

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 2, 2016

**IN RE JASMINE B., ET AL.**

**Appeal from the Juvenile Court for Stewart County**  
**No. 7295 G. Andrew Brigham, Judge**

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**No. M2016-00464-COA-R3-PT – Filed September 22, 2016**

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This is a termination of parental rights case. Appellant/mother appeals the termination of her parental rights to two minor children on the statutory grounds of: (1) abandonment by failure to provide a suitable home, Tenn. Code Ann. §§36-1-113(g)(1), 36-1-102(1)(A)(ii); (2) substantial noncompliance with the requirements of the permanency plans, Tenn. Code Ann. §36-1-113(g)(2); and (3) persistence of the conditions that led to the children’s removal from Appellant’s home, Tenn. Code Ann. §36-1-113(g)(3). Appellant also appeals the trial court’s finding that termination of her parental rights is in the children’s best interests. Discerning no error, we affirm and remand.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and W. NEAL MCBRAYER, J., joined.

James D. Potter, Clarksville, Tennessee, for the appellant, Brenda B.

Herbert H. Slatery, III, Attorney General and Reporter; and Brian A. Pierce, Assistant Attorney General, for the appellee, Tennessee Department of Children’s Services.

**OPINION**

**I. Background**

This termination of parental rights case involves two minor children, Jasmine B. (d/o/b/ March of 2003) and Jessica B. (d/o/b July of 2009) (together, the “Children”).<sup>1</sup> The

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<sup>1</sup> In cases involving minor children, it is the policy of this Court to redact the parties’ names so as to protect

Children were born to Brenda B. (“Appellant,” or “Mother”).<sup>2</sup> Jessica is a special needs child, with an approximate IQ of 58. The Tennessee Department of Children’s Services (“DCS,” or “Appellee”) first became involved with this family in August of 2013. At that time, DCS received a referral alleging sexual abuse against Jasmine B. by James W. James W. is the Children’s uncle, who was living in Brenda B.’s home with the Children. At the time of the alleged sexual abuse, James W. was a minor.

On August 27, 2013, DCS filed a petition for “Order Controlling Conduct and for Protective Supervision.” Therein, DCS averred that the Children were dependent and neglected, under Tennessee Code Annotated Section 37-1-102(b)(12)(F), “in that said children are in such condition of want or suffering as to endanger the morals or health of such children. . . .” The petition states that during DCS’s initial interview with Mother, she admitted that she had “walked out into the hallway and [had seen] Jasmine sitting with her legs open and James sitting [] between them facing her with his face close to Jasmine’s lap.” Mother stated that she separated them, reprimanded them, and grounded both James and Jasmine. DCS met with Mother on August 22, 2013 to develop a plan to ensure the Children’s safety. Although the plan allowed the Children to remain in Mother’s custody, on September 19, 2013, the Children’s guardian ad litem filed a motion for immediate removal of the Children to protective custody. The guardian ad litem stated that she visited Mother’s home on September 4, 2013 and “found the home to be extremely unsanitary and maintained in an unhealthy condition.” In addition, the guardian ad litem stated that Mother failed to adhere to the requirements set out in the August 22, 2013 plan. Specifically, she had allegedly failed to properly supervise the Children and to keep them separate from James W. In addition, the guardian ad litem stated that, on September 13, 2013, she received a call from the Children’s school guidance counselor. The guardian ad litem met with the guidance counselor and the Children’s teachers. During the meeting, “the teachers advised [the guardian ad litem] that Jessica B[.] displayed out of the ordinary and inappropriate behavior while playing with two (2) dolls during school hours.” Specifically, the guardian ad litem stated that she “was advised that Jessica B[.] laid one doll on top of the other doll and pushed the lower portion of the dolls together in such a way that the dolls were engaged in sexual activity.” At the same meeting, Jasmine B.’s teacher advised that Jasmine B. had told the teacher that “she and [James W.] often ‘played a game’ together. [James W.] advised Jasmine that this game was to be a secret, and Jasmine would not tell anyone about the game. Jasmine stated [to her teacher] that the game made her very uncomfortable . . . .” Jasmine’s teacher further stated that Jasmine had confided to another student that “she and [James W.]

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their identities.

<sup>2</sup> The Children’s father, Jason B., surrendered his parental rights on January 26, 2015. He is not a party to this appeal.

were having sex.” On September 17, 2013, the guardian ad litem met with the Children at their school. The guardian ad litem stated that Jasmine “stated that she and [James W.] ‘had sex on the couch.’” Jasmine stated that James W. “will sleep in her room at times.”

On September 19, 2013, the guardian ad litem received a call from the Children’s school counselor, who advised that Jessica came to school crying and “pointing to her vaginal area saying ‘hurts, hurts.’” Jessica was sent to the school nurse, but the nurse was not able to exam Jessica without parental consent. Jessica’s special education teacher informed the guardian ad litem that “due to Jessica B[.]’s] age and disability, she is not able to form complete sentence.”

Based on the foregoing averments, the guardian ad litem moved the trial court for immediate removal of the Children from Mother’s custody. On September 19, 2013, the trial court entered an ex-parte order placing the Children in protective custody. Very shortly thereafter, DCS placed the Children in the home of Jennifer M., where they have lived since that time. DCS assigned Ms. Angelique Y. as the Children’s initial case worker; Ms. Y. worked on the case from September of 2013 through December of 2014. The case was then assigned to DCS case worker, Ms. Katie K., from December of 2014 until December of 2015.

After removal from Mother’s home, the Children attended regular therapy sessions with Ms. Donna H., a licensed clinical social worker. In addition, the girls received counseling from Mr. Eric F., at the Sexual Assault Center to specifically address the sexual abuse issues. During the course of treatment, it was revealed that Jasmine had been sexually abused not only by James but also by her biological father and her father’s brother-in-law. During these interviews, it was also alleged that the Children, i.e., Jasmine and Jessica, were engaging in inappropriate sexual conduct with each other.

On or about October 3, 2013, DCS and Mother developed the first parenting plans for the Children. Mother’s requirements, under the plans, were: (1) to pay child support for the Children (no specific amount is indicated in the parenting plan); (2) address “environmental neglect issues” and “inappropriate sexual behaviors;” (3) submit to a “clinical assessment with parenting component” and follow all recommendations thereof; (4) participate in therapeutic visitation with the Children; (5) incorporate the suggestions of homemaker services (provided by DCS) and maintain a healthy home “environment that protects a person from mental and or physical harm, risk, or injury.” The Children’s permanency plans were revised several times over the course of the proceeding. All of the permanency plans were signed by Mother and ratified by the trial court on its finding that Appellant’s requirements, under those plans, were reasonably related to remedying the reason for foster care and were in the Children’s best interests. We will discuss the specific requirements in greater detail

below.

Following a preliminary hearing on November 4, 2013, the trial court entered an order on November 25, 2013, wherein it continued the protective custody pending an adjudicatory hearing. The adjudicatory hearing was held on January 13, 2014. By order of February 3, 2014, the trial court held that the Children were dependent and neglected. In relevant part, the February 3, 2014 order states:

Upon the evidence presented to the Court, including that: a) the stipulations by the parents that at the time of removal, the children were dependent and neglected due to environmental neglect; b) DCS reported that the parents have completed psychological assessments and have appointments to attend counseling . . .; and, c) the girls are beginning counseling . . . . From all of which the Court finds that the children . . . are dependent and neglected children within the meaning of the law . . . .

The trial court held a review hearing on August 18, 2014. The trial court entered an order on that hearing on August 25, 2014, wherein it stated that: (1) Jasmine's therapist . . . stated that Jasmine was nowhere near ready for reunification [with Mother]; (2) "the mother has no car and can't transport the children . . ."; (3) "there is domestic violence in the mother's home"; and (4) "[Mother's] judgment is still questionable as she has made plans to move to Indiana with a man . . ., who[m] she met on the internet."

On July 23, 2015, DCS filed a petition to terminate Mother's parental rights. As grounds for termination of her parental rights, DCS averred that Mother had: (1) abandoned the Children by willful failure to support; (2) abandoned the Children by failing to provide a suitable home; and (3) not substantially complied with the requirements set out in the permanency plans. DCS further averred that the conditions that led to the Children's removal from Mother's home still persisted and that termination of Mother's parental rights was in the Children's best interests. By order of September 21, 2015, an attorney was appointed to represent Mother in the termination of parental rights proceeding. On the same day, the trial court appointed a guardian ad litem to represent the Children in the termination of parental rights case.

The trial court heard the petition to terminate parental rights on February 8, 2016. By order of February 22, 2016, the trial court terminated Mother's parental rights to both Children on the grounds of: (1) abandonment by failure to provide a suitable home; (2) failure to substantially comply with the requirements of the permanency plans; and (3)

persistence of the conditions that led to the Children's removal from Mother's home.<sup>3</sup> The trial court also found that termination of Mother's parental rights is in the Children's best interests. Mother appeals.

## II. Issues

There are two dispositive issues in this appeal, which we state as follows:

1. Whether the facts, as found by the trial court, are supported by the preponderance of the evidence and clearly and convincingly establish the elements necessary to terminate Appellant's parental rights on any of the grounds found by the trial court?
2. If so, whether the facts, as found by the trial court, are supported by the preponderance of the evidence and clearly and convincingly establish that termination of Appellant's parental rights is in the Children's best interests.

## III. Standard of Review

Under both the United States and Tennessee Constitutions, a parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only when a compelling interest exists. *Nash-Putnam*, 921 S.W.2d, at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, Nos. M2004-00999-COA-R3-PT, M2004-01572-COA-R3-PT, 2005 WL 1021618, at \*7 (Tenn. Ct. App. Apr. 29, 2005) (citing Tenn. Code Ann. § 36-1-113(g)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the children's best interest. Tenn. Code Ann. § 36-1-113(c); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding

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<sup>3</sup> Although DCS averred the ground of abandonment by willful failure to support, Tenn. Code Ann. §§36-1-113(g)(1), 36-1-102(1)(A)(i), in its order terminating Mother's parental rights, the trial court held that DCS had failed to meet its burden to show that Mother's failure to provide support was willful. DCS does not appeal this holding.

termination cases. *Santosky*, 455 U.S. at 769. Accordingly, both the grounds for termination and that termination of parental rights is in the children’s best interests must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. July 12, 2004). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in termination of parental rights cases, a reviewing court must modify the customary standard of review under Tennessee Rule of Appellate Procedure 13(d). As to the trial court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

#### **IV. Grounds for Termination of Parental Rights**

As noted earlier, the trial court relied on the following statutory grounds in terminating Appellant’s parental rights: (1) abandonment by failure to provide a suitable home, Tenn. Code Ann §§36-1-113(g)(1), 36-1-102(1)(A)(ii); (2) substantial noncompliance with the requirements of the permanency plans, Tenn. Code Ann. §36-1-113(g)(2); and (3) persistence of the conditions that led to the Children’s removal from Appellant’s home, Tenn. Code Ann. §36-1-113(g)(3). Although only one ground must be proven by clear and convincing evidence in order to terminate a parent’s rights, the Tennessee Supreme Court has instructed this Court to review every ground relied upon by the trial court to terminate parental rights in order to prevent “unnecessary remands of cases.” *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010). Accordingly, we will review all of the foregoing grounds.

##### **A. Reasonable Efforts**

Before addressing the specific grounds for termination of Appellant’s parental rights, we note that, historically, the decision to pursue a termination of parental rights on the ground of substantial noncompliance with a permanency plan has invoked DCS’s statutory duty to make reasonable efforts to facilitate the safe return of children to the parent’s home. *In re R.L.F.*, 278 S.W.3d 305, 315 (Tenn. Ct. App. 2008) (citing Tenn. Code Ann. §§ 37-1-166(b), -166(a)(2), -166(g)(2)); *see also In re Tiffany B.*, 228 S.W.3d 148, 151, 160 (Tenn.

Ct. App. 2007) (vacating a finding of abandonment, substantial noncompliance, and persistence of conditions for failure to make reasonable efforts). However, in *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015), the Tennessee Supreme Court specifically overruled “the holding of *In re Tiffany B.* and other cases following the holding in *In re C.M.M.* to the extent that the court required DCS to prove by clear and convincing evidence that it made reasonable efforts to reunify as a precondition to termination of parental rights (citations omitted).” *Id.* at 555 n. 34. Nonetheless, proof of reasonable efforts is specifically required by statute to prove the ground of persistence of the conditions that led to the child’s removal from the parent’s home. However, even under that ground, DCS’s efforts to assist the parent “may be found to be reasonable if such efforts exceed the efforts of the parent or guardian toward the same goal.” *Id.* (citing Tenn. Code. Ann. § 36-1-102(1)(A)(ii)). In *Kaliyah*, the Court specifically stated that

proof of reasonable efforts is not a precondition to termination of parental rights of a respondent parent. As with other factual findings made in connection with the best interest analysis, reasonable efforts must be proven by a preponderance of the evidence, not by clear and convincing evidence. *In re Audrey S.*, 182 S.W.3d at 861. After making the underlying factual findings, the trial court should then consider the combined weight of those facts to determine whether they amount to clear and convincing evidence that the termination is in the child’s best interest (citations omitted).

*Id.* at 555.

In its February 22, 2016 order terminating Mother’s parental rights, the trial court made a specific finding that DCS “had made reasonable efforts to prevent the removal [of the Children from Mother’s custody]” and that DCS’s “efforts in the four months subsequent to removal were reasonable in helping [Mother].” Specifically, the trial court noted that DCS provided homemaker services to Mother and paid for pest control services in the home. In addition, DCS “furnished funding for a clinical evaluation and provided parenting services in the home.” DCS also provided “[o]ther assistance includ[ing] the securing of an appointment with mental health providers, the offering of transportation, and the provision of two gas cards.”

The record supports the trial court’s findings on reasonable efforts. The Children’s DCS case worker, Ms. Y., testified that DCS paid for homemaker services, clinical assessment, and pest control. In addition, Ms. Y. testified that she provided Mother with transportation so that she could attend the Children’s appointments. DCS also provided Mother with gas cards. Ms. Y. further testified that DCS provided Mother with “parenting services in the home.” Without extending the length of this opinion to set out every effort DCS made to

assist Mother, suffice it to say that, from the totality of the circumstances, there is clear and convincing proof that DCS did, in fact, make reasonable efforts to assist Mother in this case. Despite DCS's best efforts, however, the record indicates that Mother has failed to avail herself of these opportunities, *see* discussion *infra*.

## **B. Abandonment**

Mother's parental rights were terminated on the ground of abandonment by failure to provide a suitable home. Tenn. Code Ann. §§ 36-1-113(g)(1), 36-1-102(1)(A)(ii). In pertinent part, Tennessee Code Annotated Section 36-1-113(g) provides:

(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:

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

Tennessee Code Annotated Section 36-1-102 defines "abandonment," in relevant part, as follows:

(1)(A) For purposes of terminating the parental or guardian rights of a parent or parents or a guardian or guardians of a child to that child in order to make that child available for adoption, "abandonment" means that:

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(ii) The child has been removed from the home of the parent . . . as a result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child . . . and the child was placed in the custody of the department . . . that the department made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency made reasonable efforts to assist the parent . . .to establish a suitable home for the child, but that the parent . . . ha[s] made no reasonable efforts to provide a suitable home and ha[s] demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. . . .



The statutory definition of abandonment by failure to provide a suitable home expressly requires proof that the child was removed from the home of a parent “as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child....” Tenn. Code Ann. § 36-1-102(1)(A)(ii); *In re Corey N.A.*, No. E2009-01293-COA-R3-PT, 2010 WL 2490758 at \*4 (Tenn. Ct. App. June 21, 2010) (“The statute specifically and expressly requires that the juvenile court must have adjudicated the child(ren) to be dependent and neglected”); *In re Zmaria C.*, No. M2009-02440-COA-R3-PT, 2010 WL 3328009 at \*6 (Tenn. Ct. App. Aug. 24, 2010) (“To establish the ground of abandonment due to a parent’s failure to provide a suitable home for the children, DCS must establish that the children were removed from the parent’s home by order of the court in which the children were found to be ... dependent and neglected ... at least four months prior to the filing of the petition to terminate the parent’s rights.”). As set out above, the prior adjudication of dependency and neglect criterion is met in this case, *see* February 3, 2014 order, *supra*.

In its February 22, 2016 order terminating Mother’s parental rights, the trial court made the following, relevant findings concerning the ground of abandonment by failure to provide suitable housing:

It is undisputed that the children were removed from [Mother’s] home in September 2013 . . . . In December 2013, [Mother] was evicted from this residence and moved to live with [Lonny D. and Gerald D.] where she remained for approximately one year . . . . She then moved to her cousin’s residence, Mr. Danny [S.’s], where she remained for approximately 5 months until it came to light that Mr. S[.] is a convicted sex offender. She then moved to her present residence . . . where she lives with Mr. Russell [B., Mother’s paramour] and two other adults in a three bedroom house.

It is undisputed that the children require separate bedrooms due to possible depredations of one child upon the other. It is likewise undisputed that the children will continue to require therapy and counseling to address their multiple traumas. . . .

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[T]he Court is convinced that both girls will require a caregiver who can devote a significant, and perhaps inordinate, amount of time to the care of the girls to continue their progress and prevent regression. This will require continued stability and continuity and appropriate boundaries for the children .

. . .

[T]he provision of a suitable home requires more than a watertight roof. A suitable home is one in which a child can be taught and loved and cared for and protected and nurtured and shown the proper way to behave . . . .

The proof in this case shows that [Mother] has not provided a suitable home for the girls. [Mother] admitted as much during her testimony. [Mother] has lived in four different residences since removal, none of which are suitable for return of the children. . . . The testimony . . . revealed that [Mother's] home . . . was dirty and in need of pest control services . . . .

[Mother's] next two residences were not suitable. The . . . home with the [D.s] was only a temporary home . . . . The home with Mr. [S.] was clearly unsuitable due to Mr. S[.]'s sex offender status.

[Mother's] current residence is not physically appropriate, with each girl needing a separate bedroom. Two non-related adults in a relationship live in [Mother's] current residence as well as Mr. [B.]. Although no proof was introduced as to any danger posed by the occupants of [Mother's] home, no proof was introduced that the occupants would be able to contribute in any way to the children's continued psychological progress. It is troubling that Mr. [B.] did not even know the last name of one of the adults he is sharing a residence with. This is a significant flaw in [Mother's] plan for return of the children.

Even further troubling is the lack of proper infrastructure in [Mother's] home to care for these girls. These are girls with significant mental issues and [they] would be challenging for any parent to handle. [Mother] lacks a driver's license and a vehicle, depending upon Mr. B[.] to provide transportation to the girls' appointments. [Mother's] ability to set proper boundaries for the girls is questionable . . . . [Mother's] ability to properly parent these children in her current home has not been shown.

Mother's own testimony supports the trial court's findings. At the time of the hearing, Mother acknowledged that her current home did not have sufficient bedrooms for each child to each have her own and that her current home was not appropriate for the Children:

Q [to Mother]. You don't have a home that's appropriate, correct?

A. Yeah.

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Q. [W]ould you agree that your children need a stable home?

A. They need one, yeah.

Q. And you haven't provided that, have you?

A. No, I haven't

As noted by the trial court, the question of whether a home is suitable not only requires inquiry into the physical structure and condition, but it also requires inquiry into whether the environment within the home is healthy and safe for the particular children at issue. Here, the Children have special needs and requirements. Given the history of abuse in their lives, and as discussed in greater detail below, they require a parent who knows and enforces proper boundaries and who exemplifies good judgment and stability. So, not only is Mother's home physically too small for the Children, but (for the reasons elaborated below), Mother has not done the work necessary to ensure her ability to protect and nurture these Children.

We conclude, therefore, that the facts, as found by the trial court, clearly and convincingly establish the elements necessary to terminate Appellant's parental rights on the ground of abandonment by failure to provide a suitable home. Tenn. Code Ann §§36-1-113(g)(1), 36-1-102(1)(A)(ii); *Jones v. Garrett*, 92 S.W.3d at 838.

### **C. Substantial Non-Compliance with the Requirements of the Permanency Plan**

Tennessee Code Annotated Section 36-1-113(g)(2) provides that parental rights may be terminated when "[t]here has been substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan." However, as discussed by this Court in *In re M.J.B.*:

Terminating parental rights based on Tenn. Code Ann. § 36-1-113(g)(2) requires more proof than that a parent has not complied with every jot and tittle of the permanency plan. To succeed under Tenn. Code Ann. § 36-1-113(g)(2), the Department must demonstrate first that the requirements of the permanency plan 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 Valentine*, 79 S.W.3d at 547; *In re L.J.C.*, 124 S.W.3d 609, 621 (Tenn. Ct. App. 2003), and second that the parent's noncompliance is substantial in light of the degree of noncompliance and the importance of the particular requirement that has not been met. *In re Valentine*, 79 S.W.3d at 548-49; *In re Z.J.S.*, 2003 WL 21266854, at \*12. Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance. *In re Valentine*, 79 S.W.3d at 548.

*In re M.J.B.*, 140 S.W.3d 643, 656-57 (Tenn.Ct.App.2004). "Nonetheless, the permanency

plans are not simply a series of hoops for the biological parent to jump through in order to have custody of the children returned.” *In re C.S., Jr., et al.*, No. M2005-02499-COA-R3-PT, 2006 WL 2644371, at \*10 (Tenn. Ct. App. Sept. 14, 2006). Rather,

the requirements of the permanency plan are intended to address the problems that led to removal; they are meant to place the parent in a position to provide the children with a safe, stable home and consistent appropriate care. This requires the parent to put in real effort to complete the requirements of the plan in a meaningful way in order to place herself in a position to take responsibility for the children.

*Id.*

As noted above, the trial court ratified several permanency plans finding that the Appellant’s requirements were reasonably related to remedying the reason for foster care and were in the Children’s best interests. The Children’s first parenting plans were developed on or about October 3, 2013. Mother’s requirements, under the plans, were to: (1) pay child support for the Children; (2) address “environmental neglect issues,” and “inappropriate sexual behaviors;” (3) submit to a “clinical assessment with parenting component” and follow all recommendations thereof; (4) participate in therapeutic visitation with the Children; (5) incorporate the suggestions of homemaker services and maintain a healthy home “environment that protects a person from mental and or physical harm, risk, or injury.” The Children’s permanency plans were revised on March 13, 2014. Mother’s requirements under the March plan remained unchanged from the initial plan. The March 13, 2014 plan, however, notes that the desired outcome is for the Children to “live in a home safe from sexual [and environmental] harm.” In addition, the March 13, 2014 plan requires Mother to “continue individual therapy and medication management . . . until the provider deems it is not necessary . . .” and to “attend family therapy . . . and address how to effectively parent children that have been sexually abused.” Again, on September 10, 2014, the parenting plans were reviewed and updated. Mother’s requirements, under the September plans, remained substantively unchanged. The September 10, 2014 plans do, however, note that, if Mother requires “assistance with transportation to visits [she] will notify [DCS] . . . to provide assistance.” The September 10, 2014 plans indicate that “Jessica is beginning to speak more” and “is beginning to go to the bathroom without assistance.” The plans further provide that Mother “is currently employed and is cleaning houses. [Mother] has reported that she is working on obtaining transportation and getting her driver’s license.” In addition, the September 10, 2014 plans require Mother to “work on obtaining appropriate housing” and to “monitor any male that comes into contact with [the Children].”

The permanency plans were revised again on February 19, 2015, after the Children’s father surrendered his parental rights on January 26, 2015. Mother’s requirements remained

substantively the same as in previous plans. However, the February 19, 2015 plans require Mother to allow DCS “to complete background checks on any paramours.” The plans further provide that Mother “will be able to parent the children effectively . . . [and] will be able to appropriately protect the children from any abuse. . . .”

The Children’s permanency plans were revised on September 8, 2015, which was after DCS filed its petition to terminate Mother’s parental rights. In its order terminating parental rights, the trial court specifically states that, because the September 8, 2015 plans are “dated after the filing of the petition . . .[,] the court will not consider [them].” Likewise, this Court will not consider the last iteration of the permanency plans in this appeal.

As found by the trial court in several of its orders, the primary concerns in this case are with environmental neglect, sexual abuse perpetrated on the Children, and the ongoing inappropriate sexual conduct between the Children. The parenting plan requirements were developed to address these issues and to specifically enable Mother to care for the Children’s mental health and to protect them from further abuse. To this end, and as succinctly set out in the trial court’s order terminating her parental rights, Mother’s substantive responsibilities under these plans were to: (1) “pay child support”; (2) “maintain a healthy home environment for the girls to flourish mentally and be safe from further sexual abuse”; (3) participate in homemaker services and pest control”; (4) “be able to financially provide for the children”; (5) “continue individual therapy and medication management”; (6) “attend family therapy to address how to effectively parent children that have been sexually abused”; (7) “continue family support services”; and (8) “obtain appropriate housing with separate bedrooms for the girls.” As noted above, these requirements were found to be substantially related to addressing the problems that led to the Children’s removal into protective custody, and neither party raises an issue concerning the trial court’s finding in this regard.

Concerning the foregoing requirements, in its order terminating her parental rights, the trial court made the following, relevant, findings:

[Mother] did complete certain requirements. [Mother] . . . participated in homemaker services and allowed pest control services at [her] residence; she completed clinical assessment; she visited with the girls . . . .

However, . . . [Mother] never was able to provide a suitable home for the children. . . .

Ms. [K.] testified that she was concerned that [Mother] did not place priority on return of the girls but that she was more concerned with Mr. [B.]. As an example, Ms. [K.] stated that [Mother] once “passed on” a job offer to Mr.

[B.] rather than securing it for herself. Ms. [K.] stated that [Mother] would insist that Mr. [B.] be involved in any efforts to secure the girls' return. Ms. [K.] stated that [Mother] was "preoccupied" with Mr. [B.] rather than focusing on the children.

Ms. [K.] further testified that she discussed the need for [Mother] to have a home that was safe for the girls and that they were suffering from severe mental health issues, and the necessity of [Mother] to be able to meet those needs.

The court finds that provision of a safe home able to meet the needs, both physical and emotional, of the girls is a critical part of the Plans and that the court is not satisfied that [Mother] has substantially complied with this portion of the Plans.

We have reviewed Ms. K.'s testimony and conclude that it supports the foregoing findings. In relevant part, Ms. K. testified that she assisted Mother in trying to find a suitable home by informing Mother about "some homes for rent." Ms. K. stated that Mother did not pursue these housing opportunities and that she told Ms. K. that she "had been working so much . . . she wasn't able to go look at housing." Concerning Mother's relationship with Mr. B., Ms. K. stated that, due in part to the previous sexual abuse against the Children, DCS was concerned that Mother was living with Mr. B. When DCS expressed these concerns to Mother, Ms. K. testified that Mother, nonetheless, requested that Mr. B. be allowed to participate in the development of the permanency plans. Ms. K. stated that Mother appeared to be "preoccupied" with Mr. B., and this fact kept Mother from fully appreciating the effect Mr. B.'s presence in the home might have on the Children. Although DCS informed Mother that Mr. B. was not to participate in visitation, Ms. K. stated that she questioned whether he, did, in fact, come to the visits. This was "because . . . Jessica would run around calling [Mr. B.] 'Daddy,' and then Jasmine told me that that was her dad and that she was trying to tell all the kids at school." Nonetheless, Ms. K. testified that, to her knowledge, the Children had not developed any meaningful relationship with Mr. B. Although we acknowledge that DCS performed a background check on Mr. B., which indicated no cause for concern, the fact remains that these Children are not trusting of men (and rightfully so in light of the sexual abuse they have suffered). Accordingly, the primary concern is Mother's inability to recognize that, at this stage in the Children's recovery, her living with any man may be a major stumbling block to the Children's continued success. In other words, there is evidence to suggest that Mother is not prioritizing the Children in terms of her decisions concerning her living arrangements. One of Appellant's requirements under the permanency plans was to "monitor any males that came into contact with her children." When Ms. K. was asked whether, in her opinion, Mother had complied with this requirement, she answered no. Ms. K. elaborated that Jessica had told Ms. K. that Mr. B. had struck her on the collarbone and that she was scared of him. Ms. K. went on to testify:

Q. Ms. [K.], is it the fact that Mr. [B.] is male or is it the concern about [Mother's] ability to protect her children that causes the greatest concern for [DCS]?

A. The ability for her to protect her children.

In addition to her failure to provide a suitable home, the trial court also discussed its concern that Mother was unable to provide for the Children's most basic needs. In its order terminating parental rights, the court found:

[Mother] has shown poor parenting ability in her failure to discern the sexual abuse of the girls and to properly nurture the children. Several witnesses testified that Jessica could not talk when she was removed, but could only communicate by "grunting." Jessica's grunting was translated and interpreted by Jasmine. According to Ms. [M.], the resource parent, both girls were dirty when they were removed and they did not observe basic human hygiene; she stated the girls were not used to taking a shower, did not know how to clean themselves following a bathroom break, and did not wash their hands. She stated that the girls did not have clean clothes and had no pajamas. She stated that Jessica did not brush her teeth and had swollen gums.

There is no evidence that Mother has made any significant adjustment to her living conditions such that the foregoing hygiene concerns would not resurface if the Children were returned to Mother's home. As stated by the trial court, in its order terminating parental rights, "[t]he girls' behaviors and state of living would demand that their care be modified or changed." To this end, Mother was required to continue therapy and to follow all recommendations thereof, including compliance with medication. Not only was the therapy required to address basic parenting skills but, as noted above, of primary concern in the development of the parenting plans was the sexual abuse and impropriety at issue in this case. Accordingly, therapy was also required in order to address Mother's inability to protect the Children from such abuse and her inability to recognize inappropriate behavior between the Children. In its order terminating Mother's parental rights, the trial court found, in relevant part:

The court is also troubled by the failure of [Mother] to complete her individual therapy. This is in direct contradiction to the Plan which requires [Mother] to "continue individual therapy . . . [] until the provider deems it is not necessary anymore." It is the court's opinion that the removal of the girls, necessitated by environmental neglect, sexual abuse, and troubling displays of sexual impropriety by one of the girls, can be traced to [Mother's] lifestyle,

including poor choices and judgment, and poor parenting ability. These matters could be addressed by appropriate therapy. Overcoming these deficiencies would be vital, critical, and essential to a successful return of the children. Yet [Mother] did not complete her therapy.

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[Mother] has failed to continue medication management, admitting that she took herself off her medications. This is in direct contradiction to the plan which required [Mother] to “continue . . . medication management [] until the provider deems it not necessary anymore.”

In making its findings concerning Mother’s failure to complete therapy, the trial court relied, in part, on the testimony of Ms. Anita R., Mother’s therapist. Ms. R. testified that Mother began therapy in April of 2014. Mother was scheduled to attend therapy sessions two times per month. Concerning whether Mother complied with that requirement, Ms. R. testified, in relevant part, that:

Q. Okay. Between April of 2014 and March of 2015 [the last time Ms. R. testified that she saw Mother], how many sessions did you have with [Mother]?

A. We had scheduled a total of 22, and 10 of those were kept.

Q. So less than half?

A. Yes.

Q. Were any of those canceled by you?

A. One, yes.

Q. Were the others characterized as canceled by [Mother], or rescheduled, or did not show? . . .

A. There were seven that were classified as “did not show” and four that were canceled by [Mother].

Ms. R. testified that her primary concern in treating Mother was to address Mother’s lack of good judgment, specifically:



Q. In your opinion, does [Mother's] judgment, or her issues with boundaries, would that affect her parenting of her children?

A. It could. It could, yes.

Q. And how so?

A. I believe that forming good, healthy, supportive relationships and having good, supportive people in your life is an important part of parenting. So being able to decide who is healthy and supportive and who is not is very important?

Q. And [Mother] hasn't seen you for almost a year?

A. Right.

Q. If she doesn't attend counseling consistently, how is that counseling even effective?

A. Well, it's—it's not. . .

In her own testimony, Mother concedes that she has failed to substantially comply with the requirements of the permanency plans:

Q [to Mother]. [I]n the 29 months that your children have been out of your custody, what progress have you made?

A. I have got [sic] the job. That's about the only progress I have made. I have learned how to not be so controlling with my emotions.

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Q. Is there anything else you have accomplished in the last two and a half years?

A. I have learned how to take better control and not baby Jessica. I have learned how to be a mom instead of a sister or an aunt.

From the foregoing evidence, and the record as a whole, we conclude that the facts, as found by the trial court, clearly and convincingly establish the elements necessary to

terminate Appellant's parental rights on the ground of substantial noncompliance with the requirements of the permanency plans. Tenn. Code Ann. § 36-1-113(g)(2); *Jones v. Garrett*, 92 S.W.3d at 838.

**D. Persistence of the Conditions that Led to the Children's Removal**

Tennessee Code Annotated Section 36-1-113(g)(3) provides that termination of parental rights may be based on persistence of conditions. Persistence of conditions is defined as:

(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:

(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.

The purpose behind the "persistence of conditions" ground for terminating parental rights is "to prevent the child's lingering in the uncertain status of foster child if a parent cannot within a reasonable time demonstrate an ability to provide a safe and caring environment for the child." *In re Arteria H.*, 326 S.W.3d 167, 178 (Tenn. Ct. App. 2010), *overruled on other grounds* by *In re Kaliyah S.*, 455 S.W.3d 533 (Tenn. 2015).

As is the case with the statutory ground of abandonment by failure to provide suitable housing, this Court has similarly held that the ground of persistence of conditions applies as a ground for termination of parental rights "only 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 838, 872 (Tenn.Ct.App.2005), *perm. app. denied* (Tenn. Nov. 7, 2005). As discussed above, the prior adjudication of dependency and neglect criterion is met in this case.

Concerning this ground for termination of Mother's parental rights, in its order, the trial court makes the following, relevant, findings:

The reasons that led to the filing of the petition were suspected sexual abuse of the girls by [James W.] and inappropriate “acting out” of a sexual nature by the girls. [Mother] stipulated to “environmental neglect” in the adjudicatory/dispositional hearing order . . . . In the interim between the filing of the original petition and amended petition, Jasmine disclosed she had been abused by her father and her uncle and the girls’ significant issues began to come to light.

[Mother] is correct in her assertion that the abusers have been removed from the girls’ lives and that this condition has been remedied. They need not fear sharing a home with the abusers again. However, [Mother] is not correct in arguing that this is dispositive of the issue.

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Looking at the “totality” of the environment the children would be subjected to if they are returned inexorably leads one to the conclusion that “the conditions that led to the child’s removal . . . that in all reasonable probability would cause the children to be subjected to further abuse or neglect . . . still persist.” 36-1-113(g)(3)(A). The children would be returning to a physically inadequate house, peopled with non-related adults who may or may not be supportive of their rehabilitation, to a home where the sole source of transportation is a gentleman living with their mother and who himself has no visible means of support, to a home in which the financial condition would be dire, and to a mother who, while loving her children, has not taken the necessary steps to equip herself with the skills, talent, and wisdom to properly care for her children.

Second, the statute allows for consideration of “other conditions” which may cause the children to be subjected to further abuse or neglect . . . . This allows the court to look at conditions which may have arisen, or which have come to light, after the removal, so long as those conditions might subject the child to further abuse or neglect.

These conditions include the lack of a suitable home . . . and the failure of [Mother] to complete her requirements under the permanency plans. These conditions would, in the court’s opinion, likely lead to further abuse and neglect of the children.

In addition to the foregoing findings, the trial court also found that Mother had failed to: (1) secure adequate employment to provide sufficient income; (2) obtain dependable transportation; and (3) be involved in the Children’s schooling and activities. Furthermore,

the trial court noted that, “[t]his matter has been in litigation since September 2013 . . . and the court cannot foresee any reasonable probability that the conditions will be remedied ‘at an early date.’”

From our review, we conclude that the facts, as found by the trial court, clearly and convincingly establish the elements necessary to terminate Appellant’s parental rights on the ground of persistence of the conditions that led to the Children’s removal from Mother’s home. Tenn. Code Ann. §36-1-113(g)(3); *Jones v. Garrett*, 92 S.W.3d at 838.

## VI. Best Interests

When at least one ground for termination of parental rights has been established, the petitioner must then prove, by clear and convincing evidence, that termination of the parent’s rights is in the children’s best interests. *White v. Moody*, 171 S.W.3d 187, 192 (Tenn. Ct. App. 1994). When a parent has been found to be unfit (upon establishment of ground(s) for termination of parental rights), the interests of parent and child diverge. *In re Audrey S.*, 182 S.W.3d at 877. The focus shifts to the child’s best interest. *Id.* at 877. Because not all parental conduct is irredeemable, Tennessee’s termination of parental rights statutes recognize the possibility that terminating an unfit parent’s parental rights is not always in the child’s best interest. *Id.* However, when the interests of the parent and the child conflict, courts are to resolve the conflict in favor of the rights and best interest of the child. Tenn. Code Ann. § 36-1-101(d). Further, “[t]he child’s best interest must be viewed from the child’s, rather than the parent’s, perspective.” *Moody*, 171 S.W.3d at 194.

The Tennessee Legislature has codified certain factors that courts should consider in ascertaining the best interest of the child in a termination of parental rights case. These factors include, but are 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 for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

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

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(7) Whether the physical environment of the parent's . . . home is healthy and safe . . . .

(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 . . . .

Tenn. Code Ann. § 36-1-113(i). This Court has noted that “this list [of factors] 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 rights is in the best interest of a child.” *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Depending on the circumstances of an individual case, the consideration of a single factor or other facts outside the enumerated, statutory factors may dictate the outcome of the best interest analysis. *In re Audrey S.*, 182 S.W.3d at 877. As explained by this Court:

Ascertaining a child's best interests does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

*White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

In its order terminating Mother's parental rights, the trial court reviewed the foregoing factors. As to factor one, i.e., adjustment of circumstance, the trial court's order states: “Factor 1. The court concludes that [Mother] has not made an adjustment of circumstance, conduct or conditions so as to make it safe to return home.” The evidence supports the trial court's finding. As discussed in detail above, Mother has failed to secure adequate housing for the Children. Not only in regards to the physicality of the home, but (perhaps more importantly) with regard to the living conditions within the home. As noted by the trial court, at the time of the hearing, Mother was living in a home that did not have a bedroom for each girl. She shared the home with two other adults, neither of whom are related to the Children,

and with her paramour, Russell B. There is no proof in the record as to the effect these living conditions would have on the Children. Nonetheless, the record is replete with evidence that these girls will need stability and an adequate environment in order to overcome the traumas they have experienced in their young lives. The evidence is insufficient to establish that Mother has made a lasting adjustment so as to be able to care for these Children. The trial court specifically found that:

Factor 2. The court concludes that [Mother] has failed to effect a lasting adjustment after reasonable efforts by [DCS] for such a time as to make it appear that such adjustment is not reasonably possible. This matter has been before this court for over two years. [Mother] has had time to make an appropriate adjustment but has not done so to the point where it is safe for the return of the children . . . . Further, [DCS] has satisfied the court that its efforts to assist [Mother] have been reasonable.

From our review, the evidence supports the trial court's finding that Mother has failed to avail herself of the help offered to her by DCS. In particular, as discussed in detail above, she has failed to attend her therapy sessions. In order for Mother to make a lasting adjustment of her living conditions, she would, necessarily, have to receive guidance and education concerning what it would mean to be a good parent for these Children. From the record, she has failed to apply herself to that task.

Concerning visitation with the Children, the trial court noted that Mother "has visited with the children intermittently during this matter, but has made only sporadic contact with them otherwise." The record supports this finding. Jennifer M., the Children's foster mother, testified that Appellant had missed visits for two consecutive months. She further testified that, when Mother did visit, the Children suffered various degrees of regression immediately following the visit. There is no evidence that Mother called the Children between visits. Although the trial court found, under factor four, that Mother loves the Children and that she "yearns for their return," she has failed to take the steps necessary for reunification. In fact, during her testimony, Mother admitted that she does not know the names of the Children's teachers or their doctors.

In its order, the trial court was particularly concerned with factor five, i.e., the effect of a change of caretakers on the Children. As to that factor, the trial court found, in relevant part, as follows:

The court is gravely concerned about the effect a change of caretakers and the physical environment would have upon the children's emotional and psychological condition. . . . The witnesses have painted a stark picture of the

girls' situations when they were removed. The witnesses have also described a remarkable and inspiring renaissance wherein the girls are now better able to enjoy childhood and have a better chance to develop into successful teenagers and then young ladies. In other words, they have both improved significantly and are closer to being "normal" children.

Ms. [H.] testified that when the girls were first removed, their conditions were serious. She described Jessica's severe tantrums (confirmed by Ms. [M.], Ms. [Y.] and [Mother] herself). She said Jessica would throw herself against the wall, and onto the floor, and scream and cry uncontrollably.

Ms. [M.] said these tantrums included spitting, biting, and clawing, and would occur every day and last for 2-3 hours. She said that she did not leave home with Jessica for the first six to eight months. Both [witnesses] testified . . . that Jessica could only "grunt" when she was removed. Both . . . testified that now Jessica has made a "100%" turnaround. . . .

Ms. [H.] testified that Jasmine knew no boundaries when she was removed and exhibited an unhealthy fascination with boys. She said that Jasmine's behavior was disrespectful to adults and that she used argumentation to communicate. She said that Jasmine would try to be a parent, unsure of the appropriate boundary between childhood and adulthood. She said that Jasmine has improved significantly and required intensive counseling to address the sexual abuse she has suffered. She said that Jasmine will require an attentive parent, one who is able to be patient and talk through issues, and one who will stay on top of all of her issues, including school, mental health, and peers.

Mr. [F.], Jasmine's sexual abuse counselor, testified that she has made progress since she began counseling and that it is important that she continue to have access to counseling. He said she would be affected by the trauma for the rest of her life. He said her caretaker would need to exhibit consistency, provide stability, adhere to schedules, provide structure, love, support and nurturing. He said the parent would need to be able to protect Jasmine. . . . Ms. [H.] testified that both girls are "thriving" in foster care and that it would be detrimental for both children to return to the type of environment from which they were removed. She was of the opinion that both girls would need mental health assistance during each developmental stage of their lives. . . .

In light of the change in the Children's behavior, which Ms. H. observed first hand, she testified that it would be detrimental for the Children to be returned to Mother's home. She testified that the Children need a parent "who has very good boundaries" so as to allow the Children to "to stay in the child role and not the adult role and not worry about some of the things that are happening, you know, finances or relationships and things like that." In addition, Ms. H. opined that "it will be important for both [Children] to continue counseling,"

which will be paramount to their continued recovery and maintaining the progress that they have made since removal from Mother's home. Concerning whether Mother can fulfill these needs, Ms. H. stated:

Q. To your knowledge, had the mother—is the mother able to provide these needs that you have listed for each child?

A. From what I have surmised, no.

Ms. H. testified that the foster mother, Ms. M., has been “consistent in providing the care that the girls need[],” and that Ms. M.'s participation has been “key to the success that they're having.”

Ms. M. testified, in relevant part, that the Children have separate bedrooms in her home and that they are supervised at all times. Ms. M. further stated that she ensures that the Children attend all therapy and counseling appointments. Concerning the Children's reactions to the monthly visits with Appellant, Ms. M. testified that, following the visits, “Jasmine is more clingy and withdrawn,” but Jessica “shows the biggest signs of change. . . . Her behavior regresses. Her speech regresses. She comes back very angry. . . and she throws more tantrums right after a visit.”

From the totality of the circumstances, it is apparent that the Children are, indeed, thriving in their new environment and that a change in custody, at this point, would be detrimental to their mental and emotional wellbeing. This is especially so in light of the fact that Mother has failed to do the work necessary to effect any lasting change in her circumstances, or to improve her ability to draw firm boundaries and to make good decisions to ensure her ability to protect and provide for these Children. Accordingly, we conclude that the facts, as found by the trial court, clearly and convincingly establish that termination of Appellant's parental rights is in the Children's best interests.

## **VII. Conclusion**

We affirm the trial court's order terminating Appellant's parental rights. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellant, Brenda B. and her surety, for all of which execution may issue if necessary.

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ARNOLD B. GOLDIN, JUDGE