

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
March 22, 2016 Session

**IN RE CHARLES K. JR., ET AL.<sup>1</sup>**

**Appeal from the Juvenile Court for Davidson County  
No. PT192373 Hon. Sheila Calloway, Judge**

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**No. M2015-00714-COA-R3-PT – Filed May 19, 2016**

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This appeal involves the termination of a mother and father’s parental rights to their children. Following a bench trial, the trial court found that clear and convincing evidence existed to support the termination of each parent’s rights on the statutory grounds of abandonment for failure to visit, abandonment based upon each parent’s conduct prior to incarceration that exhibited a wanton disregard for the children’s welfare, substantial noncompliance with the permanency plans, and the persistence of conditions which led to removal. The court further found that termination was in the best interest of the children. The parents appeal. We affirm the judgment of the trial court as modified in this opinion.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., and ANDY D. BENNETT, JJ., joined.

Elizabeth A. Waites, Madison, Tennessee, for the appellant, Amanda S.

Kelli Barr Summers, Nashville, Tennessee, for the appellant, Charles G. K.

Herbert H. Slatery, III, Attorney General and Reporter, and Alexander S. Rieger, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children’s Services.

Thomas H. Miller, Nashville, Tennessee, guardian ad litem for the minor children, Charles K., Jr. and Timothy K.

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

## OPINION

### I. BACKGROUND

Charles K., Jr. (“Greg”) and Timothy K. (collectively “the Children”) were born to Amanda S. (“Mother”) and Charles K. (“Father”) (collectively “the Parents”) in April 2005 and June 2007, respectively. The Tennessee Department of Children’s Services (“DCS”) first became involved in May 2012 based upon truancy concerns. The maternal grandparents accepted physical custody of the Children in June 2013. At that time, neither Mother nor Father could provide stable housing.

When the maternal grandparents decided that they could no longer provide care, the Children were removed and placed into the custody of the Tennessee Department of Children’s Services (“DCS”). The Children were placed into foster care. A trial home placement with the paternal grandparents was approved in March 2014 and then extended until August 2014, when the paternal grandmother could no longer provide care due to illness. The Children were removed and placed with a new foster family. DCS was in the process of securing a new placement for the Children because the current foster family decided not to adopt them.

DCS crafted two permanency plans, one on July 22, 2013, and another on May 28, 2014.<sup>2</sup> The plans reflected that DCS first became involved in May 2012 “due to truancy issues, drug abuse, and[,] housing” and further provided:

Prior to the children coming into custody the children were placed with their maternal grandparents on June 21, 2013. On June 28, 2013 the maternal grandparents could no longer care for the [C]hildren and DCS looked for other relatives who could possibly take custody. There were no other relatives that DCS could recommend so the [C]hildren came into custody.

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There are concerns with the parents both having unaddressed mental health issues, current drug abuse, domestic violence, pending criminal charges, unstable housing[,] and income.

Pursuant to the plans, the Parents were required to (1) visit the Children a minimum of four hours per month; (2) bring food, clothes, and other necessities to the visit; (3)

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<sup>2</sup> These plans were ratified by the trial court.

complete a parenting assessment with mental health, alcohol and drug, and domestic violence/anger management<sup>3</sup> components; (4) follow all recommendations from the assessment; (5) consent to random, periodic drug screens; (6) obtain safe and stable housing; and (7) avoid further legal charges. Mother was also specifically directed to take her medication for an epilepsy-related seizure disorder and provide DCS with a release of medical records, while Father was specifically directed to maintain employment and remit child support.

Mother was arrested on August 13, 2013, as a result of several outstanding warrants. She pled guilty to possession of a Schedule II drug with intent to sell, a Class C felony, and theft over \$500, a Class E felony. She remained in jail until she was sentenced in October 2014 as a persistent offender to 10 years in the Community Corrections Program for the Class C felony and to a consecutive sentence of 4 years in the Community Corrections Program for the Class E felony, for a total effective sentence of 14 years. Likewise, Father experienced frequent, periodic incarceration following the Children's placement in foster care.

A petition to terminate each parent's parental rights was filed on June 16, 2014, and later amended on October 17, 2014.<sup>4</sup> The GAL and DCS (collectively "Petitioners") alleged that termination of each parent's rights was supported by the statutory grounds of (1) abandonment for failure to visit and remit support, (2) abandonment based upon each parent's conduct prior to incarceration that exhibited a wanton disregard for the welfare of the Children, (3) substantial noncompliance with the permanency plans, and (4) the persistence of conditions which led to removal. Petitioners also sought termination of Mother's parental rights to Timothy based upon the additional ground of confinement under a sentence of ten years or more.

A hearing was held over the course of several days in January 2015. At the time of trial, Father had not completed any requirements contained in the permanency plans and failed to attend the trial for fear of arrest on an outstanding warrant.<sup>5</sup> Unlike Father, Mother was present for trial and testified extensively concerning her history of addiction. She acknowledged that she relapsed and incurred new criminal charges after completing a court-ordered 28-day drug treatment program in 2008. She explained,

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<sup>3</sup> Mother was required to complete an assessment with a domestic violence component, while Father was required to complete an assessment with an anger management component.

<sup>4</sup> The GAL filed both petitions; however, DCS later joined in the petitions.

<sup>5</sup> Father's extensive criminal history was established by Wayne Miller, the records technician for the Davidson County Sheriff's Department, who submitted the history of his criminal charges and subsequent incarcerations in the county.

[i]t was pretty bad [from August through December 2012], to the point where I didn't care what happened just as long as I got high.

She acknowledged that her substance abuse and periodic incarceration<sup>6</sup> rendered her unable to provide for the Children. As a result of her most recent criminal convictions, she was placed under the supervision of a community corrections program that required her to address her substance abuse issues while living in Restoration House, a half-way home that required her to remit rent, maintain employment, and abide by curfew and other restrictions. She maintained employment at a rate of \$8 per hour and was compliant with the majority of the restrictions imposed upon her, other than to remain current with rent. She could not advance in the program until she remitted payment for the unpaid balance.

Mother admitted that she left the Children in the care of Father as a result of his violent behavior toward her in April 2012. She agreed that he was physically abusive toward her and others, that he abused her in front of the Children, that he smoked marijuana occasionally and was an alcoholic, and that he failed to adequately address his mental health issues. Despite his significant shortcomings, she believed that the Children would be safe in his care because he had never physically harmed them. She asserted that she attempted to retrieve the Children from him but claimed that she was told by the Metro Police Department that she did not have the requisite authority.

Mother testified that she lived with her friend, Shannon P., from April 2012 through August 2013. She acknowledged that the Children could not live with her because she did not want them to sleep on the floor in someone else's house. She suggested placement of the Children with her sister or her aunt and uncle. She agreed that her aunt and uncle sought custody of four other children and that her uncle had also admitted to impregnating a 15-year-old girl.

Mother conceded that she did not provide financial support for the Children in the four months prior to her incarceration. She stated that she bought the Children toys, shoes, and snacks when Father allowed her to visit them, approximately twice weekly and overnight on one occasion. She claimed that since the Children's removal, she regularly purchased snacks or meals for the Children during her scheduled visitation and had taken them on outings.

Mother described a loving relationship between herself and the Children. She claimed that they exchanged letters while she was incarcerated and that she also sent gifts

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<sup>6</sup> Mother's extensive criminal history was also established by Mr. Miller, who submitted the history of her criminal charges and subsequent incarcerations in the county.

and cards. She asserted that once she was permitted to initiate contact, she contacted them on a daily basis and maintained regular visitation as permitted by DCS. She was reliant on DCS to schedule visitation because the Children could not live with her or visit her at her current residence. Although she was currently unable to provide housing or meet the basic needs of the Children, she estimated that she would complete the program by April 2015, at the earliest. She planned to secure a small apartment upon her release from Restoration House and was actively searching for employment that would provide her with sufficient income. She had also reapplied for disability income from the government.<sup>7</sup> She was unable to estimate when she would be able to provide housing or meet the basic needs of the Children following her release.

Mother agreed that she had not completed a parenting assessment with mental health, alcohol and drug, and domestic violence components. She provided that she completed a six-week, intensive parenting program that addressed domestic violence and substance abuse issues, that she was currently undergoing counseling, that she attended group therapy sessions on a weekly basis, and that she was working to complete a 12-step program at Restoration House while attending narcotics anonymous and alcoholics anonymous meetings on a daily basis. She had also remained sober since February 2013. She noted that she had passed each drug screen provided by DCS, Restoration House, and the community corrections program. She admitted that she was not taking her medication for epilepsy-related seizure disorder but explained that she had been unable to procure the medication due to an issue with her insurance. She was working to resolve the issue.

Tammy Hardy, a case manager for DCS, testified that with the exception of a six-week period, she served as the case manager for the Children since their removal. Relative to Father, Ms. Hardy testified that he had not completed any of the permanency plan requirements; that he had not visited the Children since March 2014; and that she had not spoken with him since October 2014. She explained that he experienced frequent, periodic incarceration and often hid when there were outstanding warrants out for his arrest.

Relative to the Children, Ms. Hardy testified that she had been unable to find a suitable relative placement after the paternal grandparents were no longer able to care for them. She explained that the paternal grandmother had been diagnosed with cancer and died shortly after the Children were returned to foster care. She could not approve Mother's aunt and uncle as a suitable relative placement for various reasons, including a statutory rape charge and their attempt to secure custody of their four grandchildren. She provided that the Children were currently in a foster home that did not wish to adopt them. She asserted that the Children had developed a relationship with a family that

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<sup>7</sup> She suffers from an epilepsy-related seizure disorder.

indicated a desire to serve as a potential adoptive home and that she was working to secure placement. She did not expect a lengthy transition because the Children were familiar with the family through church.

Ms. Hardy testified that the Children often experienced bouts of rage and hit objects and each other. She explained that they were unable to express their emotions in a healthy manner. She stated that she was present for three or four visitations with Mother, one prior to her incarceration and two or three while Mother was incarcerated.<sup>8</sup> She described the visitations as “chaotic” and claimed that Mother often cried, while the Children “jump[ed] all over the chairs and r[a]n in the visitation room.” She noted that the Children also hit each other during visitation. She admitted that Mother attempted to “reel them in” while crying but asserted that her attempts at redirection were ineffective. She agreed that Mother’s visitation with the Children improved following Mother’s release. She identified a note confirming the fact that visitation was positive and that her interactions with the Children were appropriate in December 2014.

Ms. Hardy testified that Mother never contacted her from jail and provided that she was unable to offer some services due to Mother’s incarceration. She acknowledged that once released to the supervision of the community corrections program, Mother was specifically prohibited from contacting anyone for a period of 30 days pursuant to the rules and regulations set forth by Restoration House. She agreed that Mother could have been compliant with the permanency plan by completing separate assessments that addressed her mental health, domestic violence, and alcohol and drug issues. She conceded that Mother had completed a mental health assessment as evidenced by her counseling through Mental Health Co-op and that Mother had also completed an alcohol and drug assessment as part of her placement into the community corrections program. She asserted that Mother had not completed a parenting assessment with a domestic violence component and never requested her assistance in scheduling such an assessment. She agreed that Mother had not failed a drug screen and successfully completed parenting classes while in jail.

Christine G. testified that she served as the initial placement for the Children from July 2013 until March 2014. She described a loving relationship between the Children and Mother and recalled that Mother called the Children, wrote letters to her and the Children, and sent cards on occasion. She characterized Mother as “extremely appreciative” and thankful for her care for the Children.

Christine G. testified that the Children “struggled” but eventually “did great” while in her care. She described them as “good, loving, caring boys.” She created a

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<sup>8</sup> Ms. Hardy also testified concerning an error that affected Mother’s ability to visit with the Children for a number of months.

structured environment to address their unique needs and also secured a few counseling sessions for Greg, who was diagnosed with a sensory processing disorder. She explained that he was sensitive to fabric, material, and loud noises. She worked hard to find materials and items that did not cause him discomfort. She recalled that she was unable to continue the specialized counseling sessions due to cost but that both children eventually received counseling through their school during the school year.<sup>9</sup> She provided that the Children hit objects as a display of aggression but denied ever observing them hitting each other. She recalled that they described the violence they witnessed and that Greg demonstrated the physical punishment he received from Father.

Christine G. testified that it was difficult to facilitate visitation while maintaining the structured environment she had crafted. She eventually decided to leave during visitation in an effort to avoid imposing her preferred method of parenting. She recalled that the Children were often upset following visitation with either parent and had trouble concentrating in school. She explained that the supervised visitation was often scheduled during school hours, despite her request to follow an alternate schedule. She noted that Father only participated in therapeutic visitation and did not attempt to contact the Children beyond the contact provided through visitation.

Amanda G. testified that the Children were placed with her in August 2014. She stated that the Children had visited Mother four times and spoke with her on the telephone every other night. She provided that the Children expressed anger following their telephone contact with Mother and had also occasionally expressed anger following visitation with her. She asserted that the Children were doing well in school and receiving assistance with their education as needed. The Children had not asked about Father in several months and only occasionally mentioned Mother. She characterized Mother as appreciative and thankful for her assistance with the Children.

Tracey Rose testified that she facilitated a number of therapeutic visitations between the Children and each parent while employed by Tennessee Family Child Care Alliance (“TFCCA”). She explained that her ability to supervise ended when TFCCA’s contract was not renewed by the State of Tennessee. She later resumed her role when she obtained employment with Camelot as an in-home counselor. Relative to Father, Ms. Rose recalled that she facilitated visitation at the Hill Detention Center in a “very confined, very controlled atmosphere.” She believed those visits went well as a result of

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<sup>9</sup> Ms. Hardy confirmed this testimony and explained that the school counselor intended to resume the counseling sessions at the start of the new school year. She provided that the Children were in a new school the following year that did not provide counseling. She scheduled an intake appointment with a new service provider and ensured that the Children had started therapy before she was placed on medical leave. She admitted that the therapist erroneously failed to continue treatment. She was in the process of securing further treatment.

the controlled atmosphere. She recalled that the visitations following his release also went well.

Relative to Mother, Ms. Rose recalled that her initial visits also occurred in a facility due to incarceration. She believed the visits went well but admitted that the Children were “erratic” as a result of the environment. She did not fault Mother for the Children’s behavior and opined that Mother handled the situation well and exhibited an ability to redirect their behavior.<sup>10</sup> She admitted that the Children hit each other during visitation but characterized their behavior as playful wrestling. She asserted that Mother’s recent visitations outside of the controlled environment have “gone much better.” She provided that the Children were no longer fighting and were able to interact.

Britt Edwards testified that he served as the court-appointed special advocate since August 2013. He estimated that he had visited with the Children once per month since his appointment. He believed that termination of each parent’s parental rights was in the best interest of the Children. He commended Mother for her improvement and attempt to rehabilitate herself but explained as follows:

As the boys’ advocate, I can say that the boys have obviously been experiencing a long road to recovery as well. I have observed their grades to improve. I’ve observed their attendance in school to have improved, their performance in school. Their health issues have improved.

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They are obviously trying to deal with seeing their parents in and out of jail. They have been trying to comprehend and deal with the loss of their [paternal grandmother]. So it’s been a very long year and half for these boys.

From my conversation with [Amanda G.] and from her testimony today, the boys have been exhibiting some - - have been exhibiting more behavioral problems since the visitations have increased and the phone conversations have increased. That could be attributed to the boys being in between two worlds.

They have this sense that they’re in the home stretch, but home is a moving target for them, because we can’t provide dates of when they would be returned to their parents.

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<sup>10</sup> Ms. Hardy testified in rebuttal that Ms. Rose’s testimony was inconsistent with the report on file.



He believed the Children needed permanency and expressed concern as to whether Mother would be able to protect them from Father if she were to regain custody. He agreed that potential relative placements had been identified and that the uncle's statutory rape conviction had been expunged. He also agreed that the Children were currently not receiving counseling as required by the permanency plan.

Following the hearing, the trial court found clear and convincing evidence to support the following statutory grounds of termination: (1) abandonment for failure to visit, (2) abandonment based upon conduct prior to incarceration that exhibited a wanton disregard for the welfare of the Children, (3) substantial noncompliance with the permanency plans, and (4) the persistence of conditions which led to removal. The court also found clear and convincing evidence that termination of each parent's parental rights was in the best interest of the Children. This appeal followed.

## II. ISSUES

We consolidate and restate the issues raised on appeal as follows:

- A. Whether the court abused its discretion in admitting evidence.
- B. Whether clear and convincing evidence supports the court's termination based upon the statutory ground of abandonment for failure to visit pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(i).
- C. Whether clear and convincing evidence supports the court's termination based upon the statutory ground of abandonment based upon each parent's conduct prior to incarceration pursuant to Tennessee Code Annotated section 36-1-102(1)(A)(iv).
- D. Whether clear and convincing evidence supports the court's termination based upon the statutory ground of substantial noncompliance with the permanency plans pursuant to Tennessee Code Annotated section 36-1-113(g)(2).
- E. Whether clear and convincing evidence supports the court's termination based upon the persistence of conditions which led to removal pursuant to Tennessee Code Annotated section 36-1-113(g)(3).

F. Whether the trial court erred in failing to terminate Mother's parental rights to Timothy based upon her confinement pursuant to Tennessee Code Annotated section 36-1-113(g)(6).

G. Whether clear and convincing evidence supports the court's finding that termination was in the best interest of the Children pursuant to Tennessee Code Annotated section 36-1-113(i).

### III. STANDARD OF REVIEW

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

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

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

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

473 (Tenn. Ct. App. 2000), *abrogated on other grounds by In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable. *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at \*9 (Tenn. Ct. App. Aug. 13, 2003). This evidence also eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d at 546; *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

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

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

*In re Carrington H.*, -- S.W.3d --, No. M2014-00453-SC-R11-PT, 2016 WL 819593, at \*12 (Tenn. Jan. 29, 2016) (internal citations omitted).

## IV. DISCUSSION

### A.

Mother asserts that the court erred in admitting the agreed order of adjudication<sup>11</sup> and the dependency and neglect petition. She claims that the order was not properly authenticated and that the petition contained inadmissible hearsay. She argues that any evidence derived from either document should be excluded. Petitioners respond that the court did not err in admitting the order, which possessed the signature of the Deputy Clerk, the file-stamp of the Juvenile Court, and the signature of the Juvenile Court Magistrate. They further argue that Mother agreed to the findings of fact in the order at the time of its entry. Relative to the petition, they agree that any findings of fact based upon the petition should be stricken because the petition was admitted to show its existence, not to prove the truth of the assertions therein.

Rulings on admissibility of evidence are within a trial court's discretion. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause [s] an injustice to the party complaining.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White*, 21 S.W.3d at 223. We review the decision of the trial court to determine:

- (1) whether the factual basis for the decision is supported by the evidence,
- (2) whether the trial court identified and applied the applicable legal principle, and
- (3) whether the trial court's decision is within the range of acceptable alternatives.

*Id.* at 223. Improper admission or exclusion of evidence requires a new trial if the outcome of the trial was affected. Tenn. R. App. P. 36(b); *White*, 21 S.W.3d at 222. Indeed, relief from any error is not warranted unless "considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b).

We agree that the order was erroneously introduced through Mother after she denied knowledge of the document. Tenn. R. Evid. 901(b)(1). The order was also not a self-authenticating document because it failed to meet the requirements of Rule 902 of

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<sup>11</sup> The agreed order was erroneously included in a collective exhibit and then submitted as a stand-alone document.

the Tennessee Rules of Civil Procedure. Likewise, the petition was inadmissible because it contained “statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). However, any error in the admission of either document was harmless when the facts contained in the documents were duplicative and unnecessary to support the statutory grounds of termination or the best interest finding.

## B.

As relevant to this case, abandonment for failure to visit means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) . . . have willfully failed to visit[.]

Tenn. Code Ann. § 36-1-102(1)(A)(i). Likewise, when the parent is incarcerated when the petition is filed, abandonment means that:

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . for four (4) consecutive months immediately preceding such parent’s or guardian’s incarceration[.]

Tenn. Code Ann. § 36-1-102(1)(A)(iv).

Petitioners do not defend this ground of termination as applied to either parent. The record reflects that Mother engaged in meaningful visitation in the four months preceding her incarceration, April 13, 2013, through August 12, 2013,<sup>12</sup> and that the court failed to identify the four-month period that applied to Father. We reverse the court’s application of this ground because the record does not contain clear and convincing evidence to establish that either parent willfully failed to visit during the requisite time period. This conclusion does not end our inquiry because only one statutory ground is required to support the termination. Tenn. Code Ann. § 36-1-113(c).

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<sup>12</sup> “The applicable four month window . . . includes the four months preceding the day the petition to terminate parental rights is filed but excludes the day the petition is filed.” *In re Jacob C.H.*, No. E2013–00587-COA-R3-PT, 2014 WL 689085, at \*6 (Tenn. Ct. App. Feb. 20, 2014).

C.

A parent may be found to have abandoned his or her child by engaging in conduct prior to incarceration that exhibited a wanton disregard for the welfare of his or her children. Tennessee Code Annotated section 36-1-102(1)(A)(iv) provides, in pertinent part,

(1)(A) For purposes of terminating the parental [ ] rights of [a parent] to that child in order to make that child available for adoption, “abandonment” means that:

\* \* \*

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and . . . the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

Under this ground of abandonment, the parent’s incarceration “serves only as a triggering mechanism that allows the court to take a closer look at the child’s situation to determine whether the *parental behavior* that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child.” *In re Audrey S.*, 182 S.W.3d at 866 (emphasis added). The court may consider any relevant conduct that occurred prior to incarceration and is not limited to reviewing the four months immediately preceding the incarceration. *Id.* at 870-71. A “parent’s decision to engage in conduct that carries with it the risk of incarceration is itself indicative that the parent may not be fit to care for the child.” *Id.* at 866. It is well established “that probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.” *Id.* at 867-68 (citations omitted). Exposing a child to domestic violence is conduct exhibiting wanton disregard. *In re Robert D.*, No. E2013-00740-COA-R3-PT, 2014 WL 201621, at \*8 (Tenn. Ct. App. Jan. 17, 2014).

*Father*

Father admits his extensive criminal history and does not appear to offer a defense to this ground of termination. Petitioners allege that the record supports the court’s finding of abandonment based upon his conduct prior to incarceration. We agree.

Father's pattern of conduct clearly demonstrates a wanton disregard for the welfare of the Children. He has exhibited a substantial amount of criminal behavior, he engaged in domestic violence toward Mother while in the presence of the Children, and he failed to address his mental health and substance abuse issues. We conclude that there was clear and convincing evidence to establish that Father engaged in conduct prior to incarceration that exhibited a wanton disregard for the welfare of the Children. Accordingly, a statutory ground supported the termination of his parental rights.

#### *Mother*

Mother acknowledges her criminal history but submits that her overall conduct does not exhibit a wanton disregard for the Children's welfare given the extensive care and attention she provided during the same time period. Alternatively, she claims that *In re Audrey S.* was wrongly decided insofar as it permitted the consideration of conduct beyond the four months preceding incarceration. Petitioners allege that the record supports the court's finding of abandonment and that the court considered the appropriate time period pursuant to established law.

As a threshold issue, we reject Mother's contention that *In re Audrey S.* was wrongly decided insofar as it permits consideration of conduct beyond the four months preceding incarceration. We see no reason to depart from the court's plain reading of the statute at issue. *See In re Audrey S.*, 182 S.W.3d at 867-71 ("If parental conduct which exhibits a wanton disregard for the welfare of a child can constitutionally form a ground for the termination of parental rights, it would appear to be of no moment whether that conduct occurred during the four months immediately preceding the parent's incarceration or at some earlier point in time."). While we commend Mother for taking the first step toward rehabilitation by renouncing her pattern of substance abuse in February 2013, her extensive criminal activity and substance abuse issues cannot be ignored. Additionally, she disregarded the Children's welfare by leaving them with Father, who assaulted her and others on numerous occasions. We conclude that there was clear and convincing evidence to establish that Mother engaged in conduct prior to incarceration that exhibited a wanton disregard for the welfare of the Children. Accordingly, a statutory ground supported the termination of her parental rights.

#### D.

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

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

#### *Father*

Father does not allege that he completed the requirements or that the requirements were unreasonable. His only complaint is that DCS failed to assist him and that the evidence presented in support of this ground was speculative. We agree that the evidence presented was speculative as a result of Father’s failure to appear at trial. DCS testified that their ability to assist Father was hindered by his frequent disappearances. Moreover, “proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.” *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). We conclude that there was clear and convincing evidence to support termination based upon Father’s substantial noncompliance with the permanency plan requirements. Accordingly, a second statutory ground supported the termination of his parental rights.

#### *Mother*

Mother asserts that the record does not support termination based upon her alleged substantial noncompliance. She acknowledges that she failed to complete her parenting assessment but asserts that she completed a mental health and alcohol and drug assessment, attended parenting classes that addressed issues of domestic violence, and made diligent efforts to comply with each requirement. Petitioners respond that the record supports termination on this ground as evidenced by her failure to complete a parenting assessment and obtain safe and stable housing.



Pursuant to the permanency plans, Mother was required to (1) visit the Children a minimum of four hours per month; (2) bring food, clothes, and other necessities to the visit; (3) complete a parenting assessment with mental health, alcohol and drug, and domestic violence components; (4) follow all recommendations from the assessment; (5) consent to random, periodic drug screens; (6) obtain safe and stable housing; (7) avoid further legal charges; and (8) take her medication for an epilepsy-related seizure disorder and provide DCS with a release of medical records. We believe that these requirements were reasonable and related to remedying the conditions that led to the Children's removal from the home. The record reflects that Mother exercised visitation as permitted by DCS, that she provided the requisite necessities for each visit, that she consented to random, periodic drug screens and passed all screens, that she did not incur any further legal charges but was incarcerated due to an outstanding warrant, that she completed mental health and alcohol and drug assessments; and that she attempted to remain current with her medication as allowed by her insurance provider. No evidence was presented concerning her signing or refusing to sign a release of medical records. Thus, termination on this ground was based upon her failure to complete a parenting assessment with a domestic violence component, to follow all recommendations from the assessment, and to obtain safe and stable housing.

The record reflects that Mother completed a six-week, intensive parenting program while in jail. The program incorporated issues of domestic violence. The testimony presented at trial revealed a marked difference in Mother's behavior and understanding of her parenting failures that led to the Children's placement in foster care. Additionally, her incarceration and participation in the community corrections program hindered her ability to obtain safe and stable housing by the time of trial. With these considerations in mind, we hold that Mother diligently completed the requirements to the best of her ability and further conclude that the record did not contain clear and convincing evidence to support termination of her parental rights based upon a substantial noncompliance with the permanency plans. We reverse the court's application of this statutory ground of termination. This conclusion does not end our inquiry because only one statutory ground is required to support the termination of Mother's parental rights. Tenn. Code Ann. § 36-1-113(c).

#### E.

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

(3) The child has been removed *from the home of the parent or guardian* by order of a court for a period of six (6) months and:

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

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

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

Tenn. Code Ann. § 36-1-113(g)(3) (emphasis added). Termination of parental rights requires clear and convincing evidence of all three factors. *In re Valentine*, 79 S.W.3d at 550. Additionally, the persistence of conditions ground may only be applied "where the prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse." *In re Audrey S.*, 182 S.W.3d at 874.

As a threshold issue, we must address the fact that the Children were not removed from either parent's physical home. Application of this statutory ground in such cases is generally prohibited pursuant to the plain meaning of the statute. *See In re K.M.K.*, No. E2014-00471-COA-R3-PT, 2015 WL 866730, at \*7 (Tenn. Ct. App. Feb. 27, 2015) (reversing termination of a father's parental rights based upon the persistence of conditions when the children were not removed from his home). Here, the Children were placed with the maternal grandparents as an *alternative* to DCS custody when it was determined that neither parent could adequately care for the Children. The Children were then removed from the maternal grandparents and placed into DCS custody when the grandparents indicated that they could no longer provide adequate care. With these considerations in mind, we hold that the facts of this case are distinguishable and support the court's consideration of this statutory ground of termination.

#### *Father*

Father does not argue that he has remedied the conditions which led to removal, namely his unstable housing and failure to address his substance abuse and mental health issues. He also does not claim that he is presently able to provide adequate care for the Children or estimate when he might be able to provide adequate care. With these considerations in mind, we conclude that the evidence does not preponderate against the trial court's finding that persistent conditions were established by clear and convincing evidence; that continuation of the parent-child relationship would greatly diminish the

Children's integration into a safe, stable, permanent home; and that a third statutory ground existed for termination of Father's parental rights to the Children.

*Mother*

Mother asserts that the record does not support termination based upon this ground when the conditions which led to removal are distinguishable from her present situation. She claims that the continuation of her relationship with the Children would not diminish their chances of integration into a stable environment when the current foster parents refused to adopt. Petitioners respond that the record supports termination on this ground when Mother still cannot provide stable housing or meet the Children's basic needs.

We commend Mother for her success in addressing her substance abuse issues by actively participating in a rehabilitation program. However, the fact remains that she is unable to provide stable housing or meet the Children's basic needs and could not provide the court with a definitive answer as to when she might be able to support them. Additionally, the record reflects that DCS is in the process of securing the Children's placement in a potential adoptive home. The testimony presented also established that the Children are familiar with the family and had already established a relationship with them. With these considerations in mind, we conclude that the evidence does not preponderate against the trial court's finding that persistent conditions were established by clear and convincing evidence; that continuation of the parent-child relationship would greatly diminish the Children's integration into a safe, stable, permanent home; and that a second statutory ground existed for termination of Mother's parental rights to the Children.

F.

The GAL claims that the court erred in refusing to terminate Mother's rights to Timothy based upon her confinement under a sentence of ten years or more. He asserts that this court has repeatedly upheld termination of a parent's rights under similar circumstances, most recently in *In re Chandler M.*, No. M2013-02455-COA-R3-PT, 2014 WL 3586499 (Tenn. Ct. App. July 21, 2014), *perm. app. dismissed* (Tenn. Sept. 29, 2014). The statute at issue provides as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and non-exclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:

\* \* \*

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court[.]

Tenn. Code Ann. § 36-1-113(g)(6).

Mother does not challenge the fact that Timothy was under eight years of age at the time of her sentencing. She claims that the court properly declined termination on this ground when she was never confined as a condition of her conviction or sentence.<sup>13</sup> The record reflects that Mother was detained prior to her sentencing hearing. However, she was immediately released to the supervision of the community corrections program and was never specifically ordered to serve any portion of her sentence in confinement. Accordingly, we affirm the court's rejection of this statutory ground of termination.

G.

Having concluded that there was clear and convincing evidence supporting at least one statutory ground to terminate each parent's parental rights, we must consider whether termination was in the best interest of the Children. In making this determination, we are guided by the following non-exhaustive list of factors:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child . . . the court shall consider, but is not limited to, the following:

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

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies

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<sup>13</sup> Mother initially argued that the court erred in terminating her parental rights to Timothy based upon this ground. In her reply brief, she acknowledged that the court did not terminate based upon this ground.

for such duration of time that lasting adjustment does not reasonably appear possible;<sup>14</sup>

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

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

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to [section] 36-5-101.

Tenn. Code Ann. § 36-1-113(i). “This list is not exhaustive, and the statute does not require a trial court to find the existence of each enumerated factor before it may conclude that terminating a parent's parental rights is in the best interest of a child.” *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). The General Assembly has also stated that “when the best interest[] of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interest[] of the

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<sup>14</sup> *In re Kaliyah S.*, 455 S.W.3d at 555 (“[I]n a termination proceeding, the extent of DCS's efforts to reunify the family is weighed in the court's best-interest analysis, but proof of reasonable efforts is not a precondition to termination of the parental rights of the respondent parent.”).

child, which interests are hereby recognized as constitutionally protected.” Tenn. Code Ann. § 36-1-101(d); *see also White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004) (holding that when considering a child’s best interest, the court must take the child’s perspective, rather than the parent’s).

*Father*

Although Father has not appealed the court’s best interest finding as applied to him,<sup>15</sup> we have reviewed the issue because of the gravity and finality that this decision will have on his parental rights. *See In re Arteria H.*, 326 S.W.3d 167, 184 (Tenn. Ct. App. 2010) (considering the best interest finding even though the issue was not raised on appeal). Following our review, we conclude that there was clear and convincing evidence to establish that termination of Father’s parental rights was in the best interest of the Children pursuant to Tennessee Code Annotated section 36-1-113(i).

*Mother*

We commend Mother for her success in addressing her substance abuse and mental health issues. We also acknowledge that she maintained visitation as permitted by DCS and enjoyed a meaningful relationship with the Children. Tenn. Code Ann. § 36-1-113(i)(3), (4). However, she had not made the adjustment of circumstances necessary to make it safe and in the Children’s best interest to be in her home as evidenced by her inability to provide housing or meet the Children’s basic needs. Tenn. Code Ann. § 36-1-113(i)(1). At the time of trial, DCS was in the process of securing an adoptive placement. The testimony reflects that the Children were familiar with the placement and could easily transition into the home. Disrupting the Children’s quest for permanency based upon Mother’s unsupported claim that she could easily secure housing and find suitable income would affect the Children’s emotional and psychological condition. Tenn. Code Ann. § 36-1-113(i)(5). Questions remain as to whether the physical environment of Mother’s potential home is healthy and safe as evidenced by her failure to remain current with her rental payments at Restoration House. Tenn. Code Ann. § 36-1-113(i)(7). The Children have simply languished in custody for far too long to wait any longer for Mother to achieve total rehabilitation. The Children should be allowed to pursue permanency and stability through adoption. With all of the above considerations in mind, we conclude that there was clear and convincing evidence to establish that termination of Mother’s parental rights was in the best interest of the Children. Accordingly, we affirm the decision of the trial court.

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<sup>15</sup> Father claims that termination of *Mother’s* parental rights was not in the best interest of the Children.

## V. CONCLUSION

This judgment of the trial court is affirmed as modified, and the case is remanded for enforcement of the trial court's judgment and collection of costs below. Costs of the appeal are taxed one-half to the appellant, Amanda S., and one-half to the appellant, Charles G. K.

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JOHN W. McCLARTY, JUDGE