

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs January 3, 2023

<b>FILED</b> 05/03/2023 Clerk of the Appellate Courts
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**IN RE ZOEY O.<sup>1</sup> ET AL.**

**Appeal from the Juvenile Court for Knox County  
No. 207280 Timothy E. Irwin, Judge**

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**No. E2022-00500-COA-R3-PT**

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Mother appeals the trial court’s termination of her parental rights as to her two oldest children. As grounds for termination the trial court found abandonment for failure to provide a suitable home, substantial noncompliance with the permanency plan, persistent conditions, severe child abuse, and failure to manifest a willingness and ability to assume custody. The trial court also found that termination was in the best interest of both children. We find that clear and convincing evidence supports the trial court’s findings as to the grounds for termination and the best interests of the children. Accordingly, we affirm the trial court’s judgment.

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

JEFFREY USMAN, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and CARMA DENNIS MCGEE, JJ., joined.

Ben H. Houston II, Knoxville, Tennessee, for the appellant, Jessica S.

Jonathan Skrmetti, Attorney General and Reporter; and Erica M. Haber, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

I.

On August 13, 2018, the Department of Children’s Services (DCS) received a referral indicating that Wyatt S., a newborn, had been exposed in utero to drugs and was in

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<sup>1</sup> It is the policy of this Court to protect the privacy of children in parental termination cases by avoiding the use of full names.

a neonatal intensive care unit (NICU). The referral indicated that Wyatt tested positive for Subutex but also noted that the child's mother, Jessica S. (Mother) had a Subutex prescription.

DCS assigned Amy Keller to the matter; Ms. Keller promptly went to see Wyatt in the hospital. In the following days, Ms. Keller attempted to visit Mother, who had been discharged from the hospital on August 12, at her home on six different occasions but was unable to make contact. Ms. Keller also left a card in the door, asking Mother to call, but she did not receive any response.

On August 30, 2018, more than two weeks after she began trying to reach Mother, Ms. Keller was finally able to meet with Mother at her apartment. On this occasion, Ms. Keller encountered Zoey O., who had been born a little more than a year earlier in May 2017. At this time, the apartment was heavily cluttered and unclean, but Zoey herself appeared clean and well-nourished. Mother explained that her car was not working, so she had to walk wherever she went. Therefore, Ms. Keller drove Mother to the hospital to visit Wyatt. Mother had not visited Wyatt since she had been discharged on August 12th and had not called the hospital to check on Wyatt since August 23rd.

Mother submitted to a drug screen, testing negative for all substances. She reported to Ms. Keller that while she was pregnant with Wyatt that she received prenatal care at Cherokee Health. She added that part of her prenatal care involved weening off of Subutex. After receiving Mother's Cherokee Health records, Ms. Keller discovered Mother also had been using street-obtained Subutex to supplement her usage of the drug. Mother admitted to this use of Subutex beyond what was provided for under her prescription.

Wyatt was discharged from the hospital on September 1, 2018. DCS scheduled a Child and Family Team Meeting, but Mother did not appear for the meeting. Ms. Keller followed up by visiting Mother's apartment again. The apartment remained cluttered. Ms. Keller, this time, saw bugs and cockroaches on the floor and walls. There was garbage in the kitchen, and the home smelled of spoiled food.

On September 17, 2018, Ms. Keller also learned through a phone call that Mother was seen taking Wyatt out in a stroller uncovered in the rain, and that he was unrestrained in his stroller and had fallen out. The caller also indicated that Mother had dragged Zoey down a flight of stairs. After the phone call, Ms. Keller met with Mother and Brandon O. (Father) and saw Zoey and Wyatt (the Children). The meeting occurred at a pawn shop near their apartment. Mother and Father were there to pawn a bicycle to be able to pay for food. Mother reported that the family was being evicted on September 27th because they were behind on their rent payments.

Later that same day, after Mother and Father were offered and refused non-custodial placement options, the Knox County Juvenile Court issued an order placing the Children

in the custody of the DCS. Two days later, on September 19, 2018, DCS filed a petition for adjudication of dependency and neglect. On October 4, 2018, the first of several permanency plans was created. Under this permanency plan, Mother was required to complete drug and alcohol treatment, comply with drug screenings, provide suitable housing, remain a law-abiding citizen, cooperate with DCS, attend meetings and hearings, maintain visitation with the Children, and maintain transportation. DCS referred Mother to drug and alcohol treatment and for mental health assessments, and conducted random drug screenings. It also provided for visitation with the Children and housing resources. In November 2018, Zoey and Wyatt were placed with Foster Parents, where they have since remained.

On December 13, 2018, the trial court conducted a dependency and neglect hearing. Mother failed to appear. As a result of evidence that was presented, the trial court determined Zoey and Wyatt were dependent and neglected due to Father's homelessness, domestic violence, and substance abuse, and due to Mother's substance abuse while pregnant, environmental neglect, and failure to provide for the appropriate care and supervision of the Children. In addition to finding dependency and neglect, the trial court also adopted in its order the original October 4 permanency plan, which is discussed above.

Mother was arrested in February 2019 for shoplifting and in March 2019 for public intoxication. Both charges were eventually dismissed. Due to these arrests, the permanency plan, however, was revised in March 2019 to include a new requirement that Mother must resolve these criminal issues and inform DCS of any new charges. The trial court also entered an order on June 3, 2019, finding that Wyatt was the victim of severe child abuse as a result of Mother's use of illegal drug use while pregnant. Mother did not appeal this finding.

DCS subsequently filed a petition to terminate Mother's parental rights in July 2019. In September 2019, almost a year after creation of the first permanency plan and months after DCS filed its petition to terminate parental rights, Mother began to cooperate with DCS in connection with meeting the requirements of the permanency plan. Mother completed an alcohol and drug assessment, started an alcohol and drug treatment program, and completed an intensive outpatient program. In March 2020, the permanency plan was again revised, adding new responsibilities. Under the changes, Mother was required to address past trauma and depression, remove herself from violent situations, take prescription medications as prescribed, demonstrate sobriety, and attend medical, dental, and developmental appointments with the Children.

Mother made progress. As a result, her visitation with the Children was modified from supervised to unsupervised in June 2020. With Mother progressing, DCS moved to dismiss its petition to terminate Mother's rights in March 2021.

In May 2021, Mother was arrested in connection with a traffic violation and lost her license, which was reinstated in January 2022. In May or June 2021, Mother's visitation was modified back to supervised, as DCS had become concerned about a potential arrest due to another outstanding warrant and was concerned about the Children being present if that occurred. Furthermore, it also became clear to DCS that Mother had relapsed into drug abuse. In July 2021, Mother gave birth to the Children's younger half-sibling. Mother admitted to using heroin while pregnant. In November 2021, the trial court held a hearing and found that Mother committed severe abuse against the Children's half-sibling by using illicit substances while pregnant. Again, Mother did not appeal this order.

In November 2021, Ms. Cindy Jobe-Yago, a DCS case manager, conducted a visit to Mother's home and saw dirty dishes all over the kitchen, trash all over, and cigarette butts all over the floor. Ms. Jobe-Yago visited again in February 2022, and while the conditions were better than in November, they remained problematic for the Children.

In addressing her drug use problem, Mother engaged in behavioral health therapy and had medically-assisted drug treatment that involved prescribed Suboxone. Ms. Jobe-Yago attempted to conduct drug screens, which Mother was required to comply with under the parenting plans. According to Ms. Jobe-Yago, Mother was inconsistent with her cooperation, submitting to some drug screens but regularly declining. As an illustration, in the months leading up to trial on the termination of Mother's parental rights, Ms. Jobe-Yago was able to conduct a drug screen on February 28, 2022, that was negative, but Mother failed to respond to requests for drug screens on March 2nd, 3rd, 4th, and 7th. Mother then tested positive for methamphetamine on March 14th. With regard to her use of illegal drugs, Mother denied using methamphetamine but admitted to using heroin.

On February 17, 2022, DCS filed a second petition to terminate Mother's parental rights. Mother did not file a response to DCS's petition to terminate her parental rights. Father surrendered his parental rights on March 9, 2022. In late March, based upon Mother's failure to file a response, DCS filed a motion for default. The trial court conducted a hearing on April 19, 2022. Mother failed to appear at the hearing. The trial court granted the motion for default. Nevertheless, given the nature of termination proceedings and the requirements thereof,<sup>2</sup> the trial court proceeded with an evidentiary hearing on the merits of the petition. The court heard the testimony of Ms. Jobe-Yago and Foster Mother.

According to the testimony, Zoey and Wyatt have lived with Foster Parents since November 2018. The Children get along well with the couple's other children. Foster

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<sup>2</sup> Tennessee Code Annotated section 36-1-117(n) permits a court to enter a default judgment against a party in termination proceedings provided that proof is "presented as to the legal grounds and best interest pursuant to § 36-1-113." By requiring a showing of proof, a default judgment in a parental termination case differs from default judgment cases in other contexts. *In re Connor B.*, 603 S.W.3d 773, 783 (Tenn. Ct. App. 2020).

Mother indicated that all of the children behave like siblings. They play games and run around together. In addition to having this connection with the couple's other children, Zoey and Wyatt have also bonded with the Foster Parents. Foster Mother noted that when she drops Zoey and Wyatt off for visits with Mother that the Children would often ask if Foster Mother would return. They would ask in a manner suggesting that they were seeking affirmation that they would be back in her care. Foster Mother also testified that the Children would come back "wired" and "anxious" after their visits with Mother. Foster Mother testified that both children require some special care. Wyatt has developmental special needs and attends speech therapy and occupational therapy. Zoey has needed special treatment for anxiety and mental health. Part of her treatment included play therapy, which she successfully completed in December 2021. Both Children are also involved in Grow With Me, a special treatment program for drug-exposed children. The testimony indicated that both Zoey and Wyatt are doing well in treatment. Foster Mother testified that her family can provide for the Children's basic and specialized needs. She testified that she would "absolutely" adopt the Children if it becomes possible.

On June 3, 2022, the Knox County Juvenile Court terminated Mother's parental rights to Zoey O. and Wyatt S. As noted above, the Children's Father had already previously surrendered his parental rights on March 9, 2022. DCS moved to amend the order to correct clerical errors, and an amended final order was entered on July 1, 2022. On August 1, Mother moved to alter or amend by setting aside the default judgment. A hearing was held on August 22, 2022. As with the dependency and neglect and termination hearings, Mother again failed to appear at this hearing. Given Mother's absence, her attorney requested a continuance. The trial court denied this request. On October 21, 2022, the trial court dismissed Mother's motion to alter or amend. That same day, October 21st, Mother filed a notice of appeal.

On appeal before this court, Mother raises two foundational arguments in opposition to the judgment of the trial court, one procedural and one evidentiary in nature. For the procedural argument, she contends the trial court erred by denying her motion for a continuance of the hearing upon her motion to set aside the default. As for the evidentiary argument, she contends that the trial court erred by admitting drug screens into evidence without a proper chain of custody being established. She also argues against four of the five grounds for termination and that termination is not in the best interest of the Children. She challenges the termination grounds of abandonment for failure to provide a suitable home, substantial noncompliance with the permanency plan, persistent conditions, and failure to manifest a willingness and ability to assume custody. Mother does not challenge the termination ground of severe abuse of Wyatt. As to the two foundational arguments, the State argues, respectively, that the trial court did not abuse its discretion in denying the motion for continuance, that Mother waived her evidentiary argument, and even if the trial court erred, that any error was harmless. The State also contends each of the five grounds for termination found by the trial court is supported by clear and convincing evidence and that the best interests of the Children favor termination of Mother's parental rights.

## II.

With regard to the first of her two foundational arguments on appeal, Mother contends the trial court erred in denying her motion for a continuance of the hearing on her motion to set aside the default judgment. Mother filed a motion to set aside on August 1, 2022. A hearing was held on August 22, 2022, with seven days' notice of the hearing date. Mother failed to appear at the hearing. Due to her absence at the hearing and the one-week notice of the hearing, Mother's attorney orally requested a continuance as the hearing was set to commence. Mother's attorney explained that every effort had been made to contact Mother about the hearing, but these efforts had proven unsuccessful in getting Mother to appear. The trial court denied the motion to continue. In addressing parents failing to appear for hearings connected with termination proceedings, the trial court noted "you don't make a kid wait in limbo forever."

Mother argues that the trial court's denial of her attorney's oral motion to continue was an abuse of discretion because the trial court did not provide sufficient notice of the hearing on her motion, having only provided seven days' notice. In reviewing a trial court's decision as to a motion for continuance, the trial court's decision regarding "[w]hether to grant or deny a motion for a continuance is a matter of discretion." *Mabry v. Bd. of Pro. Resp. of Supreme Ct.*, 458 S.W.3d 900, 907 (Tenn. 2014); *see also, e.g., State Dep't of Children's Servs. v. V.N.*, 279 S.W.3d 306, 317 (Tenn. Ct. App. 2008) (quoting *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413, 415 (Tenn. 1997) ("The granting or denial of a motion for a continuance lies in the sound discretion of the court.")). Tennessee appellate courts will not disturb a trial court's "ruling on such a motion absent an abuse of that discretion and a showing of prejudice to the party seeking the continuance." *Mabry*, 458 S.W.3d at 907; *see also, e.g., V.N.*, 279 S.W.3d at 317 (quoting *Blake*, 952 S.W.2d at 415) ("The ruling on the motion will not be disturbed unless the record clearly shows abuse of discretion and prejudice to the party seeking a continuance.").

"[R]eviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). In considering a motion for continuance in the context of a parental termination proceeding, it is important to note that the Tennessee General Assembly has directed that trial courts are to "expedite the contested termination or adoption proceeding by entering such scheduling orders as are necessary to ensure that the case is not delayed." Tenn. Code Ann. § 36-1-124(a) (emphasis added). Additionally, this court has indicated that it "disapproves of unnecessary delays in the final resolution of parental termination proceedings because all parties affected by these proceedings have a right to a prompt, just adjudication of their interests and rights." *In re Ella M.I.*, No. M2013-01543-COA-R3-PT, 2014 WL 1778275, at \*4 (Tenn. Ct. App. Apr.

30, 2014); *see also, e.g., In re C.R.B.*, No. M2003-00345-COA-R3-JV, 2003 WL 22680911, at \*4 (Tenn. Ct. App. Nov. 13, 2003) (“This court . . . does not condone unnecessary delays in the final resolution of proceedings to terminate parental rights. All parties affected by these proceedings have a right to a prompt and just adjudication of their rights and interests.”).

On appeal in advancing her contention that the trial court abused its discretion in declining to grant a continuance, Mother references Tennessee Rules of Civil Procedure 6.01, 6.04, and 6.05. She does so in support of her argument that the trial court erred in denying the oral motion for continuance. Her argument, however, is thinly explained and severely lacking in record citations to support her position.

Insofar as Mother’s argument suggests that the trial court may have acted in contravention of Tennessee Rules of Civil Procedure 6.01 and 6.04(1) in failing to grant a continuance, the record before us does not support that contention. Mother argues she had only seven days of notice of the hearing on her motion to set aside. From the transcript cited by Mother on appeal, it appears that in orally moving for a continuance, Mother’s counsel stated to the trial court that notice had been given the previous Monday, one week before the hearing date. Such a time frame, however, complies with Rules 6.01 and 6.04(1) of the Tennessee Rules of Civil Procedure. Mother is correct insofar as weekend days are not to be counted when the total time is less than 11 days. Tenn. R. Civ. P. 6.01. However, Tennessee Rule of Civil Procedure 6.04(1) provides for five days’ notice for a hearing, with the last day of the period counting as part of the computation pursuant to Tennessee Rule of Civil Procedure 6.01. In other words, assuming for purposes of argument that Mother is correct that she was entitled to at least five days’ notice of the hearing, she received that five days’ notice.

In support of her contention that the trial court erred in failing to grant a continuance, Mother also briefly references Tennessee Rule of Civil Procedure 6.05 relating to service by mail, which provides for three days to be added to the prescribed period where service is effectuated in such manner. Mother, however, does not actually state in her brief how service was effectuated in this case, and even if she had, she fails to cite anywhere in the record to demonstrate how service was effectuated in this case. The transcript from the hearing in which Mother’s counsel made an oral motion for a continuance, which provides the only record cite appearing in Mother’s briefing on this matter, is devoid of any reference to the manner of service. Accordingly, Mother’s legal argument lacks the supporting factual underpinning from the record to support the legal position advanced on appeal.

Furthermore, having reviewed the transcript of the hearing in which Mother’s oral motion for a continuance was raised and addressed by the trial court, there is no reference by Mother’s counsel therein to Mother’s view that failing to grant a continuance would violate the Tennessee Rules of Civil Procedure. While noting the short time period had caused problems with reaching Mother regarding the hearing, counsel simply did not raise

before the trial court the contention, now raised for the first time on appeal, that the time period violated Rules 6.01, 6.04, and 6.05 of the Tennessee Rules of Civil Procedure. *See, e.g., Dye v. Witco Corp.*, 216 S.W.3d 317, 321 (Tenn. 2007) (concluding that failure to raise an argument before the trial court results in waiver thereof); *Sun, Air, Water & Land, Inc. v. Reynolds*, No. M2019-01581-COA-R3-CV, 2020 WL 5807008, at \*3 (Tenn. Ct. App. Sept. 29, 2020) (noting that “[i]f a party fails to first present an argument in the trial court before presenting the argument on appeal, the party has waived that argument.”)

By the time Mother’s attorney orally requested a continuance given Mother’s absence at the hearing on her motion to set aside, Mother had already previously failed to appear for the dependency and neglect hearing, failed to file a response to the original petition to terminate her parental rights, and failed to appear at the termination hearing. The trial court did not err in considering the interest of the Children or the repeated delays when it declined to grant Mother’s counsel’s oral motion for a continuance on the day of the hearing upon her motion to set aside when the motion was based on Mother’s absence. To the contrary, it was prudent and responsible for the trial court to consider the interests of the Children in avoiding further delay. We affirm the trial court’s denial of the motion to continue the hearing on Mother’s motion to set aside the default judgment.

### III.

We next turn to Mother’s second foundational argument -- her assertion that the trial court erred by admitting positive drug screens into evidence without properly demonstrating an unbroken chain of custody. She argues that because several of the grounds for termination found by the trial court relied heavily on the positive drug screens, they must be reversed. However, Mother did not appear at the trial and did not object to the admission of the evidence. As DCS correctly observes, the “failure to make evidentiary objections at trial results in the waiver of the issue on appeal.” *In re K.S.*, No. E2018-02274-COA-R3-PT, 2019 WL 3526384, at \*5 (Tenn. Ct. App. Aug. 2, 2019); *see also In re Cayson C.*, No. E2022-00448-COA-R3-PT, 2022 WL 17246337, at \*14 (Tenn. Ct. App. Nov. 28, 2022) (finding that the mother waived an evidentiary argument by failing to object at trial), *perm. app. denied* (Tenn. Feb. 17, 2023); *In re Dustin M.*, No. M2019-01661-COA-R3-PT, 2020 WL 2036648, at \*4 (Tenn. Ct. App. Apr. 28, 2020) (finding that failure to object to an issue at trial waives review of the issue on appeal). Because Mother failed to object to the admission of the drug screens at trial, we find that she has waived appellate review of this issue.<sup>3</sup>

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<sup>3</sup> In her briefing on appeal, Mother asserts in a conclusory manner that the admission of these drug screens into evidence constitutes plain error. She fails to reference the requirements for establishing plain error or how the circumstances of the present case would surmount that high threshold. Ultimately, for reasons discussed in the next paragraph, any error with regard to admission of the failed drug screens in the present case would be harmless.



Even if the issue was not considered to have been waived, DCS presented clear and convincing evidence beyond the drug screens to indicate that Mother had resumed abusing drugs. Most importantly, Mother admitted to using illegal drugs, and her third child was born having been exposed in utero to illegal drugs. In fact, it is undisputed that a dependency and neglect finding to this effect was made as to Mother's third child. Despite Mother's assertion to the contrary, it is difficult to see how any error by the trial court in considering the failed drug screens as evidence indicating renewed drug use would be anything other than harmless given the significant other evidence beyond the drug screens indicating Mother's renewed use of illegal drugs.

#### IV.

In considering Mother's arguments as to the grounds for termination, it is important to note that parents have a fundamental constitutional interest in the care and custody of their children, *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), and this interest is "far more precious than any property right," *In re Carrington H.*, 483 S.W.3d 507, 522 (Tenn. 2016) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982)). "[P]ublic policy strongly favors allowing parents to raise their biological or legal children as they see fit, free from unwarranted governmental interference." *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010). However, a parent's rights are not absolute and may be terminated on clear and convincing evidence that a statutory ground for termination exists and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c)(1), (2); *In re Adoption of Angela E.*, 402 S.W.3d 636, 639 (Tenn. 2013).

"[I]n an appeal from an order terminating parental rights[,] the 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." *In re Carrington H.*, 483 S.W.3d at 525–26 (footnote omitted). Likewise, this court must "review the trial court's findings of fact and conclusions of law as to each ground for termination, even though the statute only requires the finding of one ground to justify terminating parental rights." *Id.* at 525 (quoting *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010)). This court applies the versions of the parental termination statutes in effect on the date the petition was filed. *See In re Braxton M.*, 531 S.W.3d 708, 732 (Tenn. Ct. App. 2017) (holding "that the version of the statute in effect at the time of the petition's filing controls this action").

We review the trial court's findings of fact related to parental termination de novo, giving the findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. R. App. P. 13(d). The grounds for termination and the determination that termination is in the child's best interest must be established by clear and convincing evidence, that is, evidence that "enables the factfinder to form a firm belief or conviction regarding the truth of the facts" and which "eliminates any serious or substantial doubt about the correctness of these factual findings."

*In re Bernard T.*, 319 S.W.3d at 596; *see* Tenn. Code Ann. § 36-1-113(c). Given the heightened burden of proof to be overcome in termination proceedings, “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.” *In re Carrington H.*, 483 S.W.3d at 524. We review the trial court’s legal conclusion regarding whether the evidence sufficiently supports termination under this standard *de novo* with no presumption of correctness. *Id.*

#### A. Grounds for Termination

The trial court found by clear and convincing evidence that Mother’s parental rights were subject to termination based on the following grounds: (1) abandonment for failure to provide a suitable home; (2) substantial noncompliance with the permanency plan; (3) persistent conditions; (4) severe child abuse; and (5) failure to manifest a willingness and ability to assume custody. Tenn. Code Ann. § 36-1-113(g)(1)–(4), (14). As noted above, Mother contends that the trial court erred as to each of these grounds with the exception of severe child abuse as to Wyatt. DCS argues in support of the trial court’s conclusion as to each ground.

##### 1. Abandonment

We first address the ground of abandonment by Mother for failure to provide a suitable home. Tennessee Code Annotated section 36-1-113(g)(1) provides that abandonment, as defined by section 36-1-102, constitutes a ground on which termination may be granted. Tennessee Code Annotated section 36-1-102(1)(A)(ii) defines abandonment to include when:

(a) The child has been removed from the home or the physical or legal custody of a parent or parents or guardian or guardians by a court order 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 the child was placed in the custody of the department or a licensed child-placing agency;

(b) 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

(c) For a period of four (4) months following the physical removal, the department or agency made reasonable efforts to assist the parent or parents

or the guardian or guardians to establish a suitable home for the child, but that the parent or parents or the guardian or guardians have not made reciprocal reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal, when the parent or guardian is aware that the child is in the custody of the department . . . .

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

This court has explained that “reasonable efforts” is a fact-intensive inquiry. *In re Stephen H.*, No. M2022-00674-COA-R3-PT, 2022 WL 17843018, at \*8 (Tenn. Ct. App. Dec. 22, 2022) (citing *In re C.L.M.*, No. M2005-00696-COA-R3-PT, 2005 WL 2051285, at \*9 (Tenn. Ct. App. Aug. 25, 2005)). Reasonable efforts are marked by the “exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.” *Id.* (quoting Tenn. Code Ann. § 37-1-166(g)(1)). A suitable home requires more than a proper physical living location. *In re Nevada N.*, 498 S.W.3d 579, 595 (Tenn. Ct. App. 2016). It also requires the home to be free of drugs. *Id.*

Here, the Children were removed from Mother’s custody on September 17, 2018. The trial court found that in the following four months, Mother “made absolutely no effort to obtain or maintain a suitable home for the children.” In contrast, the trial court found that DCS made reasonable efforts to assist Mother during this time. Mother argues that there is very little evidence in the record of what efforts DCS made to assist her in providing a suitable home. However, DCS case manager Ms. Jobe-Yago testified that DCS created a permanency plan, referred Mother for assessments and treatment related to alcohol and drugs and mental health, conducted drug screenings, provided opportunities for visitation, provided housing resources, and provided case management during that original four-month period.<sup>4</sup> Ms. Jobe-Yago explained that Mother did not participate in the making of a permanency plan or involve herself in the case at all until September 2019, a year after

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<sup>4</sup> “The efforts of the department or agency to assist a parent or guardian in establishing a suitable home for the child shall be found to be reasonable if such efforts equal or exceed the efforts of the parent or guardian toward the same goal.” Tenn. Code Ann. § 36-1-102(1)(A)(ii)(c); *See In re Stephen H.*, 2022 WL 17843018, at \*9–10 (finding DCS made reasonable efforts when it created a permanency plan, provided referrals for mental health providers, referrals for parenting assessments, home safety assessments, and transported the parents to and from visitations); *In re Edward R.*, No. M2019-01263-COA-R3-PT, 2020 WL 6538819, at \*10 (Tenn. Ct. App. Nov. 6, 2020) (“[P]roviding drug screens, maintaining consistent communication with a parent, coordinating alcohol and drug assessments, and offering counseling services’ may also evidence reasonable efforts to assist a parent in establishing a suitable home.” (quoting *In re H.S.*, No. M2019-00808-COA-R3-PT, 2020 WL 1428777, at \*7 (Tenn. Ct. App. Mar. 20, 2020))).

the Children were removed. The record supports the trial court's finding that DCS made reasonable efforts to assist her.

The trial court also found that it is unlikely that Mother will be able to provide a suitable home at an early date. The record shows that Mother made progress toward the goal of obtaining or maintaining a suitable home for the Children by obtaining stable housing and working on a number of responsibilities within the parenting plans. However, Mother's efforts only began in September 2019, which as noted above, is a year after the Children were removed. The record also shows that Mother relapsed into using illegal drugs in 2021 while she was pregnant with the Children's younger sibling. Since then, Mother has also struggled to maintain her housing, falling behind on bills and rent, leading to warnings of eviction. Additionally, during subsequent DCS visits in November 2021 and January 2022, Mother's home was dirty with trash and cigarette butts on the floor. Mother argues that no photographs were admitted into evidence showing the condition of her home, which she asserts diminishes the weight of this evidence. Ms. Jobe-Yago testified, however, as to what the conditions were like in Mother's home and no contrary evidence was presented. With regard to Mother's renewed drug usage, Mother notes that the trial court relied upon her failed drug tests, which she contends are inadmissible due to a failure to establish a chain of custody. This argument is unavailing for the reasons discussed above, notably that Mother failed to object at trial and has waived this argument and also that significant evidence beyond the drug screens was presented demonstrating Mother's renewed drug usage. With regard to the latter, Mother admitted to renewed illegal drug use, and her third child was born exposed to illegal drugs.

We conclude that the evidence in the record supports by clear and convincing evidence the trial court's finding that Mother abandoned the Children by failing to provide a suitable home.

## 2. Substantial Noncompliance with Permanency Plan

Parental rights may also be terminated when "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan . . . ." Tenn. Code Ann. § 36-1-113(g)(2). "Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance." *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004).

After the removal of the Children, DCS provided Mother with the first permanency plan on October 4, 2018. Mother did not engage with participating in the creation of this original plan. After that first plan, the permanency plan was updated several times with Mother's participation remaining largely similar, but adding various additional requirements. The plans required Mother to complete alcohol and drug treatment, mental health treatment, address domestic violence, submit to random drug screens, obtain and maintain housing and income, cooperate with DCS, remain law-abiding, and visit with the

Children. Relatedly, DCS referred Mother to alcohol and drug treatment, mental health treatment, provided opportunities for visitation, and provided housing resources.

The record shows that Mother did not begin to comply with the plan's requirements until September 2019, a year after the Children were removed from her custody. Eventually, Mother did make progress toward meeting the responsibilities of the permanency plan, even progressing far enough for unsupervised visitation. However, in 2021, she relapsed and began using illegal drugs again. As the trial court noted, she tested positive for methamphetamine. Mother admitted to utilizing heroin, which she termed her "drug of choice." Further, Ms. Jobe-Yago testified that Mother's home was dirty and unsuitable for children during DCS visits in November 2021 and February 2022. Mother's deviation from the permanency plan is not minor, trivial, or technical; it is instead substantial. *See In re M.J.B.*, 140 S.W.3d at 656.

Therefore, we find that clear and convincing evidence supports the trial court's finding that Mother failed to substantially comply with the responsibilities of the permanency plan.

### 3. Persistent Conditions

The trial court also found clear and convincing evidence of the ground of persistent conditions. Tennessee Code Annotated section 36-1-113(g)(3) provides that parental rights may be terminated when:

(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;

(B) The six (6) months must accrue on or before the first date the termination of parental rights petition is set to be heard . . . .

Tenn. Code Ann. § 36-1-113(g)(3).

The Children were removed from Mother’s custody on September 17, 2018, when the trial court found there were concerns of environmental neglect. At the December 2018 permanency hearing, the trial court determined that the Children were dependent and neglected due to domestic violence, substance abuse, environmental neglect, and failure to provide for the appropriate care and supervision of the Children. The record reveals Mother renewed her drug abuse, and her home remained unsuitable for the Children. Based on these facts, the trial court found that there was little likelihood these conditions would be remedied in the near future and that the continuation of the parent-child relationship would greatly diminish the Children’s chances of early integration into a safe, stable, and permanent home.

We conclude that clear and convincing evidence supports the trial court’s finding of persistent conditions.

#### 4. Severe Child Abuse

Though Mother does not contest the ground of severe child abuse, we address the ground of severe child abuse pursuant to the Tennessee Supreme Court’s directive in *Carrington*. 483 S.W.3d at 525-26 (stating that “in an appeal from an order terminating parental rights[,] the Court of Appeals must review the trial court’s findings as to each ground for termination . . . regardless of whether the parent challenges these findings on appeal”). Severe child abuse is defined, in relevant part, as “[k]nowingly or with gross negligence allowing a child under eight (8) years of age to ingest an illegal substance or a controlled substance that results in the child testing positive on a drug screen, except as legally prescribed to the child . . . .” Tenn. Code Ann. § 37-1-102(b)(27)(E). In addressing the ground of severe abuse as a basis for termination, Tennessee law provides that severe abuse exists as a ground for termination where “the parent or guardian has been found to have committed severe child abuse, as defined in § 37-1-102, *under any prior order of a court . . . .*” Tenn. Code Ann. § 36-1-113(g)(4) (emphasis added).

In connection with the dependency and neglect proceedings, the trial court found that Wyatt was the victim of severe abuse related to Mother’s use of street-obtained illegal drugs beyond her prescribed dosage while pregnant. Mother did not appeal this severe abuse finding, making it a final prior order of a court. *See* T.C.A. § 36-1-113(g)(4); *In re Cayson C.*, 2022 WL 17246337, at \*15 (applying res judicata to a non-appealed finding of severe abuse); *In re Travionna W.*, No. W2021-01349-COA-R3-PT, 2022 WL 8080022, at \*4 (Tenn. Ct. App. Oct. 14, 2022) (affirming ground based on res judicata).

Accordingly, clear and convincing evidence supports the trial court's finding that Mother severely abused Wyatt.

#### 5. Failure to Manifest an Ability and Willingness to Assume Custody

Finally, the trial court found clear convincing evidence that Mother failed to manifest a willingness and ability to assume custody of the Children. To satisfy this ground, two prongs must be proven by clear and convincing evidence: (1) the parent or legal guardian failed to manifest an ability and willingness to personally assume legal and physical custody or financial responsibility of the child, and (2) placing the child in the parent'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); *In re Neveah M.*, 614 S.W.3d 659, 674 (Tenn. 2020). The Tennessee Supreme Court has indicated the statute 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." *Id.* at 677. Failure of the parent to manifest *either* ability or willingness will satisfy the first prong. *Id.* "Ability focuses on the parent's lifestyle and circumstances," while willingness revolves around a parent's attempts "to overcome obstacles" preventing the parent from assuming custody. *In re Serenity W.*, No. E2018-00460-COA-R3-PT, 2019 WL 511387, at \*6 (Tenn. Ct. App. Feb. 8, 2019). A parent's express desire to reunite with the child is insufficient to establish a willingness to assume custody. *See In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at \*17 (Tenn. Ct. App. July 15, 2019). On the contrary, "[w]hen evaluating willingness, we look for more than mere words." *In re Jonathan M.*, No. E2018-00484-COA-R3-PT, 2018 WL 5310750, at \*5 (Tenn. Ct. App. Oct. 26, 2018)). This court may instead consider "whether a parent has attempted 'to overcome the obstacles that prevent them from assuming custody or financial responsibility for the child.'" *In re Jaxx M.*, No. E2018-01041-COA-R3-PT, 2019 WL 1753054, at \*9 (Tenn. Ct. App. Apr. 17, 2019) (quoting *In re Cynthia P.*, No. E2018-01937-COA-R3-PT, 2019 WL 1313237, at \*8 (Tenn. Ct. App. Mar. 22, 2019)). A failure to make efforts to overcome such obstacles "can undercut a claim of willingness." *Id.* As for the second prong, a substantial risk of harm requires "a real hazard or danger that is not minor, trivial, or insignificant" and requires the harm to be more than a "theoretical possibility" but to be "sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not." *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001); *see In re Maya R.*, No. E2017-01634-COA-R3-PT, 2018 WL 1629930, at \*8 (Tenn. Ct. App. Apr. 4, 2018).

The trial court found that Mother's home is not suitable for children, that she has not been able to achieve and maintain sobriety, and that she has not addressed her drug use or mental health in a meaningful way. While she has made progress at certain points, she has also renewed her abuse of drugs. To be a suitable home, a home needs to be free from illegal drug use. *See, e.g., In re Estrella A.*, No. M2022-00163-COA-R3-PT, 2022 WL 17091958, at \*10 (Tenn. Ct. App. Nov. 21, 2022); *In re Joseph D.*, No. M2021-01537-COA-R3-PT,

2022 WL 16848167, at \*14 (Tenn. Ct. App. Nov. 10, 2022); *In re Bralynn A.*, No. M2021-01188-COA-R3-PT, 2022 WL 2826850, at \*11 (Tenn. Ct. App. July 20, 2022); *In re Nevada N.*, 498 S.W.3d at 595. The trial court also found, based on these facts, that placing the Children with Mother would be dangerous because Mother continues to use drugs and has failed to provide a safe and sanitary home. *See id.*

While we do not doubt Mother’s desire to regain custody, her attempts, especially those aimed at avoiding illegal drugs, have been insufficient and unsuccessful. We find clear and convincing evidence that Mother has failed to manifest a willingness and ability to assume custody and that placement of the Children with Mother would pose a risk of substantial harm.

### C. Best Interests of the Children

If a statutory ground for termination of parental rights has been shown by clear and convincing evidence, the focus shifts to what is in the child’s best interest. *In re Audrey S.*, 182 S.W.3d 838, 877 (Tenn. Ct. App. 2005). The Tennessee Supreme Court has summarized the law regarding the best interest analysis as follows:

Facts considered in the best interests analysis must be proven by “a preponderance of the evidence, not by clear and convincing evidence.” “After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that termination is in the child’s best interests.” When considering these statutory factors, courts must remember that “[t]he child’s best interests [are] viewed from the child’s, rather than the parent’s, perspective.” Indeed, “[a] focus on the perspective of the child is the common theme” evident in all of the statutory factors. “[W]hen the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child . . . .”

Ascertaining a child’s best interests involves more than a “rote examination” of the statutory factors. And the best interests analysis consists of more than tallying the number of statutory factors weighing in favor of or against termination. Rather, the facts and circumstances of each unique case dictate how weighty and relevant each statutory factor is in the context of the case. Simply put, the best interests analysis is and must remain a factually intensive undertaking, so as to ensure that every parent receives individualized consideration before fundamental parental rights are terminated.

*In re Gabriella D.*, 531 S.W.3d 662, 681-82 (Tenn. 2017) (citations omitted).



The nonexclusive factors relevant to the best interest analysis are laid out in Tennessee Code Annotated section 36-1-113(i)(1):<sup>5</sup>

(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

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<sup>5</sup> “This court applies the versions of the parental termination statutes in effect on the date the petition was filed.” *In re J.S.*, No. M2022-00142-COA-R3-PT, 2023 WL 139424, at \*6 (Tenn. Ct. App. Jan. 10, 2023).

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.

Tenn. Code Ann. § 36-1-113(i)(1).

In considering these factors, the trial court found that termination would provide the Children with their critical need for stability and continuity. The trial court also found that the Children have been living in the same foster home since November 2018 and the foster family can provide for their needs. Tenn. Code Ann. § 36-1-113(i)(1)(A). The trial court found that the change in caretakers and environment would negatively impact the Children. The foster parents can provide the specialized care necessary for the Children. Tenn. Code Ann. § 36-1-113(i)(1)(B). The trial court found that Mother has not demonstrated the continuity and stability necessary to meet the Children's needs due to her substance abuse and the unsuitability of her home. Tenn. Code Ann. § 36-1-113(i)(1)(C). The record supports these findings.

The trial court found that Mother has visited the Children regularly since their removal, even progressing to unsupervised visitation at one point, but she has been unable to maintain sobriety or a suitable home. Tenn. Code Ann. § 36-1-113(i)(1)(E). The trial court found that the Children do not have a healthy attachment to Mother. Tenn. Code Ann. § 36-1-113(i)(1)(D). The trial court found that the Children have bonded to the foster family and it would be cruel to remove the Children from them. Tenn. Code Ann. § 36-1-113(i)(1)(H). The trial court found that the Children have emotionally significant relationships with the foster family, who can meet their needs. Tenn. Code Ann. § 36-1-113(i)(1)(I). The trial court found that Mother has not made lasting changes to her circumstances, especially her continuing use of drugs, and has not provided a safe home for the Children. Tenn. Code Ann. § 36-1-113(i)(1)(J). The record supports these findings.

The trial court found that DCS made reasonable efforts to assist Mother in making lasting adjustments by providing services and referrals. The trial court found that while Mother has, at times, made progress, she has ultimately not taken advantage of the resources provided to her by DCS. Tenn. Code Ann. § 36-1-113(i)(1)(K)–(L). The trial court found that Mother has shown no sense of urgency in addressing the needs of the Children including her failure to adequately address her drug abuse. Tenn. Code Ann. § 36-1-113(i)(1)(M). The trial court found that Mother severely abused Wyatt. Tenn. Code Ann. § 36-1-113(i)(1)(N). The trial court found that Mother has never provided a safe and stable environment for the Children, and the trial court had no confidence in her ability to do so. Tenn. Code Ann. § 36-1-113(i)(1)(O). The trial court found that Mother has not demonstrated an understanding of the Children's needs or provided for them for any significant period. Tenn. Code Ann. § 36-1-113(i)(1)(P). The trial court also found that Mother has not shown the ability or commitment to creating a home that meets the Children's basic and specific needs. Tenn. Code Ann. § 36-1-113(i)(1)(Q). The record supports these findings.

The trial court found that the physical environment of Mother's home is not safe or suitable for the Children. Tenn. Code Ann. § 36-1-113(i)(1)(R). It found that Mother is not mentally or emotionally fit to parent the Children and it would be detrimental to remove

them from their foster home. Tenn. Code Ann. § 36-1-113(i)(1)(T). The record supports these findings.

The trial court did, however, find that Mother works and has paid child support. Tenn. Code Ann. § 36-1-113(i)(1)(S). The trial court also found that the factors set forth in Tennessee Code Annotated section 36-1-113(i)(1)(F) and (G) do not apply in the present case. The record supports these findings.

Assessed in light of all of the statutory factors, there is clear and convincing evidence to support the trial court's conclusion that termination is in the best interests of Wyatt and Zoey.

### III.

For the reasons discussed above, we affirm the judgment of the Juvenile Court for Knox County. Costs of the appeal are taxed to the appellant, Jessica S., for which execution may issue if necessary. The case is remanded for such further proceedings as may be necessary and consistent with this opinion.

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JEFFREY USMAN, JUDGE