Drinnon*, 776 S.W.2d at 97. A parent’s rights may be terminated only upon

- (1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
- (2) [t]hat termination of the parent’s or guardian’s rights is in the best interest[] of the child.

Tenn. Code Ann. § 36-1-113(c). “[A] court must determine that clear and convincing evidence proves not only that statutory grounds exist [for the termination] but also that termination is in the child’s best interest.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court’s decision to terminate those rights. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000), *abrogated on other grounds by In re Audrey S.*, 182 S.W.3d

838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). “Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re Audrey S.*, 182 S.W.3d at 861 (citations omitted). It produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In 2016, the Tennessee Supreme Court provided guidance to this court in reviewing cases involving the termination of parental rights:

An appellate court reviews a trial court’s findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. The trial court’s ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness.

In re Carrington H., 483 S.W.3d 507, 523-24 (Tenn. 2016) (citations omitted); *see also In re Gabriella D.*, 531 S.W.3d 662, 680 (Tenn. 2017).

Lastly, in the event that the “resolution of an issue in a case depends upon the truthfulness of witnesses, the trial judge, who has had the opportunity to observe the witnesses and their manner and demeanor while testifying, is in a far better position than this Court to decide those issues.” *In re Nevada N.*, 498 S.W.3d 579, 591 (Tenn. Ct. App. 2016) (citing *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). “Thus, this court gives great weight to the credibility accorded to a particular witness by the trial court.” *In re Christopher J.*, No. W2016-02149-COA-R3-PT, 2017 WL 5992359 at *3 (Tenn. Ct. App. Dec. 4, 2017) (citing *Whitaker*, 957 S.W.2d at 837).

IV. DISCUSSION

A.

As indicated above, the court granted the termination petition based upon the following statutory grounds: (1) abandonment; (2) substantial noncompliance with the permanency plan; (3) the persistence of conditions which led to removal; and (4) failure to manifest an ability and willingness to care for the Child. We will discuss each ground.

1. Abandonment

Failure to Visit

Parental rights may be terminated for abandonment when a parent fails to visit a child for a period of four consecutive months immediately before the filing of a petition to terminate parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). A failure to visit “means the failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.” Tenn. Code Ann. § 36-1-102(1)(E). The statute requires that parents offer their children more than “token visitation,” defined as visitation that “under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child.” Tenn. Code Ann. § 36-1-102(1)(C).

A parent may assert as an affirmative defense pursuant to Tennessee Rule of Civil Procedure 8.03 that his or her failure to visit was not “willful.” Tenn. Code Ann. § 36-1-102(1)(I). The burden is on the parent asserting the affirmative defense to prove by a preponderance of the evidence that his or her failure to visit the children was not willful. *Id.*; *In re Kolton C.*, No. E2019-00736-COA-R3-PT, 2019 WL 6341042 at *5 (Tenn. Ct. App. Nov. 26, 2019).

Here, DCS filed the petition on October 12, 2021, so the relevant four-month period is June 12, 2021, to October 11, 2021. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085 at *6 (Tenn. Ct. App. Feb. 20, 2014) (statutory four-month period covers four months preceding the day the termination petition was filed and does not include the day petition was filed). The record reflects that the parents visited once⁹ during the relevant time period. Neither parent raised lack of willfulness as an affirmative defense in their answer; however, they both argue that the issue was tried by implied consent and that any failure to raise the defense should be excused because counsel was not appointed until trial. Regardless of any potential for waiver, we will address their argument on appeal.

⁹ The parents claim that a second visit to deliver a birthday gift “may” have occurred; however, the record does not support this assertion.

Mother

Mother claims that her failure to visit was a result of the trial court's standing order that prohibited visitation following a positive drug screen. She claims that her visitation would have been more frequent had DCS been more diligent in scheduling drug screens to allow her to resume visitation during the pertinent time period. We disagree. Mother was aware of the court's standing order regarding the suspension of visitation due to drug use. Further, the permanency plan prohibited her from illegal drug usage and included many action steps to ensure treatment of her addictions. The record reflects that Mother was provided a plethora of drug screens and that her results were inconsistent throughout the custodial episode, not just the pertinent time period. Mother chose to use illegal drugs prior to the pertinent time period, with full knowledge of the effect that her usage could have on her visitation. She cannot now use her drug usage and its effect on visitation to establish a lack of willfulness. We affirm the trial court's determination that the evidence clearly and convincingly established that Mother abandoned the Child by failure to visit.

Father

Father likewise claims that his failure to visit was a result of the trial court's standing order that prohibited visitation following a positive drug screen. He claims that his visitation would have been more frequent had DCS been more diligent in scheduling drug screens to allow him to resume visitation during the pertinent time period. We disagree. Father was aware of the court's standing order regarding the suspension of visitation due to drug use. Further, the permanency plan prohibited him from illegal drug usage and included many action steps to ensure treatment of his addictions. The record reflects that Father was provided a plethora of drug screens and that his results were inconsistent throughout the custodial episode, not just the pertinent time period. Father chose to use illegal drugs prior to and during the pertinent time period, with full knowledge of the effect that his usage could have on his visitation. He cannot now use his drug usage and its effect on visitation to establish a lack of willfulness. We affirm the trial court's determination that the evidence clearly and convincingly established that Father abandoned the Child by failure to visit.

Failure to Remit Support

Abandonment can occur when parents "have failed to support or have failed to make reasonable payments toward the support of the child" for a period of four consecutive months immediately before the filing of a petition to terminate parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). The statute defines failure to support as a parent's failure "for a period of four (4) consecutive months, to provide monetary support or the failure to provide more than token payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(D). By statute, parents are expected to offer more than "token support," which "means that the support, under the circumstances of the individual case, is insignificant

given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). Furthermore, “[e]very parent who is eighteen (18) years of age or older is presumed to have knowledge of a parent’s legal obligation to support such parent’s child or children.” Tenn. Code Ann. § 36-1-102(1)(H).

A lack of willfulness can constitute an affirmative defense to the ground of failure to support. Tenn. Code Ann. § 36-1-102(1)(I). However, a parent “shall bear the burden of proof that the failure to . . . support was not willful” and must establish the lack of willfulness by a preponderance of evidence. *Id.* Efforts to frustrate or impede a parent’s visitation do not justify a parent’s failure to financially support a child. *In re Audrey S.*, 182 S.W.3d at 864 (citations omitted).

Mother

DCS does not defend this ground of termination as applied to Mother. The record reflects that Mother was unemployed while attempting to secure disability benefits for the majority of the custodial episode. However, her wages were garnished when she was able to secure some employment, and she remitted some payment even when not employed. We reverse this ground of termination as applied to Mother. This conclusion does not end our inquiry as only one ground of termination is required to support a trial court’s termination decision. Tenn. Code Ann. § 36-1-113(g).

Father

Father does not offer argument directly disputing this statutory ground or any of the remaining statutory grounds. Nevertheless, we will consider each remaining ground as applied to him as required by our Supreme Court. *In re Carrington H.*, 483 S.W.3d at 525-26 (“[T]he Court of Appeals must review the trial court’s findings as to each ground for termination and as to whether termination is in the child’s best interests, regardless of whether the parent challenges these findings on appeal.”). There is no dispute that Father failed to remit support during the four-month period or at any time after the Child’s removal in 2020. The record reflects that he was employed throughout the custodial episode but chose not to pay the small sum of \$5 per month as required by the trial court. Accordingly, we conclude that Father willfully failed to support the Child. We affirm the trial court’s finding of a second ground for termination as applied to him.

2. *Substantial noncompliance*

Tennessee law requires the development of a plan of care for each foster child and further requires that the plan include parental responsibilities that are reasonably related to the plan’s goal. Tenn. Code Ann. § 37-2-403(a)(2)(A). A ground for termination of parental rights exists when a petitioner proves by clear and convincing evidence that “[t]here has been substantial noncompliance by the parent or guardian with the statement

of responsibilities in a permanency plan.” Tenn. Code Ann. § 36-1-113(g)(2). To establish noncompliance, the trial court must initially find “that the requirements of the permanency plans are reasonable and related to remedying the conditions that caused the child to be removed from the parent’s custody in the first place.” *In re M.J.B.*, 140 S.W.3d at 656; see *In re Valentine*, 79 S.W.3d at 547. When the trial court does not make such findings, the appellate court should review the issue de novo. *In re Valentine*, 79 S.W.3d at 547. Second, the court must find that the parent’s noncompliance is substantial, *In re M.J.B.*, 140 S.W.3d at 656, meaning that the parent must be in “noncompliance with requirements in a permanency plan that are reasonable and related to remedying the conditions that warranted removing the child from the parent’s custody.” *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *12 (Tenn. Ct. App. June 3, 2003). To assess a parent’s substantial noncompliance with a permanency plan, the court must weigh “both the degree of noncompliance and the weight assigned to that particular requirement.” *Id.* Conversely, “[t]erms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant.” *In re Valentine*, 79 S.W.3d at 548-49. “Substantial” is defined as “of real worth and importance,” Black’s Law Dictionary (11th ed. 2019), and “the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement.” *In re Valentine*, 79 S.W.3d at 548.

This ground for termination does not require that DCS “expend reasonable efforts to assist a parent in complying with the permanency plan requirements.” *In re Skylar P.*, No. E2016-02023-COA-R3-PT, 2017 WL 2684608, at *7 (Tenn. Ct. App. June 21, 2017); see also *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015) (“[I]n a termination proceeding, the extent of [the Department’s] efforts to reunify the family is weighed in the court’s best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.”).

Mother

We, like the trial court, hold that the requirements of the plan were reasonably related to the grounds for removal but that Mother has failed to substantially comply with said requirements. We acknowledge that she fulfilled some requirements, namely she completed her assessments, maintained a stable home, and secured transportation. Despite her progress, the record also reflects that she failed to address the most important aspects of her plan, namely refraining from illegal drug use and following the recommendations from her assessments. We acknowledge that Mother made great strides since she began taking Methadone in July 2021; however, she had not completed the program at the time of trial and had just been approved to take Methadone home with her. Her visits with the Child were also inconsistent and insufficient prior to the filing of the petition. Accordingly, we conclude that there is clear and convincing evidence to support the trial court’s determination that Mother’s parental rights should be terminated on the ground of substantial noncompliance with the permanency plan.

Father

Again, we hold that the requirements of the plan were reasonably related to the grounds for removal but that Father has failed to substantially comply with said requirements. We note Father's similar progress in that he completed the necessary assessments, was employed, maintained a home, and secured transportation. However, he failed several drug screens throughout the custodial episode, only recently attempted to secure therapy and involvement with the Methadone Clinic, and had not complied with all recommendations from his assessment. He also failed to visit and to remit child support as required by the plan. Accordingly, we conclude that there is clear and convincing evidence to support the trial court's determination that Father's parental rights should be terminated on the ground of substantial noncompliance with the permanency plan.

3. Persistence of conditions which led to removal

Under Tennessee law, a trial court may terminate parental rights when:

(3)(A) The child has been removed from the home or the physical or legal custody of a parent or guardian for a period of six (6) months by a court order entered at any stage of proceedings in which a petition has been filed in the juvenile court alleging that a child is a dependent and neglected child, and:

(i) The conditions that led to the child's removal still persist, preventing the child's safe return to the care of the parent or guardian, or other conditions exist that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect, preventing the child's safe return to the care of the parent or guardian;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or guardian in the near future; and

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

Tenn. Code Ann. § 36-1-113(g)(3) (emphasis added). Termination of parental rights requires clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 550. The statute does not require that only the original conditions leading to removal be used to establish grounds for termination. On the contrary, the statute specifically includes both "[t]he conditions that led to the child's removal . . . or other conditions [] that, in all reasonable probability, would cause the child to be subjected to further abuse or neglect[.]" Tenn. Code Ann. § 36-1-113(g)(3)(A)(i).

Mother & Father

We will address this ground as applied to both parents, who live in the same household. The record reflects that the stipulated conditions which led to removal in this case persist, namely child safety concerns due to Mother's drug use. As previously stated, we acknowledge that Mother made great strides in her recovery since she began taking Methadone in July 2021; however, she had not completed the program at the time of trial and had just been approved to take Methadone home with her. Tenn. Code Ann. § 36-1-113(g) ("The [statutory grounds of termination] are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground."). Other conditions also exist that would cause the Child further neglect, including Father's failure to remedy his own illegal drug use. As previously stated, he failed several drug screens throughout the custodial episode and had only recently attempted to secure therapy and involvement with the Methadone Clinic to truly address his addiction.

Following our review, we conclude that there is little likelihood that the conditions which led to removal and other conditions now found will be remedied at an early date so that the Child can be safely returned in the near future and that the continuation of each parent's relationship greatly diminishes the Child's chances of early integration into a safe, stable and permanent home. Accordingly, we also affirm the trial court on this ground of termination as applied to both parents.

4. Failure to manifest an ability and willingness to assume custody

The trial court found that DCS had proven by clear and convincing evidence that each parent's parental rights should be terminated pursuant to Tennessee Code Annotated section 36-1-113(g)(14), which provides as follows:

A legal parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and placing the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

Tenn. Code Ann. § 36-1-113(g)(14). This ground requires the petitioner to prove two elements by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)(1), (g)(14). First, a petitioner must prove that the parent failed to manifest "an ability and willingness to personally assume legal and physical custody or financial responsibility of the child." Tenn. Code Ann. § 36-1-113(g)(14). Second, a petitioner must prove that placing the children in the parent's "legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child." *Id.*

As to the first element, our Supreme Court instructed as follows:

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

In re Neveah M., 614 S.W.3d 659, 677 (Tenn. 2020) (citation omitted) (resolving the split in authority regarding whether parental rights can be terminated if a parent has manifested a willingness, but not an ability to personally assume legal and physical custody or financial responsibility for the child).

As to the second element, whether placing the child in the parent’s custody “would pose a risk of substantial harm to the physical or psychological welfare of the child,” we have explained:

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

In re Virgil W., No. E2018-00091-COA-R3-PT, 2018 WL 4931470, at *8 (Tenn. Ct. App. Oct. 11, 2018) (quoting *Ray*, 83 S.W.3d at 732).

Mother

The record reflects that Mother showed an overall lack of willingness to assume legal and physical custody of the Child. Her visitation with the Child was sporadic, at best. She blamed her failure to visit on a lack of communication between herself and Mr. Vance. However, the record reflects that Mr. Vance regularly contacted her but that she failed to check messages and ensure prompt communication regarding the Child. She has further evidenced her inability to assume responsibility of the Child as evidenced by her continued drug usage. While we do not wish to discount Mother’s improvement since her involvement with the Methadone Clinic, we must consider her overall conduct throughout the custodial episode. Mother was advancing in the program but had just secured the responsibility for her own Methadone usage at the time of trial. She was not yet in a position to care for the Child. The record supports a finding that placing the Child with

her would pose a risk of substantial physical and psychological harm to his welfare given her failure to adequately address her illegal drug use by the time of trial and her overall lack of a relationship with the Child due to her failure to visit. The record reflects that the Child struggled during and after visitation. We affirm the court's finding on this issue.

Father

Similarly, Father failed to visit and had not remitted child support, despite his longstanding employment. He had also just entered the Methadone program at the time of trial and was not yet in a position to care for the Child. The record supports a finding that placing the Child with Father would pose a risk of substantial physical and psychological harm to the Child's welfare given Father's failure to adequately address his illegal drug use by the time of trial and his overall lack of a relationship with the Child due to his failure to visit. We affirm the court's finding on this issue.

B.

Having concluded that there was clear and convincing evidence supporting at least one statutory ground of termination, we must consider whether termination was in the best interest of the Child. As a threshold issue, the parents take issue with the court's party-prepared findings in the best interest section of the order. They argue that the court made no findings of fact or conclusions of its own in its oral ruling when discussing the best interest of the Child.

Tennessee Rules of Civil Procedure 52.01 provides that “[i]n all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.” Our Supreme Court has ruled that such findings and conclusions stated in the order must be “the product of the court's independent judgment.” *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014). Orders prepared by the trial court are preferred but not necessarily required for review by an appellate court. *Id.* at 315–16. As to party-prepared orders generally, these are permitted if “two conditions are satisfied. First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must not create doubt that the decision represents the trial court's own deliberations and decision.” *Id.*

Our review of the court's oral ruling from the bench indicates that the trial court clearly stated its findings and conclusions as to the factors included in the best interest analysis. Further, the record does not create doubt that the decision reviewed and signed by the court represents the court's own deliberations and decision. The trial court's order is sufficient for our review in accordance with Tennessee Rule of Civil Procedure 52.01 and with *Smith v. UHS of Lakeside, Inc.* We will now proceed with our analysis.

Effective April 22, 2021, the General Assembly amended Tennessee Code Annotated § 36-1-113(i) by deleting the previous subsection in its entirety and substituting a new subsection providing, inter alia, twenty factors to be considered in determining whether termination is in the best interest of the child. *See* 2021 Tenn. Pub. Acts, Ch. 190 § 1 (S.B. 205). The amended statute applies to this action filed after April 22, 2021. *In re Riley S.*, No. M2020-01602-COA-R3-PT, 2022 WL 128482, at *14 n.10 (Tenn. Ct. App. Jan. 14, 2022) *perm. app. denied* (Tenn. Mar. 17, 2022). The statute provides:

(i)(1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court. Those factors may include, but are not limited to, the following:

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;

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

(C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;

(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;

(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;

(F) Whether the child is fearful of living in the parent's home;

(G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;

(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;

(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these

relationships and the child's access to information about the child's heritage;

(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;

(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;

(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;

(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;

(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;

(O) Whether the parent has ever provided safe and stable care for the child or any other child;

(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;

(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;

(R) Whether the physical environment of the parent's home is healthy and safe for the child;

(S) Whether the parent has consistently provided more than token financial support for the child; and

(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

(2) When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

(3) All factors considered by the court to be applicable to a particular case must be identified and supported by specific findings of fact in the court's written order.

(4) Expert testimony is not required to prove or disprove any factor by any party.

(5) As used in this subsection (i), "parent" includes guardian.

Tenn. Code Ann. § 36-1-113(i). "This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's parental rights is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The General Assembly has also stated that "when the best interest[] of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interest[] of the child, which interests are hereby recognized as constitutionally protected." Tenn. Code Ann. § 36-1-101(d); *see also White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004) (holding that when considering a child's best interest, the court must take the child's perspective, rather than the parent's).

Mother

The Child has found stability and continuity of placement in his current foster home, where he has lived since February 2020 and identifies himself as a member of the family. Removing him from his current environment puts the Child at risk of physical and psychological harm as evidenced by Mother's failure to fully address her drug addiction and the Child's current relationship with his foster family and lack of a relationship with Mother. Tenn. Code Ann. § 36-1-113(i)(A), (B), (H), (I). Mother failed to maintain her relationship and attachment with the Child through visitation. There is no reasonable expectation that Mother can cultivate such an attachment given her lack of visitation throughout the episode and the Child's longstanding placement with his current family. Tenn. Code Ann. § 36-1-113(i)(D), (E). Moreover, Mother has failed to ready herself for the Child's return and was still subject to supervised visitation at the time of the hearing. She failed to utilize the efforts and connections provided by DCS and had no sense of urgency in returning communications necessary for her reunification with the Child. Tenn.

Code Ann. § 36-1-113(i)(J), (K), (L), (M), (P). Questions remain as to Mother's ability to provide a safe and stable home for the Child as evidenced by her failure to adequately address her drug use prior to the termination hearing. Tenn. Code Ann. § 36-1-113(i)(Q). With all of the above considerations in mind, we conclude that there was clear and convincing evidence to establish that termination of Mother's parental rights was in the best interest of the Child. We affirm the trial court as to its termination of her rights.

Father

The Child has found stability and continuity of placement in his current foster home, where he has lived since February 2020 and identifies himself as a member of the family. Removing him from his current environment puts the Child at risk of physical and psychological harm as evidenced by Father's failure to fully address his drug addiction and the Child's current relationship with his foster family and lack of a relationship with Father. Tenn. Code Ann. § 36-1-113(i)(A), (B), (H), (I). Father failed to maintain his relationship and attachment with the Child through visitation. There is no reasonable expectation that Father can cultivate such an attachment given his lack of visitation throughout the episode and the Child's longstanding placement with his current family. Tenn. Code Ann. § 36-1-113(i)(D), (E). Moreover, Father has failed to ready himself for the Child's return and was still subject to supervised visitation at the time of the hearing. He failed to utilize the efforts and connections provided by DCS and had no sense of urgency in enrolling in the necessary programs and therapies necessary for his reunification with the Child. Tenn. Code Ann. § 36-1-113(i)(J), (K), (L), (M), (P). Questions remain as to Father's ability to provide a safe and stable home for the Child as evidenced by his failure to adequately address his drug use prior to the termination hearing. Likewise, he remitted no child support throughout the custodial episode, despite his longstanding employment. Tenn. Code Ann. § 36-1-113(i)(Q), (S). With all of the above considerations in mind, we conclude that there was clear and convincing evidence to establish that termination of Father's parental rights was in the best interest of the Child. We affirm the trial court as to its termination of his rights.

V. CONCLUSION

The judgment of the trial court is affirmed, in part, and reversed, as to the trial court's finding that Mother abandoned the Child by failure to remit child support. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed equally to the appellants, Donna B. and Garey B.

JOHN W. McCLARTY, JUDGE