IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 11, 2003

IN RE Z.J.S. AND M.J.P.

Appeal from the Dickson County Juvenile Court
No. 05-00-024-CC A. Andrew Jackson, Judge

No. M2002-02235-COA-R3-JV - Filed June 3, 2003

This appeal involves the termination of parental rights with regard to two children being raised by a single mother. The Tennessee Department of Children's Services removed both children from their mother's custody and placed them in foster care after she physically abused the older child. The mother later pled guilty to child abuse and neglect of a child under six years old and was placed on probation. She also agreed to permanency plans with the Department intended to reunite her with her children. Approximately twenty-one months later, the Department filed a petition in the Dickson County Juvenile Court seeking to terminate the mother's parental rights, as well as the parental rights of the non-resident fathers of the two children. Following a bench trial, the juvenile court terminated the mother's parental rights, as well as the parental rights of both fathers. The mother has appealed. We have determined that the termination of the parental rights of the biological fathers of both children must be vacated because of serious procedural irregularities. We have also determined that the record contains clear and convincing evidence (1) that the mother has failed to comply substantially with the terms of her permanency plans, (2) that the conditions that led to the children's removal persist and the mother has not demonstrated that she can remedy them, and (3) that the children's interests will be best served by terminating their mother's parental rights. Accordingly, we affirm the termination of the biological mother's parental rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed In Part and Vacated in Part

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM B. CAIN, J., filed a concurring opinion.

J. Reese Holley, Dickson, Tennessee, for the appellant, K.L.P.

Paul G. Summers, Attorney General and Reporter, and Elizabeth C. Driver, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

OPINION

I.

This case is the final chapter of a tragic, yet all too familiar, story that began over twenty years ago when K.L.P. was born to an unmarried nineteen-year-old high school dropout. When

K.L.P. was an adolescent, she was sexually abused by her biological father. Her mother did not report the abuse to the authorities even though she knew about it. K.L.P.'s mother married another man in 1991, and the cycle of abuse continued. K.L.P. was sexually molested and raped by her step-father between the ages of twelve and sixteen.

K.L.P. dropped out of high school in the tenth grade and somehow found her way to Arizona. She was again victimized by rape. In January 1999, K.L.P. gave birth to her oldest son, M.J.P., in Mesa, Arizona. M.J.P.'s biological father, T.S.M., is purportedly deceased. Soon after M.J.P.'s birth, K.L.P. began a relationship with J.W.S. The abuse continued. As K.L.P. later explained, J.W.S. customarily "beat the crap out of me." In February 2000, K.L.P. gave birth to her second son, Z.J.S., in Apache Junction, Arizona. J.W.S. is the boy's biological father.

In the meantime, K.L.P.'s mother's marriage ended, and she moved to Dickson, Tennessee. K.L.P. eventually left J.W.S., and on May 15, 2000, she and her two children moved in with her mother in Dickson. On May 24, 2000, K.L.P. and her mother got into a violent argument regarding the care of the children. K.L.P. exclaimed that having children had been a "mistake" and that she "loved her kids [but] that she just did not want them." Unable to control her anger, K.L.P. began choking M.J.P. and twisted his arm behind his back.[1] K.L.P.'s mother summoned the local authorities. K.L.P. was arrested, and the Dickson County Juvenile Court signed an emergency order temporarily placing M.J.P. and Z.J.S. in the custody of the Tennessee Department of Children's Services. The Department placed the children in a foster home on May 25, 2000, and then moved them to another foster home in White Bluff on June 2, 2000, where they remain to this day.

K.L.P. was charged with child abuse and neglect of a child under six years old. On June 29, 2000, while K.L.P. was still in jail, representatives of the Department presented her with two initial permanency plans aimed at eventually reuniting her with and her children. Among other things, these plans required K.L.P. to (1) "undergo a complete psychological evaluation and . . . follow all recommendations from the assessment. She will effectively resolve the emotional issues which led to her abusing her son, including her past victimization, her strained relationships, and her low self-esteem," (2) successfully complete anger control classes and parenting classes, (3) obtain and maintain employment, (4) maintain weekly contact with her children, and (5) be "financially supportive" of the children and to "pay child support as ordered by the court." K.L.P. signed these plans, acknowledging that she agreed to their terms and that she understood that failure to live up to her responsibilities under their terms could result in the termination of her parental rights.

K.L.P. was released from jail on probation in September 2000 after pleading guilty to the child abuse and neglect charges in return for a suspended three-year sentence. The children remained in foster care after K.L.P.'s release, and both the Department and the Foster Care Review Board ("Board") provided the juvenile court with periodic reports regarding her efforts to meet the requirements of the permanency plans.

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[1] K.L.P. gave the following account of these events:

> Me and my mom got into an argument about me throwing away the diaper and stuff that she bought. I snap[ped] after that. She got in my face, and my son screamed, [and] then I grab[bed] him and choked him and pull[ed] his arm behind his back.

K.L.P. made little progress toward achieving her goals under the initial permanency plans during the months immediately following her release from jail. In her words, "I've had a hard time getting on my feet." She had regular supervised visits with her children at the Department's Dickson office. These visits went well, and she acted "appropriately" with her children. However, her case manager and the Board observed in their January 2001 reports that that she had completed none of her tasks and that she had made no progress toward reducing the risks to her children that necessitated placing them in foster care.

The circumstances apparently improved dramatically in late January 2001 after K.L.P. began receiving services from the Harriett Cohn Center in Nashville. Based on her initial assessment, K.L.P. was diagnosed with Dysthymic Disorder[2] and alcohol abuse. Her "severe and persistent mental illness" was reflected in (1) extensive problems with performing daily routine activities, (2) moderate impairment in interpersonal functioning, (3) moderate difficulty in concentration and performing tasks, and (4) extensive difficulty adjusting to change. In light of her diagnosis, the Harriett Cohn Center's treatment plan included group therapy for parenting skills, anger control, and chemical awareness. The Center decided against conducting further psychological testing or to recommend that K.L.P. have individual psychotherapy at that time.

In a May 11, 2001 letter to the juvenile court, K.L.P.'s case manager reported that she had "made great strides in her efforts to take care of her children again." By mid-June 2001, K.L.P. had successfully completed her parenting classes and her anger control classes. On June 26, 2001, her case manager informed the juvenile court that K.L.P.'s regular supervised visits with her children were going well and that she was "meeting all tasks outlined on the Permanency Plan." Accordingly, K.L.P.'s case manager recommended permitting her to have unsupervised visits with her children.

The juvenile court conducted a "permanency hearing" on June 27, 2001. Significantly, the court found that the goal of reunifying K.L.P. and her children was "realistic" and that the Department had "documented a compelling reason" for not undertaking to terminate her parental rights.[3] The court determined that K.L.P. was in compliance with the terms of the permanency plans covering her two children and that the only barrier remaining to removing the children from foster care was K.L.P.'s completion of the plan.[4] The court also directed the Commissioner of Children's

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[2]According to the American Psychiatric Association's current Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR"), Dysthymic Disorder (DS-IV Code 300.4) is characterized by a "[d]epressed mood for most of the day, for more days than not, as indicated by either subjective account or observation by others, for at least two years" and the presence of two or more of the following: (1) poor appetite or overeating, (2) insomnia or hyersomnia, (3) low energy or fatigue, (4) low self-esteem, (5) poor concentration or difficulty making decisions, or (6) feelings of hopelessness.

[3]The adoption statutes adopted in 1996 require the Department to petition to terminate parental rights for children who have been in foster care for fifteen of the most recent twenty-two months. Tenn. Code Ann. § 36-1-113(h)(1)(A) (2001); *see also* 42 U.S.C.A. § 675(5)(E) (West Supp. 2003). However, the Department may decline to file a termination petition if it has documented in the permanency plan a compelling reason for determining that terminating a parent's parental rights would not be in the best interest interest of the child or children. Tenn. Code Ann. § 36-1-113(h)(2)(B).

[4]The juvenile court's order containing its findings at the June 27, 2001 hearing was not filed until March 13, 2002. The record contains no explanation for this delay.

Services to review her case manager's recommendation that K.L.P. be permitted unsupervised visitation with her children and set another permanency hearing for May 25, 2002.

K.L.P.'s progress was apparently derailed in mid-2001. The circumstances are not entirely clear, and the Department did a poor job at trial presenting evidence on this matter.[5] As best we can determine, the Harriett Cohn Center conducted an updated assessment of K.L.P. in early June 2001 and changed her diagnosis to post-traumatic stress disorder, impulse control disorder, and alcohol abuse.[6] Apparently, the Center also determined that K.L.P. should begin individual counseling sessions through October 2001 to address the effects of her more personal issues stemming from her victimization as a child and adult. However, K.L.P. apparently understood that these counseling sessions were voluntary and not mandatory. Even though her case manager "thought" she needed more therapy, K.L.P. decided that she did not need the therapy sessions because she had previously received various types of counseling for these problems.[7]

In addition, K.L.P. was apparently charged with passing approximately $6,000 in worthless checks and was placed on probation after she agreed to make restitution to the payees. She also entered into another intimate relationship, and later in 2001, she discovered that she was again pregnant. By that time, the child's father was incarcerated.[8]

Perhaps the most significant change in K.L.P.'s circumstances following the June 27, 2001 hearing was the assignment of a new case manager in November 2001.[9] According to K.L.P., her new case manager began "pushing the adoption issue on me" by telling her that permitting the

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[5]It should go without saying that the Department, as the governmental agency seeking to terminate parental rights, has the ultimate burden of proving its case. If the Department is basing its petition on a parent's failure to meet the requirements of a permanency plan or failure to remedy the conditions that led to the child's or children's removal, it must present clear and convincing evidence demonstrating how the parent has failed to meet his or her obligations or has failed to remedy the objectionable conditions. Until the Department makes out a prima facie case, the burden does not shift to the parent to prove either that he or she has complied with the permanency plan's requirements or that he or she has, in fact, remedied the conditions that led to the removal of the child or children. In all candor, the Department's evidence in this case is barely satisfactory.

[6]The Harriett Cohn Center also determined that K.L.P. continued to exhibit moderate problems with performing activities of daily living, marked problems with interpersonal functioning, moderate problems with concentration and performing tasks, and moderate problems adapting to change.

[7]After K.L.P. missed two scheduled appointments, members of the Harriett Cohn Center's treatment staff sent her letters noting that she had missed the session and offering to reschedule the appointment. One letter asked K.L.P. to "let us know" if she "decided not to pursue our services at this time." The Department introduced these letters to prove that K.L.P. knew that the individual counseling was mandatory. We find that these letters did not clearly put K.L.P. on notice that she was required to continue with the individual counseling sessions.

[8]This pregnancy ended with a miscarriage.

[9]K.L.P. may have had as many as five different case manages during the two-year period following the Department's removal of her children.

children's foster parents to adopt them would be in the children's and K.L.P.'s best interests.[10] The new case manager prepared revised permanency plans in December 2001 without (1) reviewing K.L.P.'s file in depth, (2) discussing K.L.P.'s progress with her probation officer, or (3) reviewing the Center's records regarding K.L.P.'s treatment. The case manager conceded that she lacked "just very basic information" when she prepared the plans and that she had followed her team leader's advice because she was more familiar with the case.

These plans, which even their author believed could have been "more finely tuned," represented a marked departure from the initial permanency plans prepared in June 2000. Along with the goal of reunifying K.L.P. with her children, the new plans listed adoption as a "concurrent" goal. They required K.L.P. to (1) "maintain her current status of employment," (2) "utilize food stamps, and provide for her rent," (3) "assist in determining the extent of past psychological evaluations, and the need for future evaluations if required," (4) "demonstrate skills learned in parenting and anger management classes," and (5) "complete any further classes, or therapy, which is deemed necessary." The revised plans called for the completion of these tasks by December 5, 2002.

The Department gave up on K.L.P. within months after developing the revised permanency plans. On March 20, 2002, it filed a petition in the Dickson County Juvenile Court to terminate her parental rights with regard to Z.J.S. and M.J.P. The Department also sought to terminate the parental rights of J.W.S., the biological father of Z.J.S., and the "unknown father" of M.J.P. The juvenile court began the trial on June 17, 2002 but then continued it until July 22, 2002 because of the parties' failure to have essential records available for its consideration.

At the conclusion of the July 22, 2002 hearing, the juvenile court terminated the parental rights of the two men who had fathered M.J.P. and Z.J.S. The court also terminated K.L.P.'s parental rights with regard to both of her children. The court determined that these children were dependent and neglected and that they had been abandoned by K.L.P. The trial court also found that K.L.P. had failed to remedy the conditions that had led to the original removal of the children and had failed to comply substantially with the goals set out for her in her permanency plans. K.L.P. has appealed from this decision.

II.
TERMINATION OF M.J.P.'S BIOLOGICAL FATHER'S PARENTAL RIGHTS

Before addressing the issues raised by K.L.P., considerations of fundamental fairness and proper procedure require us to address the manner in which the Department undertook to terminate the parental rights of M.J.P.'s "unknown father."[11] For the purposes of terminating his parental rights, the Department treated him as being "unknown," even though the Department knew who he was. Under these circumstances, the Department's choice to treat him as an unknown person was sloppy at best or disingenuous at worst.

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[10] K.L.P.'s case manager confirmed that she had "on-going" discussions with K.L.P. about the adoption option and that K.L.P. "seriously considered it at one point, but then she changed her mind too much."

[11] Tenn. R. App. P. 13(b) permits this court to consider issues not raised by the parties when doing so will prevent injury to the interests of the public or prejudice to the judicial process.

A.

K.L.P. did not list the name of M.J.P.'s biological father on his Arizona birth certificate. However, shortly after the Department removed her children from her custody, K.L.P. told her case manager that T.S.M. was M.J.P.'s biological father and that he had died in February 2000 in Arizona as a result of complications following a seizure. On all subsequent quarterly progress reports and periodic review summaries, the Department named T.S.M. as M.J.P.'s biological father and stated that he was deceased.

When the Department filed its petition to terminate the parental rights of the parents of both M.J.P. and Z.J.S., it alleged that M.J.P. had been born on January 27, 1999 in Mesa, Arizona to K.L.P. and an "[u]nknown [f]ather." Accordingly, the Department requested the juvenile court's permission to effect "service by publication if the [r]espondents cannot be found after diligent efforts on behalf of the Department." K.L.P.'s case manager verified these allegations under oath, notwithstanding the fact that she knew the identity of M.J.P.'s biological father. Less than two weeks after swearing that M.J.P.'s father was "unknown," this same case manager signed a quarterly progress report identifying M.J.P.'s father and stating that he was deceased.

One day after the Department's termination petition was filed, the Department submitted a request for information from Tennessee's Putative Father Registry inquiring whether anyone had filed a notice of intent to claim paternity or acknowledge the paternity of M.J.P. This request again identified M.J.P.'s father as being "unknown." On May 1, 2002, K.L.P.'s case manager executed an "affidavit of diligent search," including a search of all the public records available on the Internet, stating that she had been "unable to ascertain the exact whereabouts" of M.J.P.'s father "despite due and diligent search" and that she had provided the court with "all information in my possession that would help the court in locating these people." Based on these representations, the juvenile court ordered that M.J.P.'s father be served by publication.[12]

At the trial on June 16, 2002, K.L.P.'s case manager testified that K.L.P. had told her that T.S.M. was M.J.P.'s biological father and that T.S.M. had died in February 2000 from complications following a seizure. She also informed the juvenile court that she was in the process of obtaining a copy of T.S.M.'s death certificate. Despite this testimony, the trial court entered an order on July 31, 2002, terminating the parental rights of the "[u]nknown [f]ather" of M.J.P. after determining that he had been "properly" served by publication.

B.

Tenn. Code Ann. § 36-1-117(a)(1) (2001) requires that both biological parents be made parties to a termination proceeding unless they have already formally surrendered their parental rights. An adoption proceeding cannot proceed until both the biological mother's and the biological father's parental rights have been adjudicated. *Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994). In this context, a child's biological father may be either the man listed on the child's birth

[12]Despite the fact that the Department knew that M.J.P. had been born in Arizona and that his father died there in February 2000, the Department sought the juvenile court's permission to publish the notice of this proceeding only in *The Dickson Herald*.

certificate or the man "specifically identified" to the Department "as the child's father by the child's biological mother in a sworn, written statement or by other information which the court determines to be credible and reliable." Tenn. Code Ann. § 36-1-117(c)(2).

Notice by service of process or some other means provided by law is essential to give a court jurisdiction over the parties or the status being adjudicated. For termination proceedings commenced in the circuit or chancery courts, service must comply with the Tennessee Rules of Civil Procedure or the statutes governing substituted service. Tenn. Code Ann. §§ 36-1-113(e), -117(m)(1). For termination proceedings commenced in juvenile court, the Tennessee Rules of Juvenile Procedure apply. Tenn. Code Ann. § 36-1-117(m)(2). The Tennessee Rules of Juvenile Procedure require notice either by service of process or by mail. However, if, after reasonable effort, the party cannot be found or the party's address cannot be ascertained, the juvenile court may authorize service upon the party by publication in accordance with Tenn. Code Ann. §§ 21-1-203, -204 (1994). Tenn. R. Juv. P. 10(c)(2).

Service of a biological parent in accordance with Tenn. R. Juv. P. 10(c) is not a mere perfunctory act undertaken simply to satisfy the technicalities of some statute. It has constitutional dimensions. *See In re Baby Girl B*, 618 A.2d 1, 17 (Conn. 1992). Due process requires plaintiffs to give defendants notice that is reasonably calculated, under all the circumstances, to inform the defendants of the pending action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S. Ct. 2706, 2711 (1983); *McClellan v. Board of Regents*, 921 S.W.2d 684, 688 (Tenn. 1996); *Karr v. Gibson*, No. 01A01-9605-CH-00220, 1998 WL 57536, at *2 (Tenn. Ct. App. Feb. 13, 1998) (No Tenn. R. App. P. 11 application filed). As the United States Supreme Court has made clear: "[t]he means employed [to give notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 657 (1950).

The type of notice required depends on the facts of each case regarding both the identity and the whereabouts of the biological parent and the diligence of the Department's efforts to ascertain both the identity and the whereabouts of the biological parent.[13] Because of the significant constitutional interests at stake, the need for finality in termination cases, and risk of collateral attacks on adoption proceedings by biological parents whose rights were terminated without notice, the Department and others seeking to terminate a biological parent's parental rights should take all reasonably available steps to assure that a biological parent has actual notice of the termination proceeding. Notice by publication, without more, should be the alternative of last resort. *See In re Baby Girl B*, 618 A.2d at 17.[14] Constructive notice alone is permissible only when the biological father is not reasonably identifiable. When the identity of a biological parent is known, constructive notice by publication must be supplemented by notice mailed to the parent's last known available address or by personal service. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. at 798, 103 S. Ct. at 2711; *Sunburst Bank v. Patterson*, 971 S.W.2d 1, 5 (Tenn. Ct. App. 1997). In light of the

[13]Constructive service is permitted when the defendant's name is unknown and cannot be ascertained upon diligent inquiry. Tenn. Code Ann. § 21-1-203(a)(4) & (5).

[14]The consequences of termination proceedings prompted the Connecticut Supreme Court to suggest that the State seriously consider appointing counsel to represent biological parents who have received only constructive notice of a termination proceeding. *In re Baby Girl B*, 618 A.2d at 18 n.22.

significant interests at issue in these proceedings, the Department cannot be permitted to forgo the relatively modest administrative burden of providing absent biological fathers with notice of the proceeding by mail.

C.

Based on the information contained in this record,[15] we conclude that the Department had pertinent, reliable information regarding the identity of M.J.P.'s biological father at least by June 2000 and did not act reasonably or diligently in following up on this information. As far as the record shows, the Department made no real effort to determine whether M.J.P.'s father was dead or, if he was not dead, where he might be. We have also determined that the constructive notice the Department chose to employ to notify M.J.P.'s "unknown father," if he was not dead, of this proceeding was not reasonably calculated to inform him that a petition had been filed in Tennessee to terminate his parental rights.

K.L.P. identified M.J.P.'s biological father in May or June 2000. In addition to his name, K.L.P. provided the Department with information regarding her relationship with T.S.M. and the circumstances surrounding M.J.P.'s birth. With this information in hand, two years should have provided the Department with more than ample time to determine whether T.S.M. was, in fact, dead as reported by K.L.P. or to ascertain his whereabouts if he was alive. The record contains no information regarding the Department's efforts to verify the information provided by K.L.P. during the next two years other than a vague allusion to searching public information available on the Internet and her case manager's testimony at the trial that the Department was still in the process of obtaining T.S.M.'s death certificate.[16]

In addition, the Department knew that M.J.P. had been born in Mesa, Arizona and that he and K.L.P. came to Tennessee for the first time in May 2000. The Department also knew that M.J.P.'s father had not accompanied them to Tennessee and, in fact, that he had maintained virtually no relationship with either K.L.P. or M.J.P. for some time. Accordingly, the Department should have known that publishing a notice of the termination proceeding in *The Dickson Herald* was not reasonably calculated to afford M.J.P.'s biological father, whoever he might have been, with constructive notice of this termination proceeding. Based on the information provided by K.L.P., this publication should have been made in Mesa, Arizona.[17]

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[15]In cases of this sort, the courts should require the Department to provide some detail regarding its efforts to ascertain the identity and whereabouts of the biological parents before terminating their parental rights.

[16]Compare the Department's efforts in this case with those described in *In re Adoption of Holly*, 738 N.E.2d 1115, 1120 (Mass. 2000).

[17]Based on the available information, the Department should have ascertained whether T.S.M. was dead as reported by K.L.P. If T.S.M. was dead, the Department should have determined whether it was reasonably feasible to verify K.L.P.'s claim that T.S.M. was M.J.P.'s biological father. If any substantial doubt existed regarding whether T.S.M. was M.J.P.'s biological father, the Department's termination petition should have (1) named both T.S.M. and an "unknown father" as defendants, (2) included all the available information regrading T.S.M. in its complaint, and (3) requested leave to name an "unknown father" because T.S.M.'s relationship with M.J.P. could not be reasonably ascertained. If T.S.M. was, in fact, not dead, the Department should have attempted to provide him with a copy of its (continued...)

The only conclusions that can be drawn from this record are that (1) the Department's minimal efforts to identify and locate M.J.P.'s biological father were neither diligent nor reasonable, (2) when the Department sought authorization for service by publication, it did not provide the juvenile court with all the information in its possession regarding the identity of M.J.P.'s biological father, and (3) the method selected by the Department to provide notice of this proceeding to M.J.P.'s biological father was not reasonably designed to provide notice. Accordingly, the portion of the juvenile court's order terminating the parental rights of the "unknown father" of M.J.P. must be set aside.

III.
TERMINATION OF Z.J.S.'S BIOLOGICAL FATHER'S PARENTAL RIGHTS

We must also vacate the portion of the juvenile court's order terminating the parental rights of Z.J.S.'s biological father for reasons similar to those that require us to vacate the portion of the order vacating the termination of the parental rights of M.J.P.'s biological father. First, the record does not indicate that the Department expended reasonable or diligent efforts to find Z.J.S.'s biological father. Second. the method of constructive notice utilized by the Department was not reasonably calculated to provide Z.J.S.'s biological father with notice of this proceeding.

The Department knew the identity of Z.J.S.'s biological father since at least June 2000. It also knew his mailing address in Apache Junction, Arizona. Despite this information, the record does not reflect that the Department undertook to contact Z.J.S.'s biological father directly during the two years between the time his child was removed from K.L.P.'s custody until the time of trial. Thus the Department, as it did with M.J.P.'s biological father, is relying solely on the publication of the notice in *The Dickson Herald* to provide Z.J.S.'s biological father of this proceeding. Constructive notice by publication in a Tennessee newspaper alone is not sufficient in light of the profound significance of the interests at stake.

Because the Department possessed the mailing address of Z.J.S.'s biological father, notice by publication should have been supplemented by mailing notice of this suit to his last known address. The record provides us with no basis for assuming that this was done, and, in fact, the order terminating Z.J.S.'s biological father's parental rights recites only that he was "served by publication." In addition, all the information received by the Department regarding Z.J.S.'s biological father indicated that he had never left Arizona and that he was not in Tennessee. Therefore, service by publication in *The Dickson Herald* could not have been reasonably calculated to provide him with notice of this proceeding. Accordingly, the portion of the juvenile court's order terminating the parental rights of Z.J.S.'s biological father must be set aside.

[17](...continued)
complaint by mailing it to his last known address. Had these efforts proved unsuccessful, the Department could then have requested permission for constructive service on both T.S.M. and the unknown father by publication in a newspaper whose circulation included Mesa, Arizona.

IV.
THE TERMINATION OF K.L.P.'S PARENTAL RIGHTS REGARDING HER TWO CHILDREN

We now turn to K.L.P.'s issues with regard to the termination of her parental rights. She asserts that the Department failed to produce clear and convincing evidence that (1) she had failed to comply substantially with her responsibilities under the permanency plans for her two children, (2) she had failed to remedy the conditions that led to the children's removal from her custody, (3) she had willfully abandoned her children, and (4) terminating her parental rights is in the best interests of her children.

A.

The Department removed M.J.P. and Z.J.S. from K.L.P.'s custody on May 24, 2000, after she choked M.J.P. during an angry argument with her mother. Despite the severe child abuse by K.L.P., the Department decided against terminating her parental rights. Instead, the Department decided to attempt to reunify K.L.P. with her children and spent the next twenty-one months trying to assist K.L.P. in regaining custody of her children.

When the Department decided that its efforts were for naught, it sought to terminate K.L.P.'s parental rights on essentially four grounds. First, it asserted that she had willfully abandoned her children under Tenn. Code Ann. § 36-1-113(g)(1). Second, it asserted that she had committed severe child abuse and had been sentenced to more than two years in prison for this abuse under Tenn. Code Ann. § 36-1-113(g)(4) & (5). Third, it asserted that K.L.P. had failed to remedy the conditions that led to the removal of the children and that these or other conditions existed that could reasonably subject the children to further abuse and neglect under Tenn. Code Ann. § 36-1-113(g)(3). Fourth, the Department asserted that K.L.P. had failed to comply substantially with her responsibilities under the permanency plans for her children as required by Tenn. Code Ann. § 36-1-113(g)(2).

Following the trial, the juvenile court determined that the Department had produced clear and convincing evidence supporting termination under Tenn. Code Ann. § 36-1-113(g) (1), (2), and (3) and that termination of K.L.P.'s parental rights was in her children's best interests under Tenn. Code Ann. § 36-1-113(c)(2). However, the juvenile court declined to terminate K.L.P.'s parental rights based on Tenn. Code Ann. § 36-1-113(g)(4) & (5). K.L.P. takes issue with the court's decision regarding Tenn. Code Ann. § 36-1-113(g) (1), (2), and (3) and Tenn. Code Ann. § 36-1-113(c)(2). The Department does not take issue with the trial court's refusal to base its decision on Tenn. Code Ann. § 36-1-113(g)(4) & (5).[18]

[18] There is good reason for the Department's decision not to contest the juvenile court's refusal to base its termination decision on Tenn. Code Ann. § 36-1-113(g)(4) & (5). The Department could have instituted proceedings to terminate K.L.P.'s parental rights without attempting to reunify her and her children. Tenn. Code Ann. § 37-1-166(g)(4)(A) (2001). However, once the Department decides to favor reunification over termination, it would be fundamentally unfair to permit the Department to lead the biological parents to believe that reunification is possible notwithstanding the severe child abuse and then later, after remedial efforts proved unsatisfactory, to pursue termination under Tenn. Code Ann. § 36-1-113(g)(4) or (5). *See Tennessee Dep't of Children's Servs. v. Hoffmeyer*, No. M2002-00076-COA-R3-CV, 2003 WL 1092779, at *15-18 (Tenn. Ct. App. Mar. 13, 2002) (Cottrell, J., concurring).

B.

A biological parent's interest in the care and custody of a child is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions.[19] *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). While this right extends to all biological parents who have sought or exercised their parenting rights,[20] it is not beyond the reach of the government in appropriate circumstances. *In re Adoption of a Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995); *In re Adoption of Copeland*, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000); *Stokes v. Arnold*, 27 S.W.3d 516, 520 (Tenn. Ct. App. 2000). A biological parent's parental rights may be terminated upon a showing that the parent is unfit or that continuing the parent-child relationship poses a substantial threat of harm to the child. *In re Swanson*, 2 S.W.3d at 188; *Tennessee Dep't of Children's Servs. v. Bates*, 84 S.W.3d 186, 192 (Tenn. Ct. App. 2002); *In re C.D.B.*, 37 S.W.3d 925, 927 (Tenn. Ct. App. 2000).

Termination proceedings in Tennessee are governed by statute. Thus, parties seeking to terminate a biological parent's parental rights must prove at least one of the statutory grounds for termination and must also prove that terminating the parent's rights is in the affected child's best interests. Tenn. Code Ann. § 36-1-113(c) (2001); *Jones v. Garrett*, 92 S.W.3d at 839 n.4; *In re C.W.W.*, 37 S.W.3d 467, 473-74 (Tenn. Ct. App. 2000). Because a decree terminating a biological parent's parental rights obliterates the parent-child relationship and, in the eyes of the law, relegates a biological parent to the role of a complete stranger to his or her child,[21] both the federal and state constitutions require an individualized determination of the existence of the required statutory grounds before the courts may terminate a biological parent's parental rights. *Stanley v. Illinois*, 405 U.S. 645, 658-59, 92 S. Ct. 1208, 1216 (1972); *In re Swanson*, 2 S.W.3d at 188; *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002).

The federal and state constitutions likewise require a heightened standard of proof in termination cases because of the fundamental importance of the rights and interests at issue. *Ray v. Ray*, 83 S.W.3d at 733; *O'Daniel v. Messier*, 905 S.W.2d at 187. Accordingly, Tenn. Code Ann. § 36-1-113(c)(1) requires that all the elements of a termination case be proven by clear and convincing evidence. This heightened standard of review prevents unwarranted termination or interference with a biological parent's parental rights. *In re. C.W.W.*, 37 S.W.3d at 473; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence that satisfies this standard eliminates any serious or substantial doubt concerning the correctness of the conclusions drawn from the evidence, *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *Walton v. Young*, 950 S.W.2d 956, 960 (Tenn. 1997); *In re C.D.B.*, 37 S.W.3d at 925, 927 (Tenn. Ct. App. 2000). It should produce in the fact-finder's

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[19] U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8.

[20] *Lehr v. Robertson*, 463 U.S. 248, 262, 103 S. Ct. 2985, 2993-94 (1983); *Jones v. Garrett*, 92 S.W.3d 835, 840 (Tenn. 2002) (extending the right to biological fathers who have grasped the opportunity to develop a relationship with the child); *In re Swanson*, 2 S.W.3d 180, 186 n.12 (Tenn. 1999); *Ray v. Ray*, 83 S.W.3d at 732.

[21] *In re Knott*, 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917); *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995); *In re Adoption of Dearing*, 572 S.W.2d 929, 932 (Tenn. Ct. App. 1978).

mind a firm belief or conviction regarding the truth of the propositions sought to be established. *In re A.D.A.*, 84 S.W.3d at 596; *Ray v. Ray*, 83 S.W.3d at 733; *O'Daniel v. Messier*, 905 S.W.3d at 188.

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c)(1), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we will review the trial court's findings of fact de novo with the presumption of correctness provided in Tenn. R. App. P. 13(d).[22] Thus, each of the trial court's factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we will determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).[23]

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[22]Of course, in the absence of findings of fact on a specific matter of fact, we will review the record de novo without a presumption of correctness. *In re Valentine*, 79 S.W.3d at 547.

[23]In light of Judge Cain's separate opinion regarding the appropriate standard of appellate review in cases of this sort, it is important to emphasize this court's conclusions with regard to the factual issues K.L.P. raises on this appeal. We have unanimously concluded (1) that the Department did not prove clearly and convincingly that K.L.P. willfully failed to support her children, (2) that the Department proved clearly and convincingly that K.L.P. had failed to comply with her obligations under the permanency plans to maintain steady employment and to demonstrate that she could provide her children with a safe and stable home environment, (3) that the Department proved clearly and convincingly that K.L.P. had failed to remedy the conditions that caused the children to be removed from her custody and that these conditions persisted, and (4) that the Department proved clearly and convincingly that the interests of Z.J.S. and M.J.P. would be best served by terminating K.L.P.'s parental rights.

It is equally important to point out that there is no disagreement among the members of this court regarding the burden of proof in cases of this sort or the process by which the fact-finder at trial (be it a jury or a trial judge) must analyze the evidence to determine whether the applicable burden of proof has been met. What disagreement there is involves the manner in which an appellate court reviews the record to determine whether the evidence supports the fact-finder's conclusions.

The approach adopted by Judges Koch and Cottrell is consistent with the approach recently used by the Tennessee Supreme Court in *In re Valentine*. On appeal, we recognize a distinction between individual facts and the combined weight of these facts. Tenn. R. App. P. 13(d) requires us to defer to the trial court's individual factual findings as long as they are supported by a preponderance of the evidence. However, we are the ones who must then determine whether the combined weight of these individual facts provides clear and convincing evidence supporting the trial court's ultimate factual conclusion. The Tennessee Supreme Court used this approach in *In re Valentine* when it recognized the difference between the conclusion that a biological parent has not complied substantially with her obligations in a permanency plan and the facts supporting this conclusion. *In re Valentine*, 79 S.W.3d at 548-49.

In this case, for example, we accredit the trial court's findings (1) that Z.J.S. and M.J.P. had been in foster care for more than six months when the termination petition was filed, (2) that K.L.P. was ordered to pay child support in July 2001 and that there is no record that she made regular child support payments except for April, May, and June 2002, (3) that K.L.P. gave Z.J.S. and M.J.P. Christmas and birthday gifts, and (4) that K.L.P. did not substantiate her claim that she had spent between $200 and $300 per month on her children between September 2000 and July 2002. However, having determined that these individual facts have been established by a preponderance of the evidence, we must proceed to determine whether they collectively establish by clear and convincing evidence that K.L.P. abandoned her children by paying only token child support during the four months immediately preceding the filing of the termination petition. As discussed more fully in Section III(C), we have determined that they do not.

C.
Abandonment By Willful Failure to Support

For the purpose of proceedings like this one, Tenn. Code Ann. § 36-1-102(1)(A)(i) (Supp. 2002) defines "abandonment" as follows:

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

In addition, Tenn. Code Ann. § 36-1-102(1)(D) defines "willfully failed to support" as "for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support." Tenn. Code Ann. § 36-1-102(1)(B) defines "token support" as "support [that], under the circumstances of the individual case, is insignificant given the parent's means."

By any objective measure, K.L.P. has been struggling to keep her head above water ever since she arrived in Tennessee. She has had a difficult time supporting herself and has been forced to rely on family and friends for help. Between her release from jail in September 2000 and the trial of this case, she had held eight jobs with seven different employers. She had been unable to hold a job for more than six months and was unemployed at the time of the trial.

In light of K.L.P.'s employment history, it comes as no surprise that her ability to support her children has been impaired. She was ordered to begin paying child support in July 2001, but the only evidence of payroll deductions for child support payments covered the months of April, May, and June 2002. She worked for two employers during this time. Her gross pay from one employer during April and May was $733.42, of which $266.73 was deducted for child support. She had no take-home pay from the other employer during June; however, this employer deducted $94.82 for child support from her net earnings.

K.L.P. also testified that she regularly purchased diapers, clothes, and shoes for her children. She also stated that she gave them each two or three dollars when she visited with them and that she provided them with modest gifts on their birthdays and at Christmas. She estimated that she spent between $200 and $300 per month on her children, but, not surprisingly, she was unable to provide documentation for these expenditures.

The juvenile court discounted K.L.P.'s testimony regarding the amount of support she was providing her children and found that she had paid only "token support" during the four month period preceding the filing of the termination petition in March 2002. We find no fault with the court's apparent conclusion that K.L.P. had overstated the amount of financial support she had provided her children. The evidence before the court cast serious doubt on K.L.P.'s ability to spend between $200 and $300 per month on her children.

We do not concur, however, with the trial court's conclusion that the support K.L.P. actually provided her children during the relevant time period was only "token support." In termination proceedings such as this one, the term "token support" is a term of art. A parent's financial support of his or her child will not be deemed to be "token" unless it is "insignificant" in light of the parent's "means." Tenn. Code Ann. § 36-1-102(1)(B). A finding of "insignificance" under Tenn. Code Ann. § 36-1-102(1)(B) cannot be made without evidence regarding both a parent's actual financial support of his or her child and a parent's "means."[24] Here the Department presented no direct evidence regarding K.L.P.'s ability to support her children financially. The record lacks any evidence regarding her employability, earning history, assets, or disposable income. Without this sort of evidence, concluding that K.L.P. provided only "token support" for her children is nothing more than conjecture. Thus, based on the record, we cannot conclude that the Department presented clear and convincing evidence demonstrating that the support K.L.P. actually provided her children between December 2001 and March 2002 was "insignificant" in light of her available resources.[25] Therefore, we vacate the portion of the juvenile court's order concluding that K.L.P. abandoned her children by paying only "token support" during the four month period immediately preceding the filing of the termination petition.

D.
Substantial Noncompliance With the Requirements of the Permanency Plan

K.L.P. also asserts that the juvenile court erred by concluding that she had failed to comply substantially with her responsibilities in both the June 2000 and the December 2001 permanency plans as required by Tenn. Code Ann. § 36-1-113(g)(2). She insists that the Department failed to produce clear and convincing evidence that she had not satisfied her obligations. While we have determined that the record contains clear and convincing evidence that K.L.P. has failed to establish stable employment or a stable living situation, we have determined that the Department failed to prove by clear and convincing evidence that K.L.P. failed to complete mandatory individual counseling obligations.

The Tennessee Supreme Court has recently prescribed the standards for reviewing terminations of parental rights based on Tenn. Code Ann. § 36-1-113(g)(2). Prior to terminating a parent's rights on this ground, the trial or juvenile court must find that the requirements of the permanency plan that the parent allegedly did not satisfy are "reasonable and are related to remedying the conditions which necessitate foster care placement." *In re Valentine*, 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C) (Supp. 2002)). If the trial or juvenile court has failed to make this finding, this court must review the trial court's decision de novo without a presumption of correctness. *In re Valentine*, 79 S.W.3d at 547. In addition, determining whether substantial noncompliance exists is a question of law that must likewise be reviewed without a presumption of correctness. *In re Valentine*, 79 S.W.3d at 548.

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[24]The word "means" in this context connotes "[t]he resources at (one's) disposal for effecting some object; chiefly, (a person's) pecuniary resources viewed with regard to their degree of adequacy to (his) requirements or habits of expenditure." 9 THE OXFORD ENGLISH DICTIONARY 517 (2d ed. 1989).

[25]The Department did not prove clearly and convincingly that K.L.P. was willfully unemployed or willfully under-employed. Given K.L.P.'s meager resources, the support she provided to her children was not clearly insignificant.

The court has also emphasized that noncompliance alone is insufficient to warrant terminating a parent's parental rights. To warrant extinguishing the parent-child relationship, the parent's noncompliance with the terms of a permanency plan must be "substantial." *In re Valentine*, 79 S.W.3d at 548. In cases of this sort, substantial noncompliance is measured by both the degree of noncompliance and the weight assigned to that particular requirement. Noncompliance with requirements in a permanency plan that are neither reasonable nor related to remedying the conditions that led to the removal of the child from the parent's custody is not substantial noncompliance for the purpose of Tenn. Code Ann. § 36-1-113(g)(2). *In re Valentine*, 79 S.W.3d at 548-49. By the same token, 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 will be deemed to be "substantial." Trivial, minor, or technical deviations from reasonable and related requirements will not be deemed to be substantial noncompliance under Tenn. Code Ann. § 36-1-113(g)(2) unless they undermine the essential goals of the particular requirement.

The juvenile court did not address either the reasonableness of the requirements in K.L.P.'s two permanency plans or the relationship of these requirements to the reasons that led to removing the children from K.L.P.'s custody in May 2000. Accordingly, we will review the trial court's findings and conclusions with regard to terminating K.L.P.'s parental rights under Tenn. Code Ann. § 36-1-113(g)(2) without a presumption of correctness.

K.L.P.'s June 2000 and December 2001 permanency plans identified five areas requiring her attention and effort. These areas included her (1) "poor anger control," (2) "poor parenting skills," (3) "emotional issues which led to her choking . . . [M.J.P.]," (4) inability to support her children financially, and (5) inability to provide her children with a safe, stable home environment. To address these areas, the Department directed K.L.P. to (1) "successfully complete anger control classes and parenting classes or completely address them within her counseling," (2) "undergo a complete psychological evaluation and . . . [to] follow all recommendations from the assessment," (3) "obtain and maintain her employment to provide a safe and stable home" for her children, and (4) become "financially supportive" of her children.

The record demonstrates that K.L.P. successfully completed both an anger control class and a parenting skills class in June 2001. Thus, the only issues for our review concern the manner in which she addressed her underlying emotional issues, her success in maintaining steady employment, and her ability to support her children financially.

Addressing Her Emotional Issues

There is little dispute that K.L.P.'s parenting ability has been adversely affected by her own past victimization. Thus, it was certainly reasonable and relevant for the Department to require her to have a psychological evaluation and to follow the recommendations of her counselors regarding follow-up therapy. The shortcoming with the Department's assertion that K.L.P did not comply with the permanency plans because she failed to complete her individual therapy is that the Department did not present clear and convincing evidence that K.L.P.'s psychological counselors required her to have individual counseling.

The juvenile court remarked on several occasions about the paucity of the Department's evidence regarding K.L.P.'s psychological evaluation and counseling at the Harriett Cohn Center. In fact, the trial court eventually decided to continue the trial to enable the parties to marshal their evidence on these issues. The record indicates that K.L.P. had at least two evaluations at the Harriett Cohn Center and that the Center's staff recommended individual therapy of some sort. However, the record is unclear regarding whether K.L.P. understood that participating in and completing this therapy was necessary in order for her to regain custody of her children. While K.L.P. conceded that she understood that her case manager believed she should have this therapy, K.L.P. stated repeatedly that her counselors and therapists at the Harriett Cohn Center had told her that the individual therapy was optional. K.L.P. decided against the therapy because she believed that she had already received adequate counseling and treatment for the emotional problems resulting from her victimization as a child and adolescent.[26]

The Department had the burden of presenting clear and convincing evidence that K.L.P. substantially failed to comply with the requirement that she address her own underlying emotional issues caused by her victimization as a child. The language of the June 2000 and December 2001 permanency plans regarding this requirement, in the words of K.L.P.'s case manager, could have been "more finely tuned." As we construe these plans, the decision regarding K.L.P.'s therapy was left to her counselors and therapists, not her case manager. Thus, her case manager's opinion that she required individual counseling is irrelevant. The records regarding K.L.P.'s treatment and counseling at the Harriett Cohn Center do not establish clearly and convincingly that the staff had determined and communicated to K.L.P. that completing her individual therapy was a necessary and indispensable part of her treatment. Accordingly, we have determined that the Department failed to prove that K.L.P. failed to comply with the requirement in her permanency plans that she follow all the recommendations of her therapists regarding the follow-up individual counseling.

Providing a Safe and Stable Home Environment

The Department also gave K.L.P. the responsibility to demonstrate that she could provide a safe and stable home environment for her children. This obligation, without question, is reasonable and integrally related to remedying the conditions that caused K.L.P. to lose custody of her children. The record shows clearly and convincingly that she was unable to accomplish this goal and that there is little likelihood that she would be able to accomplish the goal in the foreseeable future.

K.L.P. lived with her mother immediately after she was released from jail in September 2000. Eventually, she lived in five different locations, including a motel. She explained that she had problems with landlords and with the owners of the other places where she had stayed. She had lived with two different men since her release from jail, and she conceded that one of these men abused her. While she professed that she had obtained adequate housing on the eve of the trial, she

[26] The Department's lawyer cross-examined K.L.P. extensively about the comments and notes of her counselors and therapists appearing in the Harriett Cohn Center's records. While K.L.P. did not dispute the treatment notes, she stated on several occasions that the treatment notes differed from what her therapists and counselors told her. The Department did not call any of K.L.P.'s therapists or counselors as witnesses but rather presented two letters written after K.L.P. missed scheduled appointments. We have already pointed out that we do not construe these letters as stating that K.L.P. was required and expected to complete the individual therapy. In fact, one of the letters simply asked her to inform the Harriett Cohn Center if she decided that she no longer required therapy.

could not produce a written lease or other corroboration that she had solved her housing problem. Our examination of the record leads us to the same conclusion reached by the juvenile judge – K.L.P. has failed to comply with the requirement in her permanency plans that she obtain a safe and stable home for her children.

Maintaining Steady Employment

The permanency plans also required K.L.P. to "obtain and maintain" her employment. This requirement is certainly reasonable and is an essential part of the remedy for the conditions that led to the removal of the children from K.L.P.'s custody in May 2000. The Department presented clear and convincing evidence that K.L.P. failed to demonstrate that she had complied with the requirement that she obtain and maintain steady employment.

K.L.P. was unemployed at the time of the trial. Since October 2000, she has held a string of low paying jobs, and she has not been able to hold any of these jobs for longer than six months. While she testified at trial about her plans to become employed at a boat manufacturing plant, she conceded that she had not been offered and job. Taken in its entirely, the evidence demonstrates clearly and convincingly that K.L.P., despite her efforts between October 2000 and June 2002, has not been able to comply with the requirement in her permanency plans that she maintain steady employment to enable her to support herself and her children.

E.
Failure to Remedy Persistent Conditions

Finally, K.L.P. asserts that the Department failed to present clear and convincing evidence supporting the termination of her parental rights under Tenn. Code Ann. § 36-1-113(g)(3)(A). This provision, now commonly referred to as the "persistent conditions" ground for termination, empowers the courts to terminate a parent's parental rights upon proof that

> [t]he child has been removed from the home of the parent or guardian by order of a court for a period of six months and:
>
> (i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (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(s) or guardian(s) 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)(A). The Tennessee Supreme Court has held that terminating parental rights on this ground requires clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 550.

It is undisputed that M.J.P. and Z.J.S. have been in the Department's custody by court order for more than six months. We have also determined that the record contains clear and convincing evidence that two aspects of K.L.P.'s life continue to pose a significant possibility that M.J.P. and Z.J.S. will be exposed to further abuse and neglect if they are returned to their mother. These include K.L.P.'s precarious financial circumstances and her inability or refusal to come to grips with the lingering psychological effects of her own physical and sexual abuse. There is likewise ample evidence that K.L.P. will not be able to remedy these problems at an early date and that continuing M.J.P. and Z.J.S. in the netherworld of foster care will diminish their chances of becoming part of a safe, stable, and permanent home environment.

The Department, even with the best of its bureaucratic intentions, does not have the authority to remove children from their parents' custody simply because the parents are economically disadvantaged. There must be more because affluence is not the litmus test for appropriate parenting. A lack of wealth does not translate into a parent's inability to nurture, support, and provide for a child, just as having great wealth does not guarantee that a child will be loved, nurtured, and supported. However, when economic disadvantage, coupled with other factors, seriously impairs a parent's ability to support him or herself and his or her children, the Department may be required to step in to prevent the children from being victimized by neglect. K.L.P.'s current circumstances provide an example of financial conditions that are extreme enough to require the Department to intervene.

K.L.P. is a single woman who must work to support herself and her children. She has no family support, and her habit of relying on the kindness of acquaintances has led to an unstable life and other unfortunate consequences. During the two years following the removal of her children, she has been unable to find a steady job or to establish a safe, stable home for herself. To the contrary, she has worked sporadically at seven or eight low-paying jobs, she has lived in at least five different places, and she has been in yet another abusive relationship. The evidence shows overwhelmingly that she has not been successful at supplying her own needs, let alone the needs of her two young children. At the time of trial, she was unemployed, her housing arrangements were indefinite, and she had no reliable means of transportation. In addition, she had made no arrangements for child care should her children be returned to her.

Another problem eclipses K.L.P.'s financial circumstances – the problem that actually led to the removal of her children in May 2000. K.L.P. physically abused her older son, and the record contains clear and convincing evidence that she has not effectively addressed the root causes of this behavior. K.L.P. is the victim of physical and sexual abuse both as a child and as an adult. Experts working with abused mothers have concluded that a mother's own victimization all too often affects her parenting skills. One recent study has concluded that "because of their own psychological issues, victimized mothers may use less optimal parenting strategies (eg, harsh parenting) or be less attentive and emotionally available to their children. Such mothers may also have less tolerance for the normative stresses of parenting and consequently be more inclined to view their children's behavior as problematic." Howard Dubowitz et al., *Type and Timing of Mothers' Victimization: Effects on*

Mothers and Children, 107 Pediatrics 728, 735, 2001 WL 12724524 (2001). There is also a growing consensus that persons who were abused as children are prone to perpetuate the cycle of abuse by becoming abusers themselves. *Rutledge v. State*, 745 So.2d 912, 915 (Ala. Crim. App. 1999); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Alb. L. Rev. 1109, 1112-13 (1995); Scott Jebson, *Conditioning a Woman's Probation on Her Using Norplant: New Weapon Against Child Abuse Backfires*, 17 Camp. L. Rev. 301, 331 (1995).

The courts have recognized that counseling and therapy can be effective in breaking the cycle of abuse. *See, e.g.*, *In re Jessica B.*, 254 Cal. Rptr. 883, 890-91 (Ct. App. 1989); *D.O.H. v. T.L.H.*, 799 So.2d 714, 723 (La. Ct. App. 2001) (Woodard, J., dissenting). The counseling regimen developed by the Harriett Cohn Center for K.L.P. was designed to enable her to address the effects of her prior victimization. It was intended to get at the root causes of the behavior that caused K.L.P. to lose custody of her children in May 2000. K.L.P.'s insistence that she did not need this therapy clearly demonstrates that, as of the time of trial, she was both unwilling and unable to address her own psychological condition. As long as K.L.P. does not address her own mental health needs placing her children in her custody exposes them to a significant risk that K.L.P. will again abuse them.

K.L.P.'s demonstrated inability to address her precarious financial circumstances and her own mental health needs provides clear and convincing evidence that she has not been able to remedy the problems that led to the removal of her children and that returning the children to her would, in all reasonable probability, expose them to further abuse or neglect. Her failure to address these problems between September 2000 and June 2002 provides clear and convincing evidence of her inability to remedy these problems at an early date and that requiring her children to remain in foster care while she tries to address these problems will greatly diminish their chances of being integrated into a safe, stable, and permanent home. Accordingly, we find that the Department has provided clear and convincing evidence supporting the termination of K.L.P.'s parental rights under Tenn. Code Ann. § 36-1-113(g)(3)(A).

F.
The Best Interests of the Children

One final issue remains. In addition to establishing the existence of at least one of the grounds for termination in Tenn. Code Ann. § 36-1-113(g), the Department must present clear and convincing evidence that terminating the biological parents' parental rights is in the best interests of the child or children. Tenn. Code Ann. § 36-1-113(c)(2). The factors to be considered during the individualized "best interests" decision-making are included in Tenn. Code Ann. § 36-1-113(i). This record contains clear and convincing evidence regarding a number of these factors.

Ever since May 2000, K.L.P. has been barely able to support herself and has been unable to demonstrate that she could support young children – even with extensive government assistance. Although she had no child care responsibilities, she has been unable to hold down a steady job or to maintain a stable roof over her head. In addition, she "keeps getting in bad relationships" and has lived with at least one man who abused her. When directly asked whether continued counseling

might help with these problems, she defensively resisted the suggestion with, "I don't need counseling to tell me how to be like. I know . . . why I choose the wrong guys I do."

In the two years since K.L.P. physically abused M.J.P., she has failed to make any appreciable positive adjustment to her life circumstances. She has refused individual counseling aimed at helping her deal with lingering problems from the abuse she has suffered. In addition, with two years to make a go of things, she has no dependable income, no dependable housing, no dependable transportation, and a personal life that remains unstable. Since getting out of jail for child abuse, K.L.P. wrote approximately $6,000 in worthless checks for which she is also currently on probation and on which amount she is being forced to pay restitution.

All of these things matter in terms of the children. Individuals who have studied child development have suggested that abuse or neglect can disrupt a young child's inchoate brain organization, and that consequently

> positive, consistent, patterned experiences are necessary to reorganize the brain [of such a child]. Abused and neglected children "have a heightened need for permanency, security, and emotional constancy and are, therefore, at great risk because of the inconsistencies in their lives and the foster care system." Inconsistencies, such as multiple placements and disruptions of normal schedules, harm rather than help the brain development of the young child. The American Academy of Pediatrics notes "[s]tability in child care . . . is important."

Jennifer Titus, Comment, *Adding Insult to Injury: California's Cruel Indifference to the Developmental Needs of Abused and Neglected Children From Birth to Three*, 39 Cal. W.L. Rev. 115, 134-35 (2002). Here, professional tests on M.J.P. and Z.J.S. appear to bear this premise out. Both children have been found to have special needs because they are lagging behind in their socialization and language skills.

The juvenile court determined that it was in M.J.P.'s and Z.J.S.'s best interests to terminate K.L.P.'s parental rights, thus clearing the way for them to be adopted. One of the primary purposes for our statutory system of child removal, foster care, and adoption is "to protect [children] from needless prolonged placement in foster care and the uncertainty it provides, and to provide them a reasonable assurance that, if an early return to the care of their parents is not possible, they will be placed in a permanent home at an early date." Tenn. Code Ann. § 37-2-401(a) (2001). These children need stability in their lives, and K.L.P. has proved herself unable to provide that stability. On this record, custody of the children could not be returned to K.L.P. To do other than affirm the termination of K.L.P.'s parental rights would leave these children in limbo indefinitely, and we cannot agree that continuing, open-ended foster care is in the children's best interest. The evidence here supports the juvenile court's finding that rather than merely prolong foster care, termination of K.L.P.'s parental rights best serves M.J.P.'s and Z.J.S.'s interests.

V.

We affirm the judgment terminating K.L.P.'s parental rights with regard to M.J.P. and Z.J.S. In addition, we vacate the portions of the order terminating the parental rights of the fathers of both M.J.P. and Z.J.S. and remand these issues to the juvenile court for further proceedings consistent with this opinion. We also tax the costs of this appeal to the Tennessee Department of Children's Services.

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WILLIAM C. KOCH, JR., JUDGE