IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 23, 2015 Session

IN RE C.M.

Appeal from the Circuit Court for Williamson County
No. 2014113 Joseph Woodruff, Judge

No. M2014-02571-COA-R3-JV – Filed December 18, 2015

This is a dependency and neglect case. Appellants adopted the minor child, who is the subject of this appeal, from China. Thereafter, Appellee Tennessee Department of Children's Services received a referral that the child was dependent and neglected. The Juvenile Court held that the child was dependent and neglected and was the victim of severe abuse at the hands of Appellants. Appellants sought a de novo review in the Circuit Court. Following a hearing, the Circuit Court held that the child was the victim of severe child abuse and was, therefore, dependent and neglected. Appellants appeal the Circuit Court's substantive ruling and also raise issues concerning the trial court's pre-trial rulings, evidentiary rulings, and the award of guardian ad litem fees. Discerning no error, we affirm and remand.

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

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which RICHARD H. DINKINS and BRANDON O. GIBSON, J.J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellants, D.M. and M.N.

Herbert H. Slatery, III, Attorney General and Reporter, and Paul Jordan Scott, Assistant Attorney General, for the appellee, Tennessee Department of Children's Services.

Judy A. Oxford, Franklin, Tennessee, Guardian Ad Litem.

OPINION

I. Background

D.M. ("Mother") and M.N. ("Father," and together with Mother, "Parents," or "Appellants") are the parents of C.M., who was born in October of 2006 and is the subject of the instant appeal.[1] On or about March 13, 2012, Appellants adopted C.M. from China. C.M. has an older sister, K.M., whom the Appellants adopted from Russia in 2007. K.M, who is not the subject of the instant appeal, was seventeen years old during most of these proceedings. On or about April 18, 2013, Mother filed an unruly petition against K.M. in the Juvenile Court of Williamson County. On April 19, 2013, the Juvenile Court appointed Michelle Lipford as the guardian ad litem for K.M. K.M. was ultimately adjudicated to be unruly and was taken into the custody of the Tennessee Department of Children's Services ("DCS," or "Appellee").[2] K.M. was also adjudicated to be dependent and neglected based on the fact that the Parents represented K.M.'s age to be two years less than her actual age and based upon the Parents' failure to procure psychological counseling for K.M. despite her school's recommendation.

The case involving C.M., who is the subject of this appeal, was commenced on September 17, 2013 when K.M.'s guardian ad litem, Ms. Lipford, filed a petition, in the Juvenile Court of Williamson County, to adjudicate C.M. dependent and neglected. According to the petition, DCS received a referral regarding C.M. The referral suggested the following concerns:

- That the doorknob on [C.M.'s] bedroom door was installed "backward," allowing the parents to lock her in her room at bedtime, which was usually around 8:00-9:00 p.m.
- That [C.M.] was usually released from her room around 10:00 a.m., but sometimes not until as late as 3:00 or 4:00 p.m.
- That Mother had disciplined [C.M.] by pulling her hair and slapping her head.
- That [C.M.] was unable to ask for help because she did not speak English.

Following referral, DCS began an investigation into the child's circumstances. Although the

[1] In cases involving minor children, it is the policy of this Court to redact the parties' names so as to protect their identities.

[2] On March 31, 2014, Ms. Lipford filed a motion in the Circuit Court to substitute DCS as a party to the lawsuit in her place. By agreement of the parties, the motion was granted, and DCS was substituted as the Petitioner in this case.

Parents initially denied the allegation that they locked C.M. in her room, they later admitted that C.M. was, in fact, locked in her room; however, the Parents blamed K.M. During their initial involvement with DCS, the Parents alleged that C.M. was five years old. However, over the course of its investigation, DCS determined that C.M. was actually six years old. DCS further discovered that, although C.M. had been in the United States for over a year, she had neither been enrolled in school, nor received a waiver to excuse attendance. Furthermore, C.M. was not engaged in any program or service to learn English or to prepare for school; accordingly, the child could not communicate well enough to participate in any meaningful review to assess her wellbeing.

In August of 2013, C.M. was enrolled in kindergarten. Soon after starting school, DCS received new reports and concerns relating to the child's wellbeing. According to the dependency and neglect petition, these concerns included the following:

- Despite the Parents having represented on ESL paperwork that [C.M.] had participated in Pre-K last year, [C.M.] is unable to say or recognize her name; doesn't speak English; answered all kindergarten screening questions with the word "blone;" and scored .025% out of 100% on the readiness assessment; lacks any appearance of having been in a structured setting before; appears to crave touch and acts out for attention but will not make eye contact; and has deficits in fine and gross motor skills.
- When the school discussed these concerns with Mother and Father, they were adamant that [C.M.] was "extremely smart," but also described her as manipulative and sneaky and described how she steals, especially food. They went on to describe how they have to be extremely strict with her because she tries to control them. When asked if [C.M.] was fluent in Chinese, the Parents first said "no," but later said that she lays in bed and talks to herself in English and Chinese. When questioned further about [C.M.'s] participation in Pre-K, Mother said that [C.M.] went to a program at People's Church for a while but they pulled her out because she didn't like being placed in a three year old classroom with babies.
- When the school expressed concern to Mother and Father that [C.M.'s] communication problems might be related to an issue with her hearing and suggested having her tested, Mother was adamant that she could hear fine and flatly rejected the idea of having her tested. When the school suggested ways of working with [C.M.] to improve her performance at school, Mother was dismissive and claimed she was already doing everything that was suggested. The school found this statement to be suspect due to the fact that [C.M.'s] performance had improved drastically since beginning school only eight days prior to the meeting.
- At the end of the conference, which [C.M.] attended with her parents, the child was reluctant to leave and began repeating, "C not sleepy. C not sleepy." Mother became very animated in response, causing the staff concern. The school has further concerns

with other incidents of unusual behavior by Mother, including an incident when she seemed to be unable to walk without holding onto Father's arm; and an incident when she parked her car in front of the school prior to opening and had [C.M.] get out and knock on all the doors while she sat parked in the wrong lane honking the horn and blocking traffic; even after being talked with by the Assistant Principal. There is a concern that these incidents may relate to a medical condition or altered mental status.

- The school also expressed concern over the Parents' answer as to why [C.M.] thinks she is five years old when in fact she will be seven in October, in that the Parents responded that it was fine with them because they do not want the other students to view her as "the stupid Chinese girl," and that [C.M.] feels like she is viewed as a "trashy Chinese girl."
- After repeated requests by [K.M.] to visit with her sibling . . . a [supervised] sibling visitation was conducted on September 12, 2013 . . . . [C.M.] appeared happy to see [K.M.] and responded very positively to her. This reaction is in contradiction to Mother and Father's representation that [C.M.] did not wish to see [K.M.] and is fearful of her. [K.M.] remains concerned for [C.M.'s] well-being in the care of her adoptive parents

By her petition, Ms. Lipford not only asked the court to find C.M. dependent and neglected but also asked the court for a finding of severe child abuse pursuant to Tennessee Code Annotated Section 37-1-129(a)(2). Ms. Lipford also asked the court to appoint a guardian ad litem for C.M.; the court granted the motion and appointed Judy Oxford as C.M.'s guardian ad litem. In addition, by order of September 17, 2013, the trial court appointed Ann Best as a court appointed special advocate (CASA) in the case.[3]

The Parents waived initial hearing on October 8, 2013. The case was set for final hearing on November 25, 2013, and the child was to remain in the Parents' custody pending the hearing. The hearing was continued to January 15, 2014. Although the Juvenile Court began its hearing on the petition for dependency and neglect on January 15, the court continued the hearing until January 17, 2014 "for further testimony." On January 16, 2014, Ms. Oxford appeared before the court to make an oral motion for the child's immediate removal from Parents' home; however, the Juvenile Court denied the request and ordered the Parents to complete certain task before the continuation of the dependency and neglect hearing the next day. These tasks included submitting the child's "Individual Education Plan" forms to the child's school officials; having the child's glasses properly fit; and dressing the child appropriately for the weather (the court noted that the child was sent to school "in a tank top

[3] Ms. Best's name is spelled both "Anne" and "Ann" throughout the record. For consistency, we will spell it "Ann" in this opinion.

in 23 degree weather"). By order entered on January 16, 2014, the Juvenile Court noted that the Parents had failed to comply with the foregoing tasks. Accordingly, the court ordered that the child would be placed in DCS custody.

Following the conclusion of the dependency and neglect hearing on January 17, 2014, the Juvenile Court entered an order on the same day, wherein it concluded that the child was dependent and neglected pursuant to Tennessee Code Annotated Sections 37-1-102(b)(12)(C), (D), (F), and (G). However, the court reserved its ruling on the question of severe child abuse for hearing on March 12, 2014. In the meantime, the court ordered DCS to engage a qualified expert for the purposes of evaluating and formulating an opinion concerning severe child abuse. On February 14, 2014, the Juvenile Court entered a separate order containing its findings of fact. Specifically, the Juvenile Court found that the child was dependent and neglected based on the Parents' failure to provide necessary medical and dental care for the child. The court cited Trial Exhibit 12, a notarized statement from the Parents made during the adoption process. Therein, the Parents state, "We feel very confident that we will be able to provide for [C.M.'s] medical needs. . . . As soon as we bring her home, we will take her to the doctor and have her conditions fully evaluated. We will provide for all the medical needs she will need. We will provide speech therapy if she needs it. We have very good medical insurance . . . ." Despite these promises, the court noted that the child was not seen by a physician until some fourteen months after coming to the United States and that the child was not seen by a dentist until she had been in the country for sixteen months. The court noted that the lack of dental care was "inexcusable neglect," which "caused the child great pain and discomfort." The court also found the child to be dependent and neglected based on its finding that the Parents, although they had the financial means and ability, had failed to provide an English tutor for C.M. Furthermore, the court found that the Parents had intentionally failed to enroll the child in school and had been completely uncooperative with the school's request to provide C.M. with additional services such as speech therapy, assessments, and an Individual Education Program. *See* 20 U.S.C. §1414 (d). The court discussed, in great detail, the Parents' lack of cooperation with the child's school and noted the child's extremely low screening score, her need for contact, her acting out by hitting, screaming, and kicking, and her lack of eye contact. The child also lacked the fine and gross motor skills expected of a child her age, and she "ate enormous amounts of food" at school. The Juvenile Court also relied upon K.M.'s testimony about C.M. being locked in her room at night and how C.M. would cry and move furniture around. According to K.M.'s testimony, the Parents would yell at C.M. through the home's intercom system and would place towels under the door to muffle the noise. The court further noted that the child's eyeglasses were ordered and purchased on October 3, 2013; although the glasses were ready for pick up in November and the Parents were notified of this fact, Mother did not pick up the child's eyeglasses until January 2014 and, then, only after the doctor called to say that he would waive the balance due. Even after procuring the

eyeglasses, the Parents failed to have them properly fitted, so the eyeglasses would fall off the child's face during class.

On January 24, 2014, the Juvenile Court entered an order granting the guardian ad litem a judgment against the Parents for $16,410 in fees. On March 10, 2014, Parents filed an application for writ of certiorari in the Circuit Court of Williamson County (the "trial court"). At this point, however, the Juvenile Court had not yet entered a final judgment because it had specifically reserved the issue of severe child abuse for separate hearing on March 10, 2014. In response to the Parents' application for certiorari, the Circuit Court entered a Fiat on March 10, 2014 stating that "all Juvenile Court orders [will] remain in place until or unless modified by this Court. Through this order, [the Juvenile Court Judge] is not precluded from entering a final order." Thereafter, on March 18, 2014, Parents filed, in the trial court, an emergency motion for relief. In the motion, Parents argued that the Juvenile Court's delay in entering a final order had not only deprived them of any visitation or contact with C.M., but had also denied them a de novo hearing in the Circuit Court. On April 1, 2014, the trial court held a hearing on the Parents' emergency petition. The trial court denied certiorari at that time and gave the Juvenile Court until May 31, 2014 to enter a final order. The trial court noted that if the Juvenile Court failed to enter a final order by the deadline, it would "take jurisdiction over the case as if a final order ha[d] been entered and set the de novo appeal within 45 days as required by statute."

On May 14, 2014, the guardian ad litem, Ms. Oxford, moved the court to approve her fees in the amount of $16,440 for services rendered from January 17, 2014 through May 12, 2014. Ms. Oxford supported her motion with her affidavit and time records. Parents objected to the reasonableness of the fees, and the trial court conducted a hearing on May 22, 2014. By order of May 28, 2014, the Juvenile Court found that the requested fees were reasonable and would be paid by the Parents and not by the Administrative Office of the Courts. The Juvenile Court reasoned that the Parents were not indigent. Accordingly, the Juvenile Court's May 28, 2014 order awards a judgment to the guardian ad litem, and against the Parents, in the amount of $32,850.

On May 16, 2014, the Juvenile Court entered a final order in the dependency and neglect matter, wherein it found that the child was the victim of severe child abuse at the hands of Appellants. Parents filed a notice of appeal to the Circuit Court on May 21, 2014, and the Juvenile Court record was transferred to the Circuit Court on June 11, 2014. By order of July 7, 2014, the Circuit Court granted certiorari and set the matter for hearing.

By order of July 7, 2014, the trial court ruled on several pending motions. These motions included: (1) Parents' June 10, 2014 motion for consolidation, to set, for scheduling order, and for discovery order; (2) Parents' motion to compel DCS to allow access to the minor

child for the Parents' expert witnesses, Dr. Janie Berryman and Dr. Trey Monroe, and the guardian ad litem's response in opposition to this motion; (3) guardian ad litem and CASA motions to quash the subpoena for production of documents and appearance filed on behalf of CASA worker, Ann Best, and the Parents' responses in opposition to these motions. In its July 7, 2014 order, the trial court consolidated the Parents' application for writ of certiorari with their de novo appeal from the Juvenile Court. In the same order, the trial court also made the following, relevant evidentiary rulings:

> On the Motions to quash the production of documents and appearance of CASA worker Ann Best, filed by Attorney [Raquel A.] Abel [on] behalf of CASA and filed by GAL Oxford: The Court finds that CASA does not stand in the same position as the GAL and is subject to deposition and discovery of their records and communications. The Court does find that any internal communication that involved only the CASA administrators or other volunteers seeking advice on the case or how to proceed are not discoverable, but all communications with other attorneys, witnesses, or other persons are subject to disclosure to the parents. CASA is subject to the protective order of the statute and will redact the names and indentifying information of any person who made a disclosure of abuse, however, everything else, including the nature of the allegations and the surrounding circumstances is discoverable. The arguments of the Guardian ad Litem Judy Oxford that the communication between her and CASA is privileged is not well taken. Just as with any attorney communication, once that information is disclosed to third parties, it is no longer privileged . . . .
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> CASA is not required to copy every document that it received from outside sources, such as adoption records, medical records, etc., as CASA has held out to the Court that those records are voluminous. However, CASA shall provide a list of all the documents received and/or reviewed to make those documents available for inspection.
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> The Court is going to allow CASA to file reports with this Court. CASA may prepare a report for the hearing, but the admissibility of that report will be at the discretion of the trial court at the final hearing and will be subject to the evidentiary objections of the parents.
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> If CASA has certain records or information that they believe would be harmful to the child if disclosed to the parents, they may file it with the Court and seek an in camera review, however, this Court has ordered what is discoverable and anticipates that CASA will comply as set forth herein.

By the same order, the trial court also denied the Parents' motion to compel DCS to produce the child for examination by the Parents' experts, Dr. Janie Berryman and Dr. Trey Monroe.

In denying the motion, the trial court noted that its ruling "does not prohibit the parents from seeking an evaluation of the child during the course of the proceedings which the Court may allow if it deems it is appropriate for adjudication of disposition."

On July 22, 2014, Ms. Best petitioned the trial court for an in-camera review of "certain documents submitted under seal" alleging they contain information protected from disclosure by the Court's previous Order regarding communication between the CASA volunteer, Ann Best, and the CASA attorney, Raquel A. Abel. By order of August 11, 2014, the trial court found that "the highlighted portion of the documents are direct communications between the CASA volunteer and her attorney and should be protected from disclosure." Accordingly, the court held that "[s]aid portion of the pages presented to this Court shall be redacted before being provided to Ms. Connie Reguli[, attorney for Appellants,] by Ms. Raquel A. Abel."

On July 31, 2014, Parents filed a motion to dismiss for res judicata and for spoliation of evidence. In this motion, Appellants argued that:

> 14. The petition against the parents regarding [C.M.] were brought by the same petitioner that brought the allegations of dependency and neglect regarding [K.M.] The allegations of dependency and neglect against the parents regarding [C.M.] have been adjudicated by this Court . . . .
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> 16. The second petition, [regarding C.M.] was also brought by the same party, Michelle Lipford acting as guardian ad litem for [K.M.], as in the petition [regarding K.M.]. These petitions were based on the same conduct and against the same parties. Therefore, the second petition is barred by the doctrine of res judicata.
> 17. Further, the pending petition regarding [C.M.] states in paragraph six that "two individuals provided CPS with their observations of witnessing seeing [C.M.] locked in her room for extended periods." The course of discovery has disclosed that these two individuals are (1) [K.M.] and (2) her friend, [N.J.]. These witnesses have now been deposed. Only [K.M.] testified that the door knobs were turned around backwards at the Franklin, Tennessee home. The other witness, [N.J.], reportedly made observations from a home in Alabama. The testimony of [K.M.] regarding the doorknobs being turned around backwards should therefore be prohibited as res judicata.
> 18. Therefore, the following allegations cannot be re-litigated by this Court and they must be dismissed pursuant to res judicata: (1) the door knobs were

> installed backwards allowing the parents to lock [C.M.] in her room around 8 or 9 p.m.; (2) that [C.M.] was locked in her room sometimes until 3 p.m.; (3) that the Mother disciplined [C.M.] by pulling her hair and slapping her; and (4) that [C.M.] does not speak English.

In addition to the foregoing, Parents also argued that "mandatory school attendance does not start until a child reaches six years old, T.C.A. § 69-6-3001(d)." Because Parents allegedly "enrolled the minor child in [elementary school] voluntarily to commence the 2013-2014 school year in kindergarten," and because the child was "six years old at the time of her admission into school," the Parents argued that "as a matter of law any reference that the child was dependent and neglected because of her lack of enrollment in school should be stricken and prohibited." Alternately, Parents argued that after K.M., who was being held in detention at that time, informed CPS investigator, Jeanine Gaines, that C.M. was being locked in her room and that the doorknobs were turned backwards to prevent the child from leaving the room, Ms. Gaines came to the home where she took pictures that allegedly showed that K.M.'s testimony concerning the doorknobs was false. However, during discovery, Ms. Gaines allegedly reported that she no longer had these photographs. Appellants argued that Ms. Gaines "should have known that any pictures taken as part of her investigation would be material evidence in a hearing on this matter" and that "[t]he destruction of this evidence is highly prejudicial to the parents . . . ." Accordingly, the Parents argued that "any allegations that the minor child was locked in her room by turning the doorknobs around backwards should be dismissed by the Court."

On August 25, 2014, Parents filed a motion in limine to "limit the evidence presented in this case to matters contained in the original petition [for dependency and neglect]." Specifically, Parents argued that the following evidence should be prohibited at the hearing before the trial court:

> a. There have been no allegations of medical, dental, or optical neglect, therefore, the records listed from Dr. Dublin (Meridian Dental Centre); Dr. Gabriel Morel, Dr. Ryan Creggar (Brentwood Pediatric Dental); Family Vision Care; Dr. Thomas Morgan; Vanderbilt Pediatric Genetics and Genomic Medicine; VUMC/Monroe Carrell Children's Hospital; the medical history provided by the parents; letters written by parents for adoption; and notarized statements from parents regarding [C.M.], are not material or relevant to the allegations in the petition.
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> b. The Guardian ad Litem is attempting to offer two orders from the Juvenile Court . . . . This is a de novo hearing. Orders entered by the Juvenile Court Judge are neither material not relevant to the matter before this Court.

c. There have been no allegations of abuse or neglect regarding [C.M.'s] attendance at [the church learning center], therefore these records are neither material nor relevant.

d. There are no allegations about any abuse or neglect cause by the adoption of the child, therefore, the adoption and birth records of the child are not material not relevant.

In addition to the foregoing, the Parents alleged that there had been "no allegations that the child has been starved or not provided proper nutrition, therefore, the Court should prohibit any testimony proffered by any witness regarding the child's eating habits, access to food, or growth." Parents also opposed testimony proffered by Dr. Linda Ashford, Dr. Leigh Webb, Kelly Stephens, LPC, and Dawn Brimm on grounds that these witnesses allegedly lacked independent knowledge of the events or conditions relevant to the case. Concerning Dr. Ashford, the motion in limine further argues that

> Dr. Ashford is expected to opine that severe abuse has occurred under the authority of T.C.A. § 37-1-102(21)(B) which defines severe abuse as "specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairments of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct." The parents would show that this provision is unconstitutionally vague as written and as applied. This provision opens the door for such broad and speculative opinions without supporting medical or scientific data that it impinges on the constitutional right to parent.

DCS and the guardian ad litem filed responses in opposition to the Parent's motion to dismiss for res judicata and for spoliation of evidence and to their motion in limine.

The Office of the Attorney General filed a Notice of Appearance in the case for the limited purpose of defending the constitutionality of Tennessee Code Annotated Section 37-1-102(23)(B). On September 5, 2014, the State of Tennessee filed its response to the Parents' constitutional challenge to the statute. On September 8, 2014, Parents filed a memorandum of law in support of their constitutional challenge to Tennessee Code Annotated Section 37-1-102(23)(B).

On September 8, 2014, the trial court heard several pre-trial motions, including the Parents' motion alleging res judicata and spoliation of evidence. By order entered the same day, the court held that the Parents' motion to dismiss "premised upon res judicata and

collateral estoppel is DENIED." Concerning the spoliation of evidence motion and the testimony of Jeanine Gaines, the court granted the motion in part and denied it in part. Specifically, the court's order states:

> While it is the case that Ms. Gaines testified at her deposition that she made certain photographs, and that the photographs cannot be found in the files and records of DCS, there is no evidence whatsoever that the absence of the photographs from the DCS files and records is in any respect the result of wrongdoing on the part of DCS. Accordingly, the Court finds that the only appropriate sanction is to afford the Parents the benefit of an evidentiary presumption of their choice. Parents have elected to have the Court presume that the photographs, if they were to have been offered in evidence, would have corroborated the testimony of Ms. Gaines. To the extent the Court affords Parents the benefit of the evidentiary presumption, their motion for sanctions is GRANTED. In all other respects, their Motion is DENIED.
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> Parents' motion to compel DCS to produce Jeanine Gaines as a witness, a former employee who is no longer employed by DCS, is DENIED. Because Parents have attempted, without success, to locate Ms. Gaines and serve her with a subpoena, the Court will deem Ms. Gaines to be unavailable.

Concerning the Parents' motion in limine, the trial court's September 8, 2014 order states:

> 6. Parents have made a Motion in Limine consisting of three parts: (i) Parents seek to have the dependency and neglect Petition dismissed for lack of sufficiency. Having examined the Petition, the Court finds that the Petition sufficiently complies with the pleading requirements of Rule 9, Tenn. R. Juv. P.; (ii) Parents argue that DCS's anticipated expert witness, Dr. Ashford, cannot qualify as an expert witness whose opinions would be admissible under Rule 702 and 703, Tenn. R. Evid. The Court DENIES Parents' Motion in Limine without prejudice to Parents having the right to challenge the admissibility of Dr. Ashford's testimony at the time of the trial; (iii) Parents move to dismiss the Petition on the theory that DCS's proof is insufficient to meet the requirements of TCA 37-1-102(b)(23). The Court DENIES Parents' Motion without prejudice to the Parents having the right to move for a judgment as a matter of law at the close of DCS's case-in-chief.

On September 8, 2014, the trial court heard Appellants' challenge to the constitutionality of Tennessee Code Annotated Section 37-1-102(b)(23). By order of November 25, 2014, the court held that Appellants' argument was not a constitutional challenge, but rather "whether [DCS's] proof can meet the statutory definition of severe abuse." Because the issue, as stated by the trial court, could not be addressed prior to the court actually hearing proof, the court denied Appellants' motion.

The de novo hearing on the dependency and neglect petition was heard by the trial court on September 10, 11, 12 and 19, 2014. By order of October 2, 2014, the trial court found C.M. to be a dependent and neglected child as defined by Tennessee Code Annotated Sections 37-1-102(b)(12)(C), (D), (F) and (G). The court also found that C.M. was the victim of severe child abuse as defined by Tennessee Code Annotated Section 37-1-102(b)(23)(B) and that the Appellants were the perpetrators of that abuse.

On October 14, 2014, the guardian ad litem, Ms. Oxford, moved the trial court to approve her fees in the amount of $48,760. In support of her motion, Ms. Oxford filed her affidavit, along with her time records. On November 3, 2014, Parents filed a response in opposition to the guardian ad litem's motion for payment of fees. Therein, the Parents asserted that: (1) "the order of appointment [of the guardian ad litem] . . . was not served on the parents nor their attorney;" (2) "the order of appointment . . . fails to give notice to the parents that any rate in excess of that allowed under T.C.A. § 37-1-150 would be charged by Attorney Oxford;" and (3) "[t]he Juvenile Court of Williamson County previously appointed Guardian ad Litem Michelle Lipford under Tenn. Rules of Supreme Court Rule 13 in which the Juvenile Court made a finding that the State of Tennessee should pay the GAL fees, and, in fact, Michelle Lipford did bill the State of Tennessee for her fees at the hourly rate allowed under T.C.A. § 37-1-150." Parents further asserted that their "financial status had not improved since the time of Ms. Lipford's appointment and the appointment of Ms. Oxford in the Circuit Court proceedings," and they also argued that the guardian ad litem's fees are excessive. On November 3, 2014, the trial court struck the hearing on the motion for guardian ad litem fees and took the matter under advisement. On November 20, 2014, the trial court entered an order, wherein it found that the guardian ad litem's requested fees were reasonable and necessary and were incurred in the best interest of the minor child. The court also found that the Parents are not indigent; therefore, the court concluded that there was no basis to require the State to pay the guardian ad litem's fees. Accordingly, the trial court granted judgment in favor of the guardian ad litem and against the Parents in the amount of $48,160. Parents appeal.

II. Issues

Appellants raise eight issues as stated in their brief:

1. The trial court erred in not dismissing the action or limiting the action on pre-trial motions.
   A. Motion for dismissal for spoliation of evidence
   B. Motion for dismissal on res judicata
   C. Motion in Limine restricting the evidence presented by the State to that relevant to the Petition.

2. The trial court made evidentiary errors on substantive issues that prejudiced the parents
   A. The trial court erred in not allowing an examination of the child by the parents' expert in preparation for trial.
   B. The trial court erred in not allowing open unrestricted access to the records of the CASA worker
   C. The trial court allowed incompetent evidence that was prejudicial to the parents
   D. The trial court erred in not allowing parents' counsel to broadly cross examine material witnesses which caused a prejudice to the parents
   E. The trial court erred in not allowing the Father's presentation of his history and photographic evidence of the parents' relationship with the child.

3. The trial court erred in its determinations of credibility.

4. The evidence preponderates against the trial court's findings of fact and the conclusions of the court are not supported with clear and convincing evidence.

5. The trial court's finding of severe abuse is unconstitutional as applied.

6. The trial court erred in not making a finding that the State offered no evidence of reasonable efforts which would prevent removal of the child.

7. The trial court failed to provide a dispositional hearing.

8. The trial court erred in its award of guardian ad litem fees.

III. Standard of Review

The General Assembly has vested juvenile courts with "exclusive original jurisdiction" to hear allegations that a child is dependent and neglected. Tenn. Code Ann. § 37-1-103(a)(1). The statutes governing dependent and neglect proceedings require, in effect,

a two-step analysis. First, under Tennessee Code Annotated Section 37-1-129, the court is to hold a hearing and make findings as to whether a child is dependent and neglected. If the juvenile court finds the child to be dependent and neglected by clear and convincing evidence, then the court is to "proceed immediately or at a postponed hearing to make a proper disposition in the case." Tenn. Code Ann. § 37-1-129(c). Making a "proper disposition" requires the court to make a custody decision "best suited to the protection and physical, mental and moral welfare of the child." Tenn. Code Ann. § 37–1–130(a).

The fact that a child is dependent and neglected must be established by clear and convincing evidence. Tenn. Code Ann. § 37-1-129(c). While the "clear and convincing" standard is more exacting than the preponderance of the evidence standard, it does not require such certainty as the beyond a reasonable doubt standard. ***Brandon v. Wright***, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992). Nonetheless, for the evidence to be clear and convincing, it must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (citing ***Hodges v. S.C. Toof & Co***., 833 S.W.2d 896, 901 n. 3 (Tenn.1992)). The evidence should produce a firm belief or conviction as to the truth of the allegations sought to be established. ***In re M.L.P.***, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. ***In re M.A.R***., 183 S.W.3d 652, 660 (Tenn.Ct.App.2005) (quoting ***In re C.W.W***., 37 S.W.3d 467, 474 (Tenn.Ct.App.2000)).

In dependency and neglect cases, the General Assembly has directed that any appeal from the juvenile court is to be heard by the circuit court. Tenn. Code Ann. § 37-1-159(a). The appeal from juvenile court to circuit court in a dependency and neglect case is not the same as this Court's review of trial court decisions, as set out in the Tennessee Rules of Appellate Procedure. That is because, by statute, the circuit court is to "hear the testimony of witnesses and try the case de novo." ***Id***.

While the record of the juvenile court proceeding is required to be provided to the circuit court on appeal, Tenn. Code Ann. § 37-1-159(c), the circuit court is not limited to that record. On the contrary, the circuit court in a dependency and neglect proceeding may not rely solely on the record made before the juvenile court; rather, under Tenn. Code Ann. § 37-1-159(c), the circuit court must try the case de novo by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding. ***Tenn. Dep't of Children's Servs. v. T.M.B.K.***, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006). A de novo trial is "[a] new trial on the entire case—that is, on both questions of fact and issues of law-conducted as if there had been no trial in the first instance." ***Kissick v. Kallaher***, No. W2004-02983-COA-R3-CV, 2006 WL 1350999, at *3 (Tenn. Ct. App. May

18, 2006). Consequently, the circuit court is not "reviewing" the juvenile court's decision; instead, it is conducting a new proceeding as though the petition was originally filed in circuit court.

To the extent the trial court made specific findings of fact in support of the ultimate issues, we review the factual findings pursuant to Tennessee Rule of Appellate Procedure 13(d), de novo with a presumption of correctness unless the evidence preponderates otherwise. *See* ***In re H.L.F.***, 297 S.W.3d 223, 233 (Tenn. Ct. App. 2009); *see also* ***In re Adoption of A.M.H.***, 215 S.W.3d 793, 809 (Tenn. 2007). If some of the trial court's factual findings are based on its determinations of the credibility of the witnesses, then this Court will afford great weight to those credibility determinations and will not reverse such determinations absent clear evidence to the contrary. *See* ***McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995). On the other hand, the trial court's conclusions of law concerning the ultimate issues, such as a finding of dependency and neglect, are reviewed de novo without a presumption of correctness. *See* ***In re Adoption of A.M.H.***, 215 S.W.3d at 809-10.

IV. Pretrial Motions

A. Motion for dismissal for spoliation of evidence

Parents argue that the trial court's order should be reversed based upon their allegation that DCS destroyed material evidence in this case. As discussed above, Parents assert that DCS case worker, Jeanine Gaines, left her employment with the State without providing certain photographs she took at the Appellants' home. During her deposition, Appellants claim that Ms. Gaines stated that she had printed these photographs for C.M.'s DCS file, but had then deleted the photographs from her phone.

It is well settled that a trial court has wide discretion in fashioning sanctions for spoliation of evidence, and dismissal of the case is only justified in severe cases. Tenn. R. Civ. P. 34A.02; s*ee also* ***Griffith Servs. Drilling, LLC v. Arrow Gas & Oil, Inc.***, 448 S.W.3d 376, 380-81 (Tenn. Ct. App. 2014); ***Cincinnati Ins. Co. v. Mid-South Drillers Supply, Inc.***, No, M 2007-0024-COA-R3-CV, 2008 WL 220287, at *4 (Tenn. Ct. App. Jan. 25, 2008), *no perm. app. filed.* In the ***Cincinnati Insurance Company*** case, this Court specifically stated that "sanctioning a party by completely dismissing its action is a severe remedy, which can only be justified in the most serious cases. Such cases include situations where a party has intentionally concealed or destroyed important evidence in order to suppress the truth." ***Id***. at *4 (citing ***Alexander v. Jackson Radiology Associates***, 156 S.W.3d 11 (Tenn. Ct. App. 2004)). The Court then noted an example of the type of spoliation of evidence that would necessitate complete dismissal of an action, stating that "such a sanction would be appropriate in circumstances where any less severe remedy would not be sufficient to redress

the prejudice caused to a defendant by a plaintiff's spoliation of evidence." ***Id***. In this case, there is no evidence that DCS, or its employees, intentionally destroyed the disputed photographs; however, the Rules of Civil Procedure "do[] not require that a party's destruction of evidence must be intentional before sanctions are in order." ***Id***.

At the September 8, 2014 pre-trial hearing, the trial court had the following discussion concerning the disputed photos:

> THE COURT: And the issue is that the photographs were taken and now nobody has them and they can't produce them?
>
> MS. REGULI [Appellants' attorney]: Correct.
>
> THE COURT: All right. What do you contend the photographs would have shown had they not been lost?
>
> MS. REGULI: Well, it's a little bit difficult for us to say because this was a [DCS] investigation. . . . We know [Ms. Gaines] took the pictures in the house . . . . It's not just the doorknobs. Part of it involved how she went into the bedroom of K.M. and took pictures in her bedroom of things that she found in there—
>
> THE COURT: Is there testimony about what she found; has she testified?
>
> MS. REGULI: Partly, but when we found out she took photographs in the deposition, I said, oh, you'll make those available to us, right, and she said yes; so I didn't feel the need or necessity to go through and try to recall every single photograph that she took . . . .
>
> THE COURT: Okay . . . . Let me hear from the Department about why I ought to, at the very least, give the parents the benefit of an adverse inference that the photographs would not corroborate the testimony of the witness who took them.
>
> MS. CARLTON [Attorney for DCS]: I think they want the photographs to corroborate what she—there has never been an issue. We have said all along that what Ms. Gaines testified to was that when she went to the home on that particular day, the locks on the door were not turned backwards, she did not find anything that would cause her to prompt her to come to legal and file a petition . . . . And I have said all along I will stipulate [to] that . . . .

THE COURT: Okay. And so you're willing to enter into a stipulation that the missing photographs would corroborate the testimony of the witness; is that right?

MS. CARLTON: Yes.

THE COURT: All right. Ms. Reguli, what's wrong with that?

MS. REGULI: Your Honor, as I said, those are not the only photographs that were taken . . . . [T]here are other photographs other than just the doorknob . . . . [Ms. Gaines] went in [K.M.'s] room, took photographs of some things in her room . . . .

* * *

THE COURT: Ms. Reguli, what inference do you want me to draw from these missing photographs; that they are consistent with the witness's testimony or that they are inconsistent with the witness's testimony . . . . I'll give you either one; whichever one you want.

MS. REGULI: Okay. Well, the one particular photograph about the doorknob is consistent with her testimony, but the other photographs of the room of this teenage . . . .

THE COURT: Consistent or inconsistent, which do you want? I'll give you whichever adverse inference you want me to draw from the missing photographs.

I'm with you: There was a Department employee, she said she took photographs as part of her duties as an employee of the Department, the Department can't find the photos, can't produce the photos, they are part of the investigation—part of the record; they can't be produced now, they had control of the photos in the sense that they had control of the witness.

I'm going to give you an adverse inference against the Department because of the missing photos. What inference do you want me to draw; that the photos are consistent with the witness's testimony or that they are inconsistent with the witness's testimony? That's the only sanction I'm going to give in this case. I don't find any affirmative misconduct on the part of the Department, but I do find you're entitled to an evidentiary presumption, an evidentiary inference . . . adverse to the Department . . . .

> MS. REGULI: Well, they would corroborate the witness, but that's not the limit of it.
>
> THE COURT: Well, that's all I can give you; that they're either going to—I can't conjure up what these photos show because they're missing; so I'm going to give you an inference, and you want me to infer that they corroborate the witness's testimony?
>
> MS. REGULI: Right, and I would state that the failure to produce them is prejudicial to my client.
>
> THE COURT: Well, that's why I'm willing to give you the inference that you want, and that inference that you're telling me you want is that it corroborates the deposition testimony of the witness, who is now a former employee of the Department; is that right?
>
> MS. REGULI: Right, but that would go beyond that
>
> THE COURT: Then that's what the Court's ruling will be. The Court will grant an adverse inference against the Department and in favor of the . . . parents, and the inference will be that the photographs, had they not been lost, would corroborate the testimony of . . . Ms. Gaines.

Ms. Gaines' deposition, which was taken on June 30, 2014, was admitted into evidence as Trial Exhibit 19. Therein, Ms. Gaines testified that C.M.'s "door knob was turned appropriately with the lock on the inside . . . ." This testimony favors the Appellants. Therefore, given the trial court's inference that the missing photographs of the doorknob would have corroborated Ms. Gaines' testimony, there was no prejudice to Appellants. Concerning K.M.'s room, Ms. Gaines testified that she took pictures, which showed that the room was "[v]ery messy," with "vodka bottles on the dresser." Ms. Gaines also testified that she saw "lingerie" in K.M.'s room. This testimony again favors Appellants (in terms of K.M.'s ultimate credibility in the eyes of the court). Given the inference that the missing photographs would have corroborated this testimony, we conclude that there was no prejudice to the Parents. Accordingly, the trial court did not abuse its discretion, or otherwise err, in ruling on the spoliation of evidence issue. *See* ***Allstate Ins. Co. v. Watson***, No. M2003-01574-COA-R3, 2005 WL 457846, at *10 (Tenn. Ct. App. Feb. 25, 2005) (holding that assertions of spoliation regarding an undisputed issue of fact "can establish at most, harmless error"), *aff'd* 195 S.W.3d 609 (Tenn. 2006).

B. Motion for dismissal on res judicata

In their brief, Parents argue that the trial court erred, as a matter of law, when it denied their motion to dismiss on the ground of res judicata. In support of their contention, Parents cite the July 23, 2013 Agreed Adjudication and Disposition Order, in which K.M. was found to be dependent and neglected. In paragraph eight, that order states "[t]hat all other allegations in any petition or pleading are hereby dismissed." Paragraph twelve of the dependency and neglect petition regarding K.M. references the allegations made by K.M. that C.M. was locked in her room, that Mother pulled C.M.'s hair and slapped her, and noted concern that C.M. could not ask for help because she spoke no English. As discussed above, K.M.'s guardian ad litem, Ms. Lipford, also filed the original dependency and neglect petition on behalf of C.M. Based on the statement in the July 23, 2013 agreed order regarding K.M., Parents contend that the allegations that form the basis of the dependency and neglect action on behalf of C.M. are res judicata, i.e., "[t]hat all other allegations in **any** petition or pleading are hereby **dismissed**" (emphases added). From our reading of their argument, Parents also assert that the claims of dependency and neglect concerning C.M. could have been litigated together with the dependency and neglect case involving K.M.

As discussed by this Court in ***Regions Fin. Corp. v. Marsh USA, Inc***, 310 S.W.3d 382 (Tenn. Ct. App. 2009), "'res judicata' broadly refers to '[a]n issue that has been definitively settled by judicial decision.'" ***Id***. at 392 (quoting Black's Law Dictionary 1336–37 (8th ed.2004); ***Richardson v. Tenn. Bd. of Dentistry***, 913 S.W.2d 446, 459 n. 11 (Tenn.1995)). This broad definition, however, lumps together two different preclusion doctrines, claim preclusion and issue preclusion. ***Id***.[4] "Claim preclusion bars multiple lawsuits between the same parties on causes of action that were or could have been litigated in the first lawsuit." ***Id***. at 393. The party asserting the defense of claim preclusion has the burden of proving: (1) that the underlying judgment was rendered by a court of competent

[4] In more technical terms, "res judicata" is equivalent to the doctrine of "claim preclusion." ***Regions***, 310 S,W,3d at 392. Issue preclusion is equivalent to the doctrine of "collateral estoppel." ***Id***. at 393. Res judicata, as it has come to be understood in a narrow sense, is a claim preclusion doctrine that "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been raised in the former suit." ***State ex. rel. Cihlar v. Crawford***, 39 S.W.3d 172, 178 (Tenn.Ct.App.2000). To avoid confusion, we have adopted the terminology of the Restatement (Second) of Judgments and refer to the traditionally narrow definition of res judicata as "claim preclusion." ***In re Bridgestone/Firestone***, No. W2006–02550–COA–R3–CV, 2008 WL 4253516, at *5 n. 8 (Tenn. Ct. App. 2008). Likewise, collateral estoppel is an issue preclusion doctrine, ***State ex. rel. Cihlar v. Crawford***, 39 S.W.3d 172, 178 (Tenn.Ct.App.2000), and we will refer to it as "issue preclusion." We only employ the term res judicata as it broadly applies to both preclusion doctrines. ***Bridgestone/Firestone***, 2008 WL 4253516, at *5 n. 8.

jurisdiction; (2) that the same parties were involved in both lawsuits; (3) that the same cause of action was involved in both suits; and (4) that the underlying judgment was on the merits. ***Id.*** (citing ***Lee v. Hall***, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990)). By way of distinction, issue preclusion bars "a second suit between the same parties or their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit." ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987).

Applying the broad definition of res judicata to include both preclusion doctrines, the common criterion is that, in order for either preclusion to apply, the second suit must involve the same parties as the first. ***Massengill***, 738 S.W.2d at 631. Children who are the subject of the dependency and neglect proceeding are considered parties. Tenn. Code Ann. § 37-1-128(b)(2)(B)(ii)(a) (including the child in the list of parties to an action, i.e., ". . .by the parties to an action, including the parents . . .and the child. . . ."); *see also* ***State Dep't of Human Servs. v. Gouvitsa***, 735 S.W.2d 452, 457 (Tenn. Ct. App. 1987), *perm. app. denied* (Tenn. Aug. 3, 1987). The dependency and neglect petition at issue in this case involves only C.M.; likewise, the prior adjudication of dependency and neglect, upon which Appellants' rely for their res judicata argument, involved only K.M. In other words, C.M. was neither a party to the previous dependency and neglect adjudication, nor the subject of that adjudication. Accordingly, in the previous dependency and neglect adjudication, the trial court did not specifically address the allegations of dependency and neglect regarding C.M. In this regard, the same cause of action was not involved in both suits. For these reasons, the doctrine of res judicata is inapplicable in this case.

C. Motion in Limine restricting the evidence presented by the State to that relevant to the Petition

Appellants contend that the trial court should have limited DCS's action as a matter of law. Specifically, the Parents argue that the trial court erred in denying their motion in limine to "limit the State's proof to be consistent with the allegations set forth in [its] petition." The Parents aver that the trial court's finding of severe child abuse was a "de facto termination of their parental rights in that . . . once there is a finding of severe child abuse in a dependency and neglect proceeding, the State is not required to relitigate that issue in a petition for termination of parental rights." In their appellate brief, Appellants do not specify the exact evidence that the trial court failed to exclude. However, as discussed above, in their motion in limine, which was filed on or about August 24, 2014, the Parents specifically ask the trial court to exclude the following: (1) C.M.'s medical, dental, or optical records; (2) medical history provided by the Parents; (3) letter written by Parents for C.M.'s adoption; (4) orders of the Juvenile Court; (5) People's Church Creative Learning Center records; (6) C.M.'s adoption or birth records; (7) Dr. Ashford's testimony. We glean from their appellate arguments that the Appellants contend that the admission of the foregoing evidence was error

because DCS's petition did not contain allegations regarding medical, dental, or optical neglect, or other allegations that would make the foregoing evidence material and relevant. Appellants appear to make a due process argument that because the trial court's adjudication of severe child abuse was based on evidence that should have been excluded as immaterial to DCS's original petition, this Court should reverse the trial court's order.

In the first instance, due process is not static; rather, its requirements depend on the particular situation presented in a case and, in particular, on three factors: (1) the private interest affected by state action; (2) the risk of erroneous deprivation of those rights; and (3) the government's interest. ***Mathews v. Eldridge***, 424 U.S. 319, 335 (1976). As discussed above, Appellants' argument appears to rest on a lack of notice that DCS was relying on any ground other than those specifically set out in its petition. Regarding notice of allegations, our Supreme Court has stated that, "[e]laborate procedures at one stage may compensate for deficiencies at other stages." ***Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys.***, 863 S.W.2d 45, 50 (Tenn. 1993). In other words, due process is satisfied when proceedings in one tribunal give notice of the allegations prior to a de novo appeal in the second tribunal. ***Id***. Under such circumstances, the parties have full notice of the allegations and full opportunity to present their defense; accordingly, there is no risk of erroneous deprivation. ***Id.***

Although allegations of medical, dental, and optic neglect were not raised in the original petition, these allegations were tried in the Juvenile Court. Specifically, DCS presented evidence concerning: (1) the child's medical treatment (or lack thereof); (2) the issue with the child's eyeglasses; and (3) the child's dental problems. Based upon this evidence, the Juvenile Court held that "the record is replete with the parents' failure to provide necessary medical and dental care for the child." The Juvenile Court further found that the Appellants had failed to pick up C.M.'s eyeglasses in a timely manner. So, although the petition itself did not set out these allegations, because they were tried in the Juvenile Court proceedings, we conclude that sufficient notice of the specific details of the allegations supporting the charge was provided at least by the time of the de novo hearing in the Circuit Court. See ***Bignall v. North Idaho College***, 538 F.2d 243, 248 (9th Cir.1976) (although the notice prior to the hearing was defective, by the time of the trial de novo there was ample notice to satisfy due process). We, therefore, hold that the claim of inadequate notice of the allegations supporting DCS's case is without merit, and there was no violation of due process.

V. Evidentiary Errors

Before turning to the Appellants' specific evidentiary issue, we first note that "[d]ecisions regarding the admission or exclusion of evidence are entrusted to the trial court's discretion. Thus, reviewing courts will not disturb these decisions on appeal unless the trial

court has abused its discretion." ***State v. Banks***, 271 S.W.3d 90, 116 (Tenn. 2008) (citing ***State v. Robinson***, 146 S.W.3d 469, 490 (Tenn.2004); ***State v. James***, 81 S.W.3d 751, 760 (Tenn.2002)). Additionally, trial courts have discretion to determine the applicability of a hearsay exception. *See* ***Arias v. Duro Standard Prods. Co***., 303 S.W.3d 256, 262 (Tenn. 2010) (citing ***State v. Stout***, 46 S.W.3d 689, 697 (Tenn.2001); ***State v. Stinnett***, 958 S.W.2d 329, 331 (Tenn.1997)). An abuse of discretion will be found only where the trial court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party." ***Id.*** (citing ***Konvalinka v. Chattanooga–Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 358 (Tenn.2008)).

A. Examination of child by the parents' expert

On June 17, 2014, Appellants filed a motion, wherein they asked the trial court "to compel the Department of Children's Services to allow the parents to meet with the child with their experts, Dr. Janie Berryman and Dr. Trey Monroe in preparation for the final hearing . . . ." In their appellate argument, Parents appear to mischaracterize their motion. Instead of requesting a meeting between the child and their experts, as set out in context above, the Parents' motion requested that they be allowed to meet with the child in the presence of their experts. The substance of the Parents' motion is highlighted by the guardian ad litem in her June 20, 2014 response in opposition to Parents' motion. Therein, the guardian ad litem took issue with the Parents' contact with the child, not with the Parents' experts' contact with the child: "The child has been very traumatized by these parents. This child has been diagnosed by two different professionals with having post-traumatic stress disorder. The possibility of contact with these parents causes this child to shut down emotionally. It is vital to the well-being of this child that there be no contact whatsoever with these parents until final resolution of this case." In addition, the guardian ad litem argued that, "[t]he parents have had no contact since January 16, 2014. There is no good reason to cause this child to have to suffer contact with these parents prior to the hearing on this appeal."

By order of July 7, 2014, the trial court denied the Parents' motion, stating that "the motion to compel DCS to produce the child to the expert witnesses of the parents . . . is denied at this time[;] however, this order does not prohibit the parents from seeking an evaluation of the child during the course of the proceedings which the Court may allow if it deems it is appropriate for adjudication or disposition." In fact, the evidence at trial indicates that both Dr. Berryman and Dr. Monroe met with C.M. prior to the hearing. Dr. Berryman testified that she had four, forty-five minute sessions with C.M. Dr. Berryman explained that she had also reviewed Dr. Monroe's records. In that the trial court did not specifically bar Appellants' experts from evaluating the child, and in light of the fact that the record also

shows that both Dr. Berryman and Dr. Monroe had contact with and observed C.M. before the hearing, we cannot conclude that the trial court abused its discretion in denying Appellants' motion to meet with the child in the presence of their expert.

B. Access to the CASA records

In its July 7, 2014 order, the trial court also ruled on the guardian ad litem's July 17, 2014 motion to quash Appellants' subpoena for the production of documents by CASA worker Ann Best. By their subpoena, Appellants sought "all records, notes, communications, text messages, emails, letters/correspondence, interview notes, and any other documents and correspondence created by . . . relied upon . . .received by . . . and sent by [Ann Best, CASA representative]." In her motion to quash, the guardian ad litem argued, *inter alia*, that "emails and communications she has had with Ms. Best should be protected by the attorney work product privilege." CASA filed a similar motion to quash. As set out in full context above, in its July 7, 2014 order, the trial court held that

> any internal communication that involved only the CASA administrators or other volunteers seeking advice on the case or how to proceed are not discoverable; but all communications with other attorneys, witnesses, or other persons are subject to disclosure to the parents. CASA is subject to the protective order of the statute and will redact the names and identifying information of any person who made a disclosure of abuse, however everything else, including the nature of the allegations and the surrounding circumstances is discoverable . . . .
>
> CASA is not required to copy every document that it received from outside sources, such as adoption records, medical records, etc., as CASA has held out to the Court that those records are voluminous. However, CASA shall provide a list of all the documents received and/or reviewed and make those documents available for inspection.

Based on the trial court's holding, *supra*, it appears that the trial court only denied Appellants those portions of the CASA records that are statutorily protected. Specifically, Tennessee Code Annotated Sections 37-1-409(a)(1) and (2) deem the following information confidential: (1) "reports of harm . . . and the identity of the reporter;" (2) "the name of any person reporting child abuse." Because the trial court only limited the disclosure of CASA records to comply with the foregoing statute, we cannot conclude that the trial court abused its discretion. Indeed, had the trial court allowed Appellants "unrestricted access" to CASA's records, it would have been in violation of the statute.

C. Incompetent, prejudicial evidence

Parents allege that the trial court erroneously allowed hearsay testimony of several witnesses over their objection. We reiterate that the admissibility or exclusion of evidence rests within the trial court's sound discretion, and we will only reverse those evidentiary decisions for an abuse of discretion. ***State v. Banks***, 271 S.W.3d at 116; ***Pack v. Boyer***, 438 S.W.2d 754, 758 (1968). Additionally, trial courts have discretion to determine the applicability of a hearsay exception. *See* ***Arias***, 303 S.W.3d at 262 (Tenn. 2010). That being said, the admission of improper evidence of a fact in issue is harmless where the verdict or judgment is supported by sufficient competent evidence. ***Berke v. Chattanooga Bar Ass'n,*** 436 S.W.2d 296, 304 (Tenn. Ct. App. 1968).

In her direct testimony, Ann Best testified concerning out-of-court statements relating to Appellants' disclosure of C.M.'s age on her preschool forms. The relevant portion of Ms. Best's testimony is as follows:

> Q [to Ms. Best]. Okay. And what were the next record—you said there were some other school records, I think from The People's Church.
>
> A. Yes. I also went to the Creative Learning Center at The People's Church. C.M. was enrolled at the Creative Learning Center from August to December of 2012, and I—I was given the registration form . . . .
>
> Q. Okay. And that's—at the top it says, "Creative Learning Center, The People's Church" . . . and it shows [Father's] signature at the bottom?
>
> A. Yes . . . . That was the only thing in C.M.'s file. And what I noticed on the Creative Learning Center registration form is that C.M. was registered with a birth date of September 30, 2008, not the right month, day, or year. I also was told that she was enrolled in the three-year-old class because according to that birth date, she would have been three, turning four . . . .
>
> MS. REGULI: Judge, I'm going to object to the hearsay of what report somebody else has given her.
>
> THE COURT: Sounds to me like it's an expression of a then-existing mental or emotional condition; so I . . . think it comes in under 803-3; so the objection is overruled.

* * *

> A. C.M. was in the three-year-old class, as I said, and a couple of months into the . . . semester, [Appellants] requested that she be in the four-year-old class. .
>
> MS. REGULI: Now, Judge, now I'm going to enter an objection. Now, we're into double hearsay.
>
> THE COURT: No, we're not.
>
> MS. REGULI: I'm sorry, what somebody has told her—what somebody else has told her that the [Appellants]—
>
> THE COURT: Well, I'm sorry, I'm going to overrule that objections.

Ms. Best then testified that:

> The school said that the [Appellants] did not have any official birth date records for C.M., and they now think she's four, turning five, and that she would be more appropriate in the four-year-old class because she's acting very babyish at home. The school strongly objected to that move because she was fitting very well in with the three-year-olds; however, they made an accommodation for the [Appellants] and made a spot for her in the four-year-old class, at which time C.M. was—did not return to the school, and they said they unenrolled her due to the fact that they were going to take her to speech therapy.

In their brief, Appellants contend that the foregoing testimony impugns their credibility. However, our review of the record indicates that, in his testimony, Father admits that he misstated the child's date of birth in her admission paperwork, which was admitted as Trial Exhibit 30. Specifically, Father testified, in relevant part, as follows:

> Q. Well, how old was [C.M.] when she came from China?
>
> A. She was five when she—when we got her. I know that.
>
> Q. And all of a sudden she's three a couple of months later?
>
> A. I don't know what you mean.
>
> Q. That's what you put down here, 2008, she was three. That's what you told

the Creative Learning Center, isn't it?

A. If that's what's on the form, that's—that's what I wrote. I don't recall that I actually put that on there for a reason. . . . I didn't have much time that morning, and I just . . . raced through that form.

Q. You enrolled her in—she was enrolled in a three-year-old class, was she not?

A. I believe so, yes.

Q. And you told the Creative Learning Center that she was three, did you not?

A. I don't recall telling them that at all.

Father was then presented with the registration forms that he admitted to filling out, and the testimony continued as follows:

Q. Where you filled in the birth date, September 30, 2008.

A. Right.

Q. Okay. And your testimony is you just scribbled something down?

A. Yeah.

Q. Okay. So even if the birth date was wrong, you knew how old your daughter was, and you misrepresented it and you told the school that she was three when you knew she was almost six.

* * *

A. This was a mistake. Again, I flew through this. And I always have trouble with dates when it comes to my children's ages. So I was trying to reverse engineer that, and I was in a hurry, and I wrote that. There was no ill intent.

Even if we allow, *arguendo*, that Ms. Best's statements were improperly allowed over Appellants' hearsay objection, Father's testimony provides an independent basis for the trial court to conclude that he misled the preschool by putting an erroneous birthdate on C.M.'s paperwork when he admittedly knew the child was not three. In this regard, Father's

testimony renders any mistake in the admission of Ms. Best's testimony harmless error. ***Berke,*** 436 S.W.2d at 304.

Appellants' second objection concerns the alleged lack of foundation or personal knowledge for the testimony by Ms. Best that C.M. was not treated for a parasite infection until March 2014, which was after she was placed in foster care. Appellants' objection involves the following testimony from Ms. Best:

> A. I'll also point out at [C.M.'s] first visit on May 7, 2013, the pediatrician did two additional tests. One was a bone growth test and one was a test for the parasite, Giardia.
>
> The bone growth test results came back as showing that she had bone growth consistent with a child between the ages of six and seven, and the parasite test showed that she was positive for the parasite, Giardia.
>
> Q. Okay.
>
> A. The parents were informed of that positive test result, and they told the pediatrician that she was asymptomatic and they denied treatment, which is a five-day course of antibiotics.
>
> Q. Did you ever have a discussion with [Appellants] about that?
>
> A. I did not.
>
> Q. Did there come a time later where the parasite became a problem?
>
> MS. REGULI: Judge, I'm going to object unless she can lay a foundation as to how she would have personal knowledge of that unless—since it's not in these records.
>
> THE COURT: Overruled.
>
> A. Yes. The—when she went into foster care, the foster parents noticed that she had very unusual bathroom habits, she had diarrhea, it was very pungent. And they had these records from the pediatrician; so they took her to be treated for the parasite in February of 2014.
>
> At that time, she still tested positive for the parasite and she—the foster parents did opt to treat her with the five-day course of antibiotics.
>
> She was retested in March and she was negative for the parasite . . . .

Aside from Ms. Best's testimony, the record contains other evidence concerning C.M.'s issues with the intestinal parasite. Trial Exhibit 30 contains C.M.'s medical records. These records contain a notation from May 17, 2013, indicating that C.M. had tested positive for Giardia. Her pediatrician noted that she was asymptomatic, i.e., no diarrhea or abdominal pain, at that time.

Ashley Snipes, C.M.'s kindergarten teacher testified, in pertinent part, as follows:

> A. C.M. had severe gas [] a day earlier in that week, and the student that sits next to her was home with a stomach virus. C.M. spent many trips going back and forth the to the bathroom, and the gas smelled very viral, it was a horrible smell, it was very frequent, and so I sent her to the nurse, thinking that she had a stomach virus and to please call the mom.
>
> And so the nurse did, and the mom ended up asking to speak with C.M. on the phone. C.M. started crying and the nurse could hear—hear the mom yelling—
>
> * * *
>
> Q. So I suppose you inquired why she wasn't going home?
>
> A. I did.
>
> Q. And—well, let me just ask this: Did you subsequently have a conversation with mom about that?
>
> A. The next day I got a phone call in my classroom from the mom, yell at me—yelling at me, telling me I need to get C.M.'s number, and that the reason C.M. was in the bathroom is that she was fascinated with the hand dryers. We—and I told the mother we do not have hand dryers in out bathroom, and she said, "Well, it's the soap dispenser then" . . . .

Even assuming, *arguendo*, that Appellants' objection to Ms. Best's testimony should have been sustained, there is sufficient independent corroborating testimony and evidence to render harmless any error with Ms. Best's testimony. Exhibit 30 corroborates Ms. Best's testimony that the child had the parasite, and Ms. Snipes' testimony corroborates Ms. Best's allegedly hearsay testimony that the child was symptomatic.

Parents also objected to Ms. Best's testimony concerning C.M.'s dental care:

A. Dr. Dublin was the family dentist where C.M. went for an appointment on July 24, 2013. This was her first dental appointment.

MS. REGULI: And, Your Honor, I would enter an objection to relevance on this. There's nothing in the Petition that has any mention of anything about dental in the D&N petition.

THE COURT: It's overruled.

Q. So that was [C.M.'s] first visit to a dentist, but [Appellants] had indicated prior—they told people that she was going to the dentist regularly.

A. That's correct. They told a social worker from Adoption Assistance, Inc. and they told the pediatrician.

Q. And what was the purpose of that visit; the first visit? Was it just a well check?

A. No. Dr. Dublin told me that she was there because of pain in her lower jaw.

MS. REGULI: Judge, I'm going to object to hearsay on that.

THE COURT: Well, the record that I'm looking at says the reason for visit is a cavity. Am I on the same page?

MS. REGULI: Yes, Sir.

THE COURT: And, Ms. Best, is this something—this statement about complaint of pain, something that was related to you by the dentist who treated—who treated her, or who was it related to you by?

THE WITNESS: It was related—I—I had a face-to-face interview with the dentist, who then later referred C.M. She did not treat C.M. that day because there was so much decay in her mouth after she did the x-ray. She felt there was a need for an extraction; so she referred C.M. to a specialist, the Pediatric Dentistry, Dr. Ryan Craiger.

THE COURT: Okay. All right.

The foregoing testimony is corroborated by independent evidence in the record. Trial Exhibit 30 contains Dr. Kyna C. Dublin's records, which state "pain on LL." Likewise, Dr. Ryan A. Cregger's records, which are also contained in Trial Exhibit 30, state that "PT having pain on left side." In light of the independent testimony corroborating Ms. Best's statements, we conclude that the trial court's decision to overrule Appellants' objection to the testimony was, at most, harmless error.

Appellants' remaining issues concerning the denial of their objections to certain testimony involve the allegation that Appellants attempted to obtain letters from C.M.'s medical providers. In relevant part, Ms. Best testified:

> A. I [Ms. Best] got a call from [C.M.'s] providers. I got a call from the eye care provider saying that [Mother] had called and—
>
> MS. REGULI: Judge, I'm going to respectfully object to hearsay.
>
> THE COURT: I'm going to hear it and I'll determine whether it's hearsay or not. Go ahead.
>
> A. (Con't) The eye doctor said that [Mother] had called and [asked] would he please provide a letter from his practice saying that the fact that he—that the [Appellants] did not have the eyeglasses was—was his fault.
>
> MS. REGULI: And—and, Your Honor, he has testified, so this is duplicative of his testimony.
>
> THE COURT: It's overruled.
>
> A. (Con't) I asked Dr. Dunn if he was going to provide the letter. He said, "Absolutely not." . . . . I also got a call from the Adoption Assistance people that [Mother] had called and would they please provide a letter. I don't really recall what purpose, but they also declined to provide a letter.
>
> I was in the pediatrician's office meeting with the pediatrician when [Father] called to make an appointment, and he wanted the pediatrician to write a letter to say that he was not allowed to schedule a physical [for C.M.] until May 7th of that year because insurance would not cover it. The pediatrician would also not provide that letter.
>
> MS. REGULI: Same objection, Judge.

THE COURT: Same ruling.

Again, Ms. Best's testimony is corroborated by independent evidence. For example, Dr. Daxx Dunn, C.M.'s optometrist, testified that the Parents failed to pick up C.M.'s eyeglasses, but that Appellants had telephoned his office on January 16, 2014 to request that he "make a statement noting we had made a mistake and not called when the glasses [were] in. . . ." Dr. Dunn went on to state that there was a typographical error in his computer system and that the Parents' phone number was incorrect; however, he testified that this error, at most, caused a two week delay. From the record as a whole, we conclude that the trial court did not err in allowing Ms. Best to testify concerning Appellants' request for letters from certain providers.

D. Cross examination of material witnesses

Parents next argue that the trial court erred in limiting their cross-examination of K.M. and N.J. As to K.M.'s testimony, the trial court limited Appellants' cross-examination concerning the fact that K.M. had posted certain salacious photographs of herself online:

> Q [to K.M.]. [A]nd these pictures that you say you posted . . . .
>
> THE COURT: Ms. Reguli—does this relate in any fashion to the witness's credibility?
>
> MS. REGULI: Yes.
>
> THE COURT: All right. I'm going to allow you a little bit of leash here, but I expect to see you connect up this line of questioning to something that's relevant for the court to determine pretty quickly.
>
> And just so the record's clear, just so you understand, the witness has testified on Direct that she did certain things, she posted certain photographs, and she testified about that.
>
> Now, if you want to show that that testimony was false, okay, but if you just want to elaborate on the content of the photographs, I'm having a hard time understanding what that has to do with anything that I have to decide, but I'm going to—this is Cross-examination and I'm going to allow you, but you need to understand the Court is not going to receive specific acts of conduct or the—of this nature for the purpose of arguing that there is some kind of character issue that relates to credibility. Is that understood?

Ms. Reguli then attempted to pass a collection of the photographs to the witness. DCS objected, arguing that "this is just done for the purpose of embarrassing this witness and there's no relevance to it to this case." The trial court allowed the photographs to be marked for identification purposes, but noted that:

> I do not see how this exhibit advances an issue that I have to decide, one of which is whether the witness has credibility and is entitled to be believed. I don't see anything in this proposed exhibit that speaks to that.

The trial court then allowed Ms. Reguli to make an offer of proof. In the offer of proof, Appellants argued that:

> the trial court limited the [Appellants'] ability to impeach this witness as anticipated under Tenn. Rules of Evidence 608 and 616. In particular, as [Appellants'] counsel attempted to cross examine this witness on her aberrant behavior, including engaging in pornographic activity on the internet and her prejudice against her parents, the Court cut off counsel and did not allow the testimony. This evidence is material and relevant to [Appellants'] ability to defend against this action.

Tennessee Rule of Evidence 608 states, in relevant part:

> (b) Specific Instances of Conduct - Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness . . . may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness . . . . The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:
>
> (1) The court . . . must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry . . .

Tennessee Rule of Evidence 616 provides that "[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Given the nature of these photographs and the fact that K.M. conceded, on direct examination, that she did, in fact, post the photographs to the internet, the question of her credibility with regard to this conduct was established. As the

trial court noted, unless Ms. Reguli was attempting to discredit K.M.'s earlier admission, there was no need for further testimony concerning the photographs. Furthermore, the mere fact that K.M. posted these photographs of herself is not probative on the question of whether she was biased against Appellants. Accordingly, we conclude that the trial court correctly limited Appellants' cross-examination of K.M. by excluding the photographs.

Appellants also argue that the trial court erred in limiting their cross-examination of N.J. During cross-examination, Ms. Reguli questioned N.J. about the configuration of the locks on the doors inside Appellants' Alabama house. N.J. testified, in her deposition, that she did not remember the exact locking mechanism, i.e., "I can't remember the exact lock, but it was either a push or a turn." Despite N.J.'s deposition testimony, Ms. Reguli spent much of her cross-examination questioning N.J. about the particulars of the locks:

> Q [to N.J.]. And you said this was the doorknob and that this was the lock here in the door, right?
>
> A. yes, Ma'am.
>
> Q. And you explained it as a lock that you turn, correct?
>
> A. Umm. Yes, M'am.
>
> Q. Right?
>
> A. I don't—yes
>
> MS. CARLTON [Attorney for DCS]. Objection, Your Honor. I thought that her testimony was that you pushed the button.
>
> MS. REGULI: No, I asked her in her—
>
> THE COURT: I'm—I'm going to—I'm going to allow this line of questioning for a little bit longer. I'm assuming that there's a point here somewhere.

Ms. Reguli continued questioning the witness about her deposition. The trial court then stated:

> THE COURT: Ms. Reguli, I want to allow you leeway to cross-examine the witness, but I think it's only fair to tell you that the Court is not particularly impressed with the witness's inability to recall the details of a doorknob in a

house that she saw only one time in her life, that being a weekend in the Fall of 2012, some two years ago, and her ability to recall or not recall the latching mechanism on a doorknob is really not getting a lot of traction with me; so I don't—I want you to cross-examine all you want, but I—but I don't think it's fair for you not to know that this not making much headway with the Court.

MS. REGULI: Well, and respectfully, Your Honor, this is the crux of the case. It—

THE COURT: Well, no, Ma'am, the crux of the case—there are many cruxes to this case, but the—the locks on the house in Franklin, Tennessee, are much more important than the physical configuration of the locks on the house in Birmingham, Alabama. That's the point that I'm trying to impress with you.

So, I'm going to give you a little bit more time to develop what I think you're trying to establish, which is that the witness's recollection of the lock in the house in Birmingham, which she saw in the Fall of 2012, is not clear and that she cannot clearly testify about that lock.

If that's the point that you're trying to make, you have made it, but if you want to make it some more, I'll give you a little bit more time to make it.

Appellants made an offer of proof concerning the trial court's limiting N.J.'s testimony. Therein, they argued that "[t]he ability to continue on this line of questioning would have revealed to the trial court that the testimony of [N.J.] was substantially different than that of [K.M.] on the description of the locking mechanism."

Tennessee Rule of Evidence 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As noted by the trial court, the point had been made that N.J. did not remember the configuration of the locks in the Alabama home. Furthermore, as the trial court states, the configuration of the Alabama locks was not as probative as the configuration of the locks in the Tennessee home, where C.M. had primarily lived with Appellants. Furthermore, concerning Appellants' contention, as set out in the offer of proof, that N.J.'s testimony was substantially different than K.M.'s, the trial court heard the testimony of both witnesses and could easily compare the details related by each witness. In light of the lack of probative value of N.J.'s testimony, and given the fact that the trial court heard both witnesses testify in person, we conclude that the trial court did not abuse its discretion in limiting Ms. Reguli's cross-examination of N.J. regarding the locks in the Alabama home.

E. Evidence of Father's history with child and photographic evidence

In Trial Exhibit 26, Appellants entered over 180 photographs into evidence. These photos are of Appellants, their extended family, and C.M. In relation to these photos, Ms. Reguli asked Father to describe what was depicted in the photos, and he testified, for several pages of transcript, along these lines:

> So this is the lady from China on the left, kind of coaching [C.M.] to get to know my wife. Here I am, seeing her for the first time. It was so wonderful. And we had the—I had the camera on her and I was giving her something. And that was what she got. She got this little bear, and it was cute because she didn't hold it right side up; she held it upside down. But this is the first picture of us together with her. . . . Now, here we are at the—we're at the notary in Shanghai, and she was having a sucker and she seemed to be getting fairly content, but a bit nervous . . . .

After several more minutes of testimony, the trial court interjected:

> I get the point. There is not enough time in the world for us to go through every day of this child's life. You've [Ms. Reguli] got to focus on what is going to be relevant and helpful to your clients' case, and it is not helpful to the Court for you to present every random fact that you can—that you have at your fingertips and expect me to sort it out and figure out what's—what's relevant, what's helpful; so you're going to have focus if you want to help me understand the evidence that you want me to consider.
>
> MS. REGULI: Well, then, Your Honor, I think, respectfully, I have to withdraw my witness until the State's put on all their proof. Like I said, I know what they're going to say and do.

In the first instance, based upon the foregoing dialogue, the trial court did not, in fact, limit Ms. Reguli's examination of Father. Rather, the court admonished Ms. Reguli to focus her examination on those things that were relevant and helpful to her client's case. After these instructions by the trial court, Ms. Reguli abruptly chose to withdraw her witness. Ms. Reguli recalled Father later in the hearing but did not pursue the line of questioning concerning the photographs. Furthermore, if Ms. Reguli was under the impression that the trial court was excluding the photographic evidence or was unfairly limiting her ability to examine her witness, she was obligated to make an offer of proof under Tennessee Rule of Evidence 103(a)(2), which states that "[e]rror may not be predicated upon a ruling which . . . excludes evidence, unless a substantial right of a party is affected and. . . [i]n case the ruling

is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer . . . ." In the absence of such offer of proof, this issue is effectively waived.

VI. Credibility

In its October 2, 2014 order adjudicating C.M. to be a dependent and neglected child, the trial court made a specific finding that Appellants were not credible witnesses. The court explained:

> [Father and Mother] were not credible witnesses. First, [Father] offered testimony that was inherently implausible and which did not survive cross-examination unimpeached. He attempted to explain away certain inconsistent statements as being manifestation of a poor memory for dates. His demeanor was evasive and his testimony was unpersuasive. [Mother] was even more unworthy of belief than her husband. Her testimony was implausible, contradicted by other witnesses, impeached with evidence of false statements, and internally inconsistent and contradictory. Her manner of testifying was evasive and argumentative. Her emotional affect and demeanor were contrived, unconvincing, and suggestive of evasion and deception. Most troubling of all was her persistent casting of blame and assignment of fault to others. The upshot of her testimony is that everyone is against her and making things up about her. The Court declines to credit her testimony in any material respect.

As noted above, when the trial court's findings are based on its determinations of the credibility of the witnesses, then this Court will afford great weight to those credibility determinations, and will not reverse such determinations absent clear evidence to the contrary. *See* ***McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995). We have reviewed the entire record in this case, including the testimony of both of the Appellants. From our review, the trial court's summation of Appellants' credibility is well taken and supported by myriad contradictions in their testimony in the record. For example, K.M. testified that Appellants insisted that she tell others that she was two years younger than her true age. K.M. did not discover her true age until she found her adoption records. K.M.'s testimony is bolstered by the clear evidence that Appellants also reported to C.M.'s preschool that she was two years younger than her actual age. During his testimony, Father testified that he did not know about C.M.'s low kindergarten-screening score until "some point later;" however, C.M.'s teacher, Ms. Snipes, testified that Father was present when she initially disclosed C.M.'s scores.

Mother stated to Ms. Snipes that she had installed wooden letters and an alphabet strip in C.M.'s room to help the child identify English characters; however, the DCS caseworker testified that neither of these items was present when she visited the Appellants' home. Both of the Appellants stated to various providers that C.M. had been seen by a physician in September 2012 when, in fact, the record indicates that C.M.'s first doctor's visit was on May 7, 2013. These discrepancies, coupled with the trial court's findings concerning the Appellants' demeanors and emotional affect at trial, support the trial court's credibility finding, and there is no clear evidence in the record to dispute it. ***McCaleb,*** 910 S.W.2d at 415.

VII. Finding of Severe Child Abuse

Tennessee Code Annotated Section 37-1-102(b)(12)(G) defines a dependent and neglected child, in relevant part, as a child "who is suffering from abuse or neglect." This definition also includes a child "whose parent, guardian or custodian neglects or refuses to provide necessary medical . . . care" and a child "who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others." Tenn. Code Ann. §§ 37-1-102(b)(12)(D), (F).

"Severe child abuse," as is relevant to the instant appeal, is defined as:

> Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or intellectual disability, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct.

Tenn. Code Ann. § 37-1-102(b)(21)(B). In this regard, severe child abuse is abuse or neglect with a higher threshold. In other words, a severely abused child is, necessarily, dependent and neglected. Accordingly, if we conclude that the trial court's finding of severe child abuse is supported by clear and convincing evidence in the record, we will pretermit discussion of the court's dependency and neglect finding, as this finding is subsumed in the finding of severe child abuse.

As set out in the trial court's October 2, 2014 order,

> [t]he abuse alleged in this case can be characterized in two general categories. First, neglecting or refusing to provide necessary medical care and educational services and, second, physical abuse in the form of pinching, pulling [C.M.'s] hair, and locking or otherwise confining her to her room for unreasonable

periods of time.

Concerning its finding of severe child abuse, the trial court's order goes on to state that:

> The Court further credits the testimony of Dr. Linda Ashford, a qualified expert witness that:
>
> (1) In 2014 [C.M.] was not functioning at a level consistent with a child who has been in the U.S. for nearly two years after adoption from China;
> (2) This suggests that [C.M.'s] environment in the adoptive home was neglectful and abusive and;
> (3) [C.M.] has probably already suffered from post-traumatic stress disorder; and
> (4) If returned to the adoptive home environment, it is reasonably foreseeable that [C.M.] would suffer profound physical, emotional, and psychological sequelae in the future.
>
> Therefore, the Court finds that the physical abuse of [C.M.] has been proved by clear and convincing evidence to be severe abuse as defined by 37-1-102(b)(21)(B) . . . . [T]he Court finds, by clear and convincing evidence, that the perpetrators of the abuse of [C.M.] are her adopted parents, [the Appellants].

The trial court's order further provides that C.M. "is the victim of severe abuse at the hands of one or both of her parents, [the Appellants], and that if only one of the parents was the perpetrator of the abuse, the other parent failed to protect [C.M.]."

Although the trial court couches the abuse against C.M. as "physical abuse," we are not bound by that characterization as we review the trial court's conclusions of law de novo. While we agree with the trial court's ultimate conclusion that C.M. is the victim of severe child abuse as defined at Tennessee Code Annotated Section 37-1-102(b)(21)(B), as set out in its order, the trial court's findings of fact support a finding that C.M. is severely abused due to the neglect she suffered at Appellants' hands, as opposed to any "specific brutality." However, this may be a distinction without difference as the facts in this case cumulatively satisfy all of the statutory definitions for severe child abuse, i.e., "specific brutality," "abuse," and/or "neglect". Tenn. Code Ann. §37-1-102(b)(21)(B). In its order, the trial court made the following, relevant factual findings concerning severe child abuse:

> The parents admit that prior to adoption, they were informed that [C.M.] was a child with special needs, and they agreed in writing that, "As soon as we bring her home, we will take her to the doctor and have her conditions fully

evaluated. We will provide for all medical needs she will need" . . . . The parents also admit that from the time they brought [C.M.] to the U.S. from China, there was a delay of 14 months before [C.M.] was first examined by a medical doctor, a delay of 16 months before she was first treated by a dentist, and a delay of 19 months before she was examined by an optometrist.

On May 8, 2012, Rachel Ward, a social worker with Adoption Assistance Incorporated, performed a post-adoption assessment of the parents and [C.M.]. This assessment involved an in-person visit between Ms. Ward and the parents. At the time, the parents told Ms. Ward that [C.M.] had a well visit scheduled with Dr. Sharon Brown for May 15, 2012. This statement by the parents to Ms. Ward was false. At trial, [Father] denied any knowledge of this false representation and testified that if it was, in fact, made, as reported by Ms. Ward, the person who made the representation was his wife. [Mother] denies making any misrepresentation and attributes the discrepancy in the post-adoption report to a misunderstanding.

* * *

In April 2013, Ms. Ward again came to the parents' home for a post-adoption visit. At that time, Ms. Ward was told by [Mother] that [C.M.'s] last doctor visit was with Dr. Langston in September 2012. This was also a false statement. [Mother] testified that she had taken [C.M.] with her when she had taken their other adopted daughter, [K.M.], to an appointment with Dr. Langston, she had expected that Dr. Langston would work [C.M.] in as a patient that same day, but that this work-in did not happen. Again, [Mother] offered no plausible explanation for this discrepancy.

When [C.M.] was eventually examined by a U.S. physician in May 2013, she was diagnosed with an intestinal parasitic infection called giardiasis. Although [C.M.] was asymptomatic in May of 2013, the parents were told what symptoms to look for and that when [C.M.] became symptomatic, then treatment ought to be sought. The evidence proves that [C.M.] became symptomatic at least as early as the fall of 2013, but that the parents never sought treatment. [C.M.] was eventually treated for the infection in March 2014, after she was removed from the parents' custody.

Regarding dental care, the first time [C.M.] saw a dentist was on July 24th, 2013, because of pain. The dentist diagnosed severe decay and referred [C.M.] to a specialist. The specialist prescribed a 7-day course of antibiotics and extracted the tooth on August the 14th, 2013. He also performed a routine dental cleaning.

On August 3rd, 2013, [Father] took [C.M.] to an optometrist to perform

a routine examination and eyeglasses were prescribed for near-sightedness. At the time of this visit, [Father] filled out a patient history indicating "no pertinent medical history." The eyeglasses prescribed for [C.M.] were not picked up by the parents until January 2014.

These facts regarding [C.M.'s] medical care were proven beyond reasonable dispute. What is most troubling about these facts is that they do not exist in a vacuum. Both parents have testified that they knew [C.M.] was a child with special needs. They both testified that prior to the adoption, she was physically small for her reported age. They both testified that they were informed by the orphanage that [C.M.] was wearing diapers and drinking from a bottle as late as age three or four. [Mother] testified that [C.M.] is developmentally delayed. They excused the delay in seeking medical treatment by claiming they relied on a medical examination conducted in China at the time of the adoption. This examination, conducted by Chinese physicians, was a required part of the adoption process. The parents claim that they were told [C.M.] passed this examination and would not need to be seen by a doctor in the U.S. for at least a year. Whether or not they were told this, they offered no plausible explanation for the statements made to Ms. Ward during the post-adoption assessment that [C.M.] was scheduled for a well visit and had been seen by Dr. Langston. The Court finds that this delay in obtaining medical care has caused [C.M.] harm.

The evidence also proves that after [C.M.] was enrolled [in school], the parents delayed for several months to sign and deliver to the administration at [the school] a permission slip authorizing the school psychologist . . . to observe [C.M.] in class so that the process could begin for developing an Individual Education P[rogram] (IEP) for [C.M.] until after she was removed from the parents' custody. The Court finds that this delay was unreasonable and has also caused [C.M.] harm.

The trial court's findings concerning the parents' neglect in procuring medical care for this child are supported by clear and convincing evidence in the record. Trial Exhibit 46 is a May 19, 2011 letter from the Appellants to the Chinese adoption facilitators indicating the Appellants' desire to adopt C.M. This letter, which was written and signed by the Appellants, states, in relevant part, that "we have read [C.M.'s] medical report and developmental report and we understand that she is a special need[s] child. . . ." The letter goes on to state: "We feel very confident that we will be able to provide for [C.M.'s] medical needs and provide a loving home for her. As soon as we bring her home, we will take her to the doctor and have her conditions fully evaluated. We will provide for all the medical needs she will need." The Appellants also state that they will "provide speech therapy if she needs it" and go on to affirm that they "have very good medical insurance which will cover [the

child] once she becomes our daughter." The record is replete with evidence of how the Appellants failed to uphold their promises.

As found by the trial court, the record indicates that the Appellants failed to take C.M. to a medical doctor for some fourteen months. In addition, when the child was seen by the doctor and was diagnosed with an intestinal parasite, Appellants delayed treatment (a course of antibiotics) until the child was symptomatic. However, when the child showed symptoms of intestinal distress, they still did not have her treated immediately. This was confirmed by C.M.'s teacher, Ashley Snipes, who testified, as discussed *infra*, that C.M. had severe gas and diarrhea, but that Mother refused to pick her up from school. Ms. Snipes reported that the child was returned to her classroom in tears, and Mother contacted Ms. Snipes the next day to complain that the child was faking her symptoms in order to play with the bathroom soap dispenser.

Dr. Linda Ashford, a pediatric psychologist at Vanderbilt and a qualified expert in this case, testified that she observed "very significant developmental delay based on [C.M.'s] age" and recommended that the Parents "continue to pursue those efforts to have [testing] done in the school so that C.M. could get the kind of intervention and therapies that could help her with her skills." By failing to have C.M. evaluated by a physician, Appellants also delayed diagnosis of the child's developmental and physical delays. As a result, the child was unable to assimilate into a classroom situation. Ms. Snipes testified that the child demonstrated "animalist behavior" in the class and showed signed of neglect in her need to be physically near the teacher at all times. Moreover, despite Dr. Ashford's recommendation, Appellants failed to comply with the school's request that they fill out forms so that the child could be evaluated for an IEP, and this caused the child to suffer more problems with assimilation.

Concerning C.M.'s nutrition, the record indicates that, while she lived with the Appellants, C.M. remained in the lower 1% for weight for children her age. Trial Exhibit 28 is Ms. Ward's report, which corroborates her testimony as found by the trial court, *supra.* Ms. Ward expressed concern that the child had not gained weight between the time Ms. Ward visited the Appellants' home one month after C.M. was adopted and her follow-up visit six month post-adoption. DCS case worker Ann Best testified that C.M. did not begin to gain weight until she was enrolled in school. At that point, C.M.'s weight went from 30 pounds to 36 pounds over a four-month period. Ms. Snipes' testimony corroborates Ms. Best's. Ms. Snipes testified that, "[w]hen C.M. would go through the [lunch] line, she would want more . . . [T]ypically [the children] don't want [vegetables, but] C.M. wanted everything." Ms. Snipes testified that, although she was initially suspicious that C.M. could not possibly eat everything she asked for, she observed that the child did, in fact, clean her plate. Accordingly, Ms. Snipes testified that "as my suspicions grew that [C.M.] was very hungry at

school, I did ask the lunch ladies to just let her get whatever she want[ed], and they did." K.M. also testified concerning what Appellants fed C.M.:

> Q [to K.M.]. What was C.M. typically fed during the day?
>
> A. It would usually be a bowl with rice in it, some sort of a breakfast bar or fruit, and [Mother] bought bags of dried fruit or dried craisins or something to put on top of the rice for, like, breakfast. Sometimes [Mother would] put—she had a pantry full of NutriSystem, and she'd put that on top of rice or, like, if somebody had a to-go box that they came home, leftovers, and she'd put that on top of it; so it always was rice with something.

K.M. also stated that, "I don't think [C.M.] ever got a lot of food because I've seen her a few times, like, she would drop a crumb on the floor, and she would . . . get it and eat it; and everything she had in the bowl, she would clean it out."

In addition to the foregoing testimony, Dr. Ashford, a pediatric psychologist at Vanderbilt testified, in relevant part, as follows:

> So, the foster parents indicated that [C.M.] had gone from over-eating at mealtime and frequently requesting food, to be able to stop eating sooner, but they still felt like she ate more than other kids her age probably ate.
>
> Q. Is that something that you see with children from—
>
> A. What we typically see in clinic is that children who have been adopted quite recently; two weeks, three weeks, are eating voraciously . . . prior to adoption they were in an institution; so it's a standard question that I ask. The range of answers that I might get would be a child who eats until she vomits, to children who are constantly asking for food throughout the day.

Based on her observations of C.M., Dr. Ashford opined that C.M.'s behaviors, especially the voracious eating, were behaviors that were "very typical of children who have been in the country for just a couple of weeks with their new family, and so, you know, [C.M.'s] still eating voraciously after two years . . . so I was concerned that she [was] not . . . more secure with her idea that there's more food." Dr. Ashford went on to opine that

> [t]he environment that [C.M.] had been in in her adoptive home did not meet [her] needs . . . the idea that children who are adopted, who have been in an institution, that they eat voraciously, is complicated. It's just not that they're

hungry; it's that food is only provided when it's provided and that's all you get, and so there's this lack of understanding security and safety that there's food in the cupboard and I'm going to get it later, they don't have that, and so I was curious why would that not be the case; you know, she's been in an adoptive home for 19, 20 months, and so that was still an issue.

In addition to the lack of medical treatment and the issue concerning C.M.'s nutrition, the record shows that Appellants also delayed the child's dental treatment, and C.M. was not seen by a dentist until approximately sixteen months post-adoption. Ann Best testified concerning the child's dental care, or lack thereof:

BY MS. CARLTON [Attorney for DCS]:

Q [to Ms. Best]: So that was her first visit to a dentist, but [Appellants] had indicated prior—had told people that she was going to the dentist regularly.

A. That's correct. They told a social worker from Adoption Assistance, Inc., and they told the pediatrician.

Q. And what was the purpose of that visit; the first visit? Was it just a well check?

A. No. Dr. Dublin told me that she was there because of pain in her lower left jaw.

[MS. REGULI OBJECTS to HEARSAY]

THE COURT: And, Ms. Best, is this something—this statement about complaint of pain, something that was related to you by the dentist who treated—who treated her, or who was it related to you by?

THE WITNESS: I had a face-to-face interview with the dentist, who then later referred C.M. She did not treat C.M. that day because there was so much decay in her mouth after she did the x-ray. She felt there was a need for an extraction; so she referred C.M. to a specialist . . . Dr. Ryan Craiger.

[Dr. CRAIGER'S RECORDS WERE ADMITTED INTO EVIDENCE]

Q. And what did Dr. Craiger do?

> A. Dr. Craiger saw C.M. on August 2nd of 2013. At that time he also did an x-ray and prescribed antibiotics for seven to ten days to reduce the pain and to reduce the inflammation.
>
> C.M. then returned on August 14 for several procedures. The doctor had to do an extraction and put a spacer in where the tooth was removed. He also had to do—the cavity on one tooth was so deep, it was into the pulp; so he had to do a crown on that tooth.

The evidence concerning the lack of dental care and the extent of C.M.'s dental issues is not contested in the record. Also, there is clear and convincing evidence that the child suffered pain due to the lack of timely dental care.

Finally, the record indicates that Appellants did not take C.M. to the optometrist until some nineteen months after the adoption. Dr. Daxx Dunn, the optometrist, testified that C.M. was found to be nearsighted. He prescribed eyeglasses, which were ordered on October 3, 2013 (the day of the visit). Dr. Dunn testified that Mother called his office on December 12, 2013 and indicated that she had not heard that the child's eyeglasses were ready for pick up. However, Dr. Dunn stated that his records indicated that his office staff had notified Mother on November 12, 2013. As a gesture of good faith, Dr. Dunn waived the $60 balance due on the eyeglasses, and Mother indicated that she would be in the next day to pick them up. The record indicates that the child's eyeglasses were not, in fact, picked up until January 15, 2014, a month after Mother's call to Dr. Dunn's office. Dr. Dunn further testified that he later received notification from the credit card company that Appellants had disputed the charges; accordingly, Dr. Dunn received no payment except for the portion the insurance paid. Even after the Appellants picked up C.M.'s glasses, they did not bring the child in to have the glasses properly fit.

The trial court also based its finding of severe child abuse on its conclusion that the child had been physically abused by Appellants. In its order, the trial court credits K.M., Ms. Snipes, and Ms. Best's testimony as credible. Throughout these proceedings, Appellants have never disputed that C.M. suffered physical abuse in the form of pinching, hair pulling, and being locked or confined in her room for long periods of time; rather, they argued that any physical abuse against C.M. was perpetuated by K.M. Concerning Parents' allegation that K.M. had physically abused C.M., the trial court specifically found that

> [t]o the extent that the parents rely upon certain evidence in the form of three videos and various asserted statements by [C.M.] to the effect that [K.M.] is the perpetrator of the physical abuse that she suffered, the Court finds that evidence unpersuasive. The Court notes that the video evidence offered by the parents appears to be staged and contrived; for example, although [C.M.] does,

> indeed, make statements to the effect that [K.M.] pinched her and locked her in her room, those statements were prompted by the parents, [C.M.] was awarded with food for making those statements, and the verbal exchanges between [C.M.] and her parents in each of these three videos were nearly identical. The fact that the parents did not share the videos with their own expert child psychologist, who was asked to opine on the absence of evidence of coaching, likewise renders the videos highly suspect and unreliable.
>
> Most implausible of all, however, is the parents' assertion that [K.M.] abused [C.M.] and at the same time taught her English words "pinch, pull, and lock." Moreover, [C.M.] made a disclosure to Ms. Best to the effect that her mother told her to accuse [K.M.] of the abuse.

In addition to its findings concerning the credibility of the Parents' evidence, the trial court also made findings based on objective independent evidence in the record:

> This . . . evidence is the unchallenged testimony of Ms. Snipes, [C.M.'s] kindergarten teacher . . . and other disinterested witnesses regarding [C.M.'s] behavior in the six months between August 2013, when she started school, and her removal from the parents' home in January, 2014.
>
> During this period of time—which starts four months after [K.M.], by all accounts, had any opportunity to harm [C.M.] physically or to lock her in her room—[C.M.] exhibited frenetic behavior with little or no impulse control, and inappropriately seeking attention from authority figures such as teachers. She was described by several witnesses as acting like an animal that had been released from confinement in a cage. This behavior, however, quickly subsided shortly after [C.M.] was removed from the parents' home, and has now, according to the testimony, completely abated.

K.M. testified regarding the child being locked in her bedroom for extended periods of time as follows:

> A. [D]epending on what time [Mother] got up is when C.M. got up, because eventually I started going to school, and during the weekends she got up around 11:00—10:00, 11:00, 12:00
>
> Q. And that's when C.M. got up?
>
> A. Well, that's when [Mother] got up; so around that time is when C.M. got up.

* * *

Q. Okay. Did you ever hear anything that would suggest [C.M.] wasn't asleep?

A. She used to cry and make loud—lots of loud noises.

Q. And when she cried and made the loud noises, why didn't she come out of her room?

A. She was locked in her room.

Q. Okay. How did you know she was locked in there?

A. Because the doorknob was locked.

Q. Okay. And did you find her locked in her room more than once?

A. Yes.

Q. Would you say it was fairly common?

A. When she goes to bedtime and [Appellants] do the bedtime routine, she would be locked in her room . . . and [Appellants] put a towel underneath.

Q. They'd put a towel underneath the door?

A. Yes.

Q. Like, between the door and the floor?

A. Yes.

Q. Why would they do that?

A. I think it was to cancel out the noise she'd make when she'd wake up because she would—used to scream and yell for somebody to get her out.

* * *

Q. So you think maybe there were hours where she would be in there crying or screaming.

A. Yes.

K.M.'s friend, N.J., also testified concerning C.M. being locked in her bedroom. N.J. traveled with Appellants, K.M., and C.M. to Appellants' Alabama house. When N.J. and K.M woke up after the first night in Alabama, N.J. testified:

Q [to N.J.]. And did you notice anything about C.M. that morning?

A. She was in her room crying.

Q. And when did you—when did you notice that? Do you recall?

A. Like, as soon as we woke up, she was in her room crying. She was, like, complaining about, like, wanting to go to the bathroom. Or "sissa" I should call it.

Q. Okay. Was she doing anything else, I mean, to indicate that she needed to go to the restroom, any non-verbal—

A. I mean, she was, like, crossing her legs and you could tell she had to go, like.

Q. And, I mean, was she out in the hall? How did—

A. No, no, no, no.

Q. Okay.

A. This was, like, when we opened the door and—

Q. Were you the one who opened the door or—

A. No.

Q. –who was?

A. K.M.

Q. Could you tell if the door was locked or not?

A. It was locked, yeah, because C.M. could not open the door.

In addition to the foregoing testimony, Dr. Ashford testified, in pertinent part, that the foster parents reported to Dr. Ashford that C.M. "was sleeping in her own bed, but she was always requesting that the door to her bedroom be left open and that she would ask repeatedly when they put her to bed." Dr. Ashford further reported that C.M.'s foster mother "described [C.M.] as an early riser and she'd wake up really early in the morning, and from the story that the foster mother told, it sounded like C.M. learned very quickly to modify her early rising by calling out for her, and sometimes she would actually fall back asleep after she would stay in the bed . . . ." Dr. Ashford ultimately opined that "all the things [Dr. Ashford observed] indicate that if [C.M.] were locked in her room and if she was fed intermittently or inconsistently, if her psychological needs for safety and security, since attachment and love had not—I mean, if they had been provided, then I don't think I would see those things [that Dr. Ashford observed in C.M.'s case]."

Although each of the foregoing facts, taken alone, may not rise to the level of severe child abuse, we do not consider these facts individually; rather, we view them as a whole. As stated by Judge (now Justice) Kirby in ***In the Matter of S.J. et al.***, 387 S.W.3d 576, 591-92 (Tenn. Ct. App. Aug. 9. 2012), *perm. app. denied* (Tenn. Oct. 17, 2012): "Under the clear and convincing evidence standard, it is important to 'distinguish between the specific facts found by the trial court and the combined weight of those facts'" ***Id.*** at 591 (quoting ***In re Tiffany B.***, 228 S.W.3d 148, 156 (Tenn. Ct. App. 2007)). "Once these specific underlying facts are established by a preponderance of the evidence, the court must step back and look at the combined weight of all of those facts, to see if they clearly and convincingly show severe child abuse." The record is replete with proof of actions and inactions that, when taken as a whole, clearly and convincingly support the trial court's conclusion that Appellants committed severe child abuse against C.M. Therefore, from our review of the entire record, we conclude that the evidence does not preponderate against the facts, as found by the trial court, and, when taken cumulatively, these facts clearly and convincingly support the trial court's conclusion that C.M. is the victim of severe child abuse, as defined in Tennessee Code Annotated Section 37-1-102(b)(21)(B), and that the severe child abuse was perpetrated by Appellants. Because a severely abused child is, necessarily, dependent and neglected, we pretermit discussion of Appellants' issue concerning the trial court's adjudication of dependency and neglect.

VIII. Reasonable Efforts

As noted above, in its May 16, 2014, the Juvenile Court found that C.M was the victim of severe child abuse at the hands of Appellants. Tennessee Code Annotated Section 37-1-116(g)(4) relieves DCS of its obligation to make reasonable efforts towards reunification when certain circumstances are present:

> (4) Reasonable efforts of the type described in subdivision (g)(2) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that:
>
> (A) The parent has subjected the child that is the subject of the petition or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home to aggravated circumstances as defined in § 36-1-102;

One of the "aggravating circumstances" defined at Section 36-1-102 is "severe child abuse, as defined at § 37-1-102." The Juvenile Court's determination that C.M. had been subjected to "aggravated circumstances" at the hands of the Appellants relieved DCS of its duty to provide reasonable efforts towards reunification. Tenn. Code Ann. § 37-1-116(g)(4). Furthermore, in reviewing the record, it does not appear that the Appellants raised the issue of reasonable efforts in the trial court. It is well settled that issues not raised at trial may not be raised for the first time on appeal. ***State Dep't of Human Servs. v. Defriece***, 937 S.W>2d 954, 960 (Tenn. Ct. App. 1996).

IX. Dispositional Hearing

On appeal, Appellants contend that the trial court failed to hold a separate dispositional hearing in contravention of Tennessee Code Annotated Section 37-1-129(c), which provides, in relevant part that "[i]f the court finds from clear and convincing evidence that the child is dependent, neglected or unruly, the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case." At the close of proof in the dependency and neglect hearing, the following exchange occurred between the trial court and Ms. Reguli:

> THE COURT: Ms. Reguli . . . I'm really not clear on what the party's position was [regarding disposition] . . . . 37-1-129(c) says if the Court finds, you know, clear and convincing evidence of neglect . . . the court shall proceed immediately or a postponed hearing to make a proper disposition of the case. What's your client's position with respect to the procedural posture of where

we find ourselves today?

> MS. REGULI: I think everybody has closed their case-in-chief as to an adjudication on the Petition as to whether or not the Court's going to make a finding by clear and convincing evidence that the child is dependent/neglected within the statute. . . . Now, whether or not you can make the complete disposition without having additional evidence, I would like for you to be able to. I think my clients have tried to express everything that, you know, they feel and—and that they've done. If you felt like you needed to say, if the child is a dependent neglect, but if the child's going to be returned to the parent or parents are going to have custody, I would need this, this, and this, then it might, then it might require some additional proof from them, perhaps, of that additional inquiry.

In the first instance, Tennessee Code Annotated Section 37-1-129(c) does not specifically require a separate dispositional hearing, i.e., "the court shall proceed immediately **or** at a postponed hearing to make a . . . disposition" (emphasis added). In addition, as set out in context above, Appellants' counsel appears to concede that additional evidence is not needed in order for the court to make its dispositional decision. Instead, Ms. Reguli states that she "would like for [the court] to [make a complete disposition without having additional evidence." Accordingly, we cannot conclude that the trial court erred in proceeding to disposition without further hearing. We further note that Appellants have not specifically appealed the dispositional ruling but have only appealed the fact that there was not a separate disposition hearing. In the absence of any substantive challenge to the ultimate merits of the trial court's dispositional decision, any error would be harmless.

X. Guardian ad Litem Fees

Rule 17.03 of the Tennessee Rules of Civil Procedure provides the Court may in its discretion allow a guardian ad litem's fee, which is to be taxed as costs. Likewise, Tennessee Code Annotated Section 20-12-119 provides, in relevant part, that:

> (a) In all civil cases, whether tried by a jury or before the court without a jury, the presiding judge shall have a right to adjudge the cost.
>
> * * *
>
> (2) Costs shall include all reasonable and necessary litigation costs actually

> incurred due to the proceedings that resulted from the filing of the dismissed claims, including, but not limited to . . .
>
> (E) Guardian ad litem fees.

In addition, Rule 54.04 of the Tennessee Rules of Civil Procedure provides that "[c]osts not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are . . . guardian ad litem fees."

Turning to the record, the guardian ad litem's fee statements indicate that she spent a total of 243.8 hours on this case from September 20, 2013 to October 9, 2014. The guardian ad litem stated that although her usual fee is $300 per hour, she elected to charge a reduced hourly rate of $200.00 for her services in this case. The record in this case is voluminous, and it is clear to this Court that the guardian ad litem was very involved in the case; she not only performed her duties as guardian ad litem, but she was also actively involved in preparing the case for trial. Accordingly, we cannot conclude that the trial court erred in granting the guardian ad litem her fees.

Concerning the trial court's decision to charge those fees to the Appellants, as opposed to the State, pursuant to the foregoing statute and rules, *supra*, the trial court had the discretion to award those fees as costs against the Appellants. The record indicates that the Appellants have the ability to pay these fees. We conclude, therefore, that the trial court did not abuse its discretion in ordering the Appellants to pay the guardian ad litem fees.

XI. Conclusion

For the foregoing reasons, we affirm the order of the trial court. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellants, M.N. and D.M. and their surety, for all of which execution may issue if necessary.

_____

KENNY ARMSTRONG, JUDGE