

The Family Court of the State of Delaware



ROBERT BURTON COONIN
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, STE 9400
WILMINGTON, DELAWARE 19801-3732

December 18, 2018

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**LETTER, DECISION
AND ORDER**

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RE: K----- & R----- S---- v B----- S----- & S--- S-----
File No.: 17-11-06TN; Petition No.: 17-33251
Petition for Termination of Parental Rights: S----- S----- (DOB 1/24/15)

K----- & R----- S---- v B----- S----- & S--- S-----
File No.: CN17-01976; Petition No.: 18-06928
Petition for Permanent Guardianship: S----- S----- (DOB 1/24/15)

B----- S----- & S--- S----- v K----- & R----- S-----
File No.: CN17-01976; Petition No.: 18-13437
Petition to Rescind Guardianship: S----- S----- (DOB 1/24/15)

Dear Ms. Laffey, Ms. Band and Ms. Herbert:

This is the Court's decision regarding the Petition for Termination of Parental Rights filed

by K----- and R----- S---- (collectively hereinafter “Guardians”) on November 2, 2017 against B----- S----- (hereinafter “Mother”) and S--- S----- (hereinafter “Father”), the Petition for Permanent Guardianship filed by Guardians on February 16, 2018 against Mother and Father, and the Petition to Rescind Guardianship filed by Mother and Father on May 7, 2018 against Guardians, all in the interest of the minor child, S----- S-----, born January 24, 2015 (hereinafter “Child”). Guardians are represented by Kathy Laffey, Esquire. Mother is represented by Marissa Band, Esquire. Father is represented by Laina Herbert, Esquire.

A. PROCEDURAL HISTORY

Prior to the commencement of the above matters, K----- and R----- S---- filed a Petition for Guardianship on March 3, 2017 against Mother and Father in the interest of Child. That same day, the S-----s filed a Motion and Affidavit for Emergency Ex Parte Order. During a March 8, 2017 hearing on the Motion, Mother and Father both consented, via phone from Florida where they were then residing, to the S-----s having guardianship over Child. The parties also agreed that Mother and Father could have phone contact with Child twice per month, and send her pictures and letters.

In their November 2, 2017 Petition for Termination of Parental Rights (“TPR”), Guardians sought TPR on multiple grounds: that Mother and Father had consented; intentionally abandoned Child; unintentionally abandoned Child; and failed to plan. Megan Mahle, Esquire entered her appearance on behalf of Mother on November 21, 2017 and the Court appointed Ms. Herbert to represent Father on November 29, 2017.¹

On November 21, 2017, Mother filed a Motion for Increased Contact/Visitation with Child requesting at least two hours per week of in-person contact with Child, now that she had relocated back to Delaware. Pursuant to an Order of the Court from December 13, 2017, Mother was granted one hour of visitation per week with Child at the Department of Corrections New Expectations Program where Mother was then residing.² On February 6, 2018, Father filed a Motion for Increased Contact/Visitation with Child attesting that he was then also living in Delaware and requesting at least two hours per week of in-person contact with Child concurrent with Mother’s visitation. On March 1, 2018, a Stipulation and Order between Father and Guardians was entered as an Order of the Court wherein Father was to receive at least one hour of in-person visitation per

¹ Ms. Band entered her appearance to represent Mother, in place of Ms. Mahle, on September 26, 2018.

² That Order expressly limited the scope of visitation to Mother only and “no other individuals.”

week with Child concurrent with Mother in addition to the previously ordered phone and written contact.

On May 1, 2018, Mother filed a second Motion for Increased Visitation with Child attesting that she had been successfully discharged from the New Expectations Program and requesting at least eight hours per week of unsupervised contact with Child. On May 9, 2018, Father also filed a renewed Motion for Increased Visitation with Child requesting at least four weeks per week of visitation with Child concurrent with Mother's visitation. Pursuant to a May 15, 2018 Order of the Court, Mother and Father were granted concurrent unsupervised visitation with Child two times per week for 1.5 hours each session with pick-up and drop-off at the Family Visitation Center at the Hudson State Service Center in Newark.

On July 30, 2018, Mother filed her third and final Motion for Increased Visitation with Child requesting at least one eight-hour day visit per week. On August 15, 2018, Father also filed his third and final Motion for Increased Visitation with Child again requesting the same contact as Mother, one eight-hour day visit per week, held concurrently with Mother's contact. Pursuant to a September 14, 2018 Order of the Court, the exchange location was changed to Mother's residence but the visitation frequency and duration was not changed from the May 1, 2018 Order.

In their February 16, 2018 Petition for Permanent Guardianship, Guardians sought permanent guardianship on the basis that the parents had consented, intentionally abandoned Child, unintentionally abandoned Child, and failed to plan. In their May 7, 2018 Petition to Rescind Guardianship, Mother and Father asserted that the reason for guardianship as to Mother no longer existed because she was successfully addressing her substance use, and she had secured appropriate housing and employment.

In a related matter, Mother and Father consented to the termination of their parental rights in their son, K----, in order that he be adopted by to Mother's half-sister and her husband, which the Court granted on August 8, 2018.

Present for the entirety of the consolidated three-day TPR and Guardianship hearing on November 5th, 7th and 9th, 2018 were Guardians, their counsel Ms. Laffey, Mother, her counsel Ms. Band, Father and his counsel Ms. Herbert. On day one, testimony was taken from A Better Chance for Our Children case manager, Laurie Lattomus; Mother's half-sister, T----- D----- (hereinafter "Maternal Aunt"); Mother's mother, K---- M----- (hereinafter "Maternal Grandmother"); Petitioner guardian R----- S----- (hereinafter "Maternal Great Uncle"); Petitioner

guardian K----- S---- (hereinafter “Maternal Great Aunt”); and, paternal grandmother of Child’s older half-sibling by another father, M----- H---. On day two, testimony was taken from Connections therapist, Lauren Kelley; Children and Families First home visiting nurse, Suyen Estelow; New Expectations Program director, Diane Tisdell; and, Mother. On day three, Mother concluded her testimony. Additional testimony on day three was taken from Oxford House state outreach coordinator, Shawn Wister; Father; and, paternal grandmother, C----- S----- (hereinafter “Paternal Grandmother”). At the conclusion of day three, rebuttal testimony was taken from Maternal Aunt; Maternal Great Uncle; Newark Christian Childcare administrator, L---- M---; and Mother.

At the outset of day one of this matter, Guardians’ attorney stated that she was pursuing TPR and Permanent Guardianship against Mother and Father on the limited bases of failure to plan and unintentional abandonment (and not also, intentional abandonment and consent, as stated in the original petitions). However, at the conclusion of day three testimony Guardians’ attorney conceded that no evidence was presented to support the ground of abandonment, and that she therefore was basing Guardians’ claim solely on failure to plan as to both parents. As such, the below discussion will solely address the TPR grounds of failure to plan.

B. BACKGROUND FACTS

Maternal Great Uncle,³ 55 years old, and Maternal Great Aunt, 54 years old, reside in their Newark, DE home with Child and their three children: a 22-year-old adopted daughter, A-----;⁴ a 16-year-old son, A----; and a 13-year-old son, E---. Child has resided in their home continuously since February 2017, where she has her own bedroom. However, even before that, Guardians began helping care for Child as soon as she came into Maternal Aunt’s care in the fall of 2016. Guardians and A----- are all employed,⁵ A---- is a high school junior, and E--- is in eighth grade.

Mother, 28 years old, has resided in a seven-bedroom Mommy and Me Oxford House in Newark, DE since June 12, 2018.⁶ At the time of the hearing, Mother reported that there were five women and four minor children, including herself and her ten-month-old daughter, S-----, residing

³ Maternal Great Uncle is the brother of Maternal Grandmother.

⁴ A----- has been in Maternal Great Aunt’s care since A----- was an infant.

⁵ Maternal Great Uncle is a district manager for Verizon Communications, Maternal Great Aunt is a marketing manager for Barclay’s Bank, and A----- works at Café Napoli.

⁶ According to the Oxford House website, the homes are set up as “self-run, self-supported recovery houses.” <http://www.oxfordhouse.org/userfiles/file/>

in the home. Mother also reported sharing a second floor bedroom with S-----, who has a bassinet in the room. At the time of the hearing, Mother was employed part-time at Café Verdi restaurant and part-time at Wilmington Psychiatric Services. In addition to Child, Mother has legal rights in three other children: a 12-year-old son, C-----; a daughter, M-----;⁷ and S-----. Father, 28 years old, has been staying in the homes of friends for an indeterminate period and concedes he lacks appropriate housing to care for Child. At the time of the hearing, Father was employed part-time at Applebee's. In addition to Child, Father and Mother have two biological children in common: S-----, and a two-year-old boy, K---- (in whom they no longer hold parental rights). Father and Mother's relationship status is unclear to the Court.⁸

Prior to the entry of the March 2017 guardianship with Maternal Great Aunt and Great Uncle, Child resided with Mother in Florida in Mother's exclusive care from Child's birth in January 2015 until she was about six months old. At that time, Father was released from incarceration and began almost daily involvement in Child's care. In September 2016, Mother and Father both consented to Maternal Aunt taking over primary care of Child to keep Child from entering the care of the Florida Department of Children and Families,⁹ which precipitated Maternal Aunt taking Child back with her to Delaware. Although their infant child remained in a Florida hospital following his September 7, 2016 birth, Mother and Father returned to Delaware in October 2016, in order to be close to Child, according to Father.¹⁰ In the months that followed, Maternal Great Aunt and Great Uncle assisted Maternal Aunt in her care of Child before taking over the primary care of Child and filing their Petition for Guardianship in March 2017.

C. TERMINATION OF PARENTAL RIGHTS

A. Standard for Termination of Parental Rights

The United States Supreme Court has held that a parent's interest in his or her children "undeniably warrants deference and, absent a powerful countervailing interest, protection."¹¹

⁷ The Court is uncertain of her date of birth but believes that she is about nine years old.

⁸ Father confirmed that they were married for social media purposes on November 28, 2017. Pet. Ex. #4. However, Mother testified that they are currently only co-parenting, and that they are presently neither married nor engaged.

⁹ Mother memorialized her consent in a signed writing on September 29, 2016. Mother's Ex. #4.

¹⁰ Mother testified that they left Florida for Delaware so that Mother could enter a 60-day treatment program.

¹¹ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Likewise, the Delaware Supreme Court has found that the parental right is a sacred one that “does not depend on societal standards or mores of lifestyle, age, economic achievement, or sex.”¹² It has also held that parental rights arise from a natural relationship, are fundamental liberties and may not be abrogated in the absence of the most compelling reasons.¹³ While recognizing the fundamental liberty interest of the parents, the Court must consider that one of the important objectives of the termination of parental rights statute is to insure that children are not denied the opportunity for a stable family life.¹⁴

A parent’s strong interest in his or her child can be terminated only upon a showing, by clear and convincing evidence, that one or more of the statutory grounds set forth in 13 *Del. C.* §1103(a) has been established and that severing the parental ties would be in the best interests of the child.¹⁵ The clear and convincing standard of proof requires greater certainty about the factual conclusions than a preponderance of the evidence standard, underscoring the important liberty interest at stake and the special loss that occurs with the termination of a parent’s rights in a child.¹⁶

B. Grounds for Termination of Mother’s Parental Rights - Failure to Plan

In Delaware, when determining whether parental rights in a child should be terminated, a trial judge must conduct a two step analysis.¹⁷ First, one of the grounds listed in 13 *Del. C.* § 1103 must be established by clear and convincing evidence.¹⁸ Second, after finding a statutory ground to terminate parental rights exists, the trial judge must also find by clear and convincing evidence that termination of parental rights is in the best interest of the child as defined in 13 *Del. C.* § 722. At the conclusion of the hearings in this matter, Guardians sought termination of Mother’s parental rights in Child on the sole ground of 13 *Del. C.* § 1103(a)(5) known as “failure to plan.”

13 *Del. C.* § 1103(a)(5)(b) provides a ground to terminate parental rights of a child in the care of her guardians/blood relatives if the Court finds that the parent is not able or has failed to plan adequately for the child’s physical needs or mental and emotional health and development; the child has resided in the home of the guardians/blood relatives for at least 1 year; and the parent

¹² *In the Matter of Burns*, 519 A.2d 638, 645 (Del. 1986).

¹³ *See id.*; *In the Interest of Stevens*, 652 A.2d 18, 24 (Del. 1995).

¹⁴ *See Shepherd v. Clemens*, 752 A.2d 533 (Del. 2000).

¹⁵ *Id.*; *see also In re Hanks*, 553 A.2d 830, 833 (Del. 1982).

¹⁶ *See Patricia A.F. v. James R.F.*, 451 A.2d 830 (Del. 1982).

¹⁷ *Barr v. Division of Family Servs.*, 974 A.2d 88, 93-94 (Del. 2009); *Division of Family Servs. v. Hutton*, 765 A.2d 1267, 1271 (Del. 2001).

¹⁸ *Barr*, 974 A. 2d at 94; 13 *Del. C.* § 1103(a).

is incapable of discharging parental responsibilities, and there appears to be little likelihood that the parent will be able to discharge such parental responsibilities in the near future.¹⁹

a. Mother has adequately planned for Child's physical needs or mental and emotional health and development

Mother's Housing

Between March 2017, when Maternal Aunt and Maternal Uncle became the legal guardians of Child, and October 2017, Mother's exact residences are unclear to the Court, aside from periods of incarceration in both Florida and Maryland. After her release from incarceration in Maryland in July 2017, Mother reported that she was homeless in Delaware until October 2017. From October 11, 2017 to April 13, 2018, she resided at New Expectations, a New Castle County facility for pregnant women facing criminal charges. Pet. Ex. #1. While there, she gave birth to and cared for her infant daughter, S-----, born in February 2018. From April 13, 2018 until about May 12, 2018, Mother resided with S----- rent free in the North Wilmington home of a female friend, M-----, who had agreed to watch S----- in the home while Mother worked so that Mother could keep S----- out of daycare. Mother reported that she moved out of the home after only one month because she and M----- were "butting heads" and Mother wanted to preserve their relationship as friends. From mid-May to mid-June 2018, Mother resided with S----- in her first Mommy and Me Oxford House. However, Mother moved with S----- to a second Oxford House after only one month due to an interpersonal conflict with some of the other residents in the first home.

Mother has been residing in her current Mommy and Me Oxford House residence since about mid-June 2018. Based on the Court's review of the criminal records of the other adult residents in the home and the testimony from Oxford House state outreach coordinator, the Court finds Mother's current housing to be appropriate. Mother has her own room, she has a bed and clothing set aside for Child, Child would be permitted to reside in the room with her, and the seven-bedroom home does not appear to be overcrowded. Furthermore, although all the residents of the home are recovering addicts, the home serves as a beneficial support system for the residents, who are not permitted to remain in the home if they fail random in-house drug tests. Additionally, while concerns were expressed by Guardians regarding the condition of the outside yard, the Court declines to conclude that the absence of a fence in the backyard, or presence of a wheelbarrow and

¹⁹ 13 Del. C. § 1103(a)(5)(b).

step ladder on the property are sufficient bases to find the home inappropriate. However, the Court is more concerned, in light of both Child's and S-----'s documented challenges with asthma and other breathing issues, about Ms. Lattomus's observation during her September 2018 visit to Mother's residence that the home seemed "musty" and that she suffered from breathing issues following the visit.²⁰

Mother's Employment and Budget

One or two weeks after she completed the New Expectations program in April 2018, Mother secured part-time employment at a Grotto Pizza location in close proximity to the Oxford House Mother resided at in May and June 2018. At some point thereafter, Mother secured a second part-time job at an Applebee's location. When she was informed that she would be getting full-time hours at Applebee's, she quit her job at Grotto in July 2018 because she had moved to her current Oxford House location by then and Grotto was no longer conveniently located near the residence. When Mother was unable to procure full-time hours at Applebee's, she secured a job at Café Verdi in Wilmington in July or August 2018, and left her Applebee's job. Since the end of August 2018, she has been working part-time at both Café Verdi as a server and Wilmington Psychiatric Services as a receptionist and billing coordinator.

During her most recent pay period at Café Verdi, Mother earned \$3.00 per hour plus tips and worked 24 hours over two weeks for a total net pay of \$46.62, not including tips. Mother's Ex. #1. Mother added that she has been working in that position four nights a week and about four hours per day. During her most recent pay period at Wilmington Psychiatric Services, Mother earned \$12.50 per hour and worked 60 hours over two weeks for a total net pay of \$657.72. Mother's Ex. #2. She works in that position, Monday through Friday between 9:00 AM and 4:00 PM, except on Monday when she stays until about 7:00 PM. Mother reported believing that she would be eligible for a raise to \$16.50 per hour and permanent position at the end of November 2018, following the conclusion of her 90-day probationary period.

In addition to her recent employment history, Mother testified that she completed a financial management program while at New Expectations. Based on her most recent paystubs, the Court estimates that Mother makes about \$1,526.07 per month plus tips, with the possibility

²⁰ While no evidence was presented to conclude a nexus exists between the "musty" smell and Ms. Lattomus's subsequent respiratory complications, the Court's concern at a minimum requires comment.

that her income will increase if she gets the promotion to \$16.50 per hour. Furthermore, she receives over \$200 per month in food stamps, \$210 per month in child support from Father for S----, and additional informal cost sharing from Father. With these sources of income and a rent payment of only about \$600 per month at the Oxford House, her finances appear appropriate for her to care for Child in addition to S-----, up to and including placing both girls in daycare at \$70 per week per child.

Mother's Substance Abuse and Mental Health Treatment

According to Maternal Grandmother, Mother had been diagnosed with bipolar disorder in both 2008 and 2014. Although Mother did admit spending time at three different mental health facilities in the past ten years, most recently in 2016, she also countered that all of her past mental health diagnoses have been while she was under the influence of an illicit substance and that therefore those diagnoses are not currently valid. Additionally, Ms. Kelley, Mother's therapist since October 2017, testified that Mother has no current mental health diagnoses other than substance abuse disorder, and that she has no current medications prescribed other than methadone. Based on Ms. Kelley's testimony, the Court is satisfied that Mother is adequately addressing her former mental health concerns through her continued involvement and compliance with Ms. Kelley at Connections Community Services.

Mother tested positive for cocaine and opiates on October 11, 2017, on the day that she was admitted to the New Expectations program and the day she began receiving mandatory services from Connections. However, all of her random urine drug screens at Connections from November 16, 2017 to October 16, 2018 have been negative for all substances aside from methadone and metabolites. Mother's Ex. #9. In addition, Mother submitted to two hair follicle drug tests on July 24, 2018 and October 30, 2018 which also came back negative for all illicit substances. Mother's Ex. # 6 and 7. Furthermore, Mother successfully completed the New Expectations program on April 13, 2018. Mother's Ex. #12. New Expectations director, Diane Tisdell, praised Mother for going "above and beyond" in her efforts to complete all the required elements of her participation in the program and for how well Mother is doing in her recovery.

Despite her discharge from New Expectations and the end of her mandatory involvement with Connections, Mother has voluntarily remained involved in the methadone program, with daily take-home doses, and in monthly counseling sessions with Ms. Kelley. Ms. Kelley praised Mother for her compliance with the Connections treatment plan "since day one" and for her positive level

of engagement in the program. Mother also continues to attend NA and AA meetings three or four times per week, on the nights that she does not work and on weekends. Furthermore, Mother receives ongoing accountability for her sobriety from living with other recovering addicts at her Oxford House, where the other residents can, at any time, request that Mother, or for that matter any resident, submit to twelve-panel drug tests. Finally, from December 31, 2017 until present, while Maternal Great Uncle has either been supervising Mother's visits with Child or facilitating exchanges for visits, Maternal Great Uncle has never observed Mother's behavior to suggest she is under the influence of any illicit substances.

Therefore, the Court is encouraged at Mother's present long-term sobriety and satisfied that she has adequately planned and is continuing to adequately plan to care for Child with regard to her management of her history of drug addiction.

Mother's Criminal Record

On October 1, 2018, Mother was successfully discharged from her probation term in Delaware. Mother's Ex. #5. However, on December 6, 2018, a *capias* was issued for her arrest in Delaware for her ongoing failure to pay related to a 2013 vehicular infraction. As to her recent criminal history in other states, Mother testified that there is no active warrant for her arrest in Maryland related to her May 2017 drug possession charge or any other matter, but that she does have an active warrant for her arrest in Florida for violation of her probation. Ms. Lattomus further testified that the violation was issued in May 2017 in relation to Mother's guilty pleas on forgery and grand theft charges in March 2017. Mother added that she was not aware of this warrant until she was sentenced to probation in Delaware in October 2017 and that now that she has completed her probation in Delaware, she is inquiring with public defenders in Florida about whether she can be represented in the matter without her returning to Florida. The Court is concerned that Mother's warrant was issued shortly after she left Florida to return to Delaware (before being arrested in Maryland in May 2017), and questions whether Mother truly was not aware that she was violating her probation, as she testified. Although the Court is concerned that Mother has an active warrant for her arrest in Florida, the Court does not believe that this alone is a basis for a finding that Mother has failed to plan and trusts that Mother understands the severity of this active warrant and that, therefore, she will diligently and appropriately address the matter now that she has been discharged from probation in Delaware.

Mother's Visitation with Child

Mother has not missed a scheduled visit with Child since the Court granted weekly visits starting in December 2017 and then twice weekly visits starting in May 2018. Mother's history of consistent contact with Child is no surprise when considered alongside the testimony from both Ms. Kelley and Mother's home visiting nurse, Suyen Estelow, that Mother talks with them excitedly about each visit and about getting Child back in her care. Furthermore, the Court heard no evidence that these visits have been anything but appropriate. Therefore, the Court finds that the level of attention Mother has given to visiting with Child demonstrates that she has adequately planned for reunification with Child.

Child's Medical and Other Needs/Parenting Skills

While Mother was residing at the New Expectations program, she completed Children and Families First's Nurturing Parenting Program for children ages 0 to 3, and University of Delaware's Expanded Food and Nutrition Education Program. Mother's Ex. # 13 and 14. She also completed a CPR course. Mother testified that, among others, she learned important lessons from each of the three courses that she plans to apply to caring for both Child and S-----. In addition to her involvement in these courses, Mother has been receiving weekly parenting support from Ms. Estelow for the last year or so. Ms. Estelow testified that she assists Mother with, among others, addressing S-----'s medical needs and making her home safe for S-----, but also clarified that the training she is providing Mother would also be applicable to Child. Ms. Estelow also praised Mother for her compliance and motivation. However, despite all these supports, the Court is a little concerned that, according to Maternal Great Uncle, Mother does not ask questions about Child's care or her specific medical needs, and that, for whatever reason, Child suffered from coughing fits requiring medical attention after a visit with Mother and Father two weeks before these hearings.

Other General Issues

As to transportation, Mother does not have a license. As a result, she is dependent on Father for transportation, unless she takes a bus. Mother testified that payment of outstanding fines of \$139 and taking the driving test again are all that prevent her from recovering her license. Although relying on the bus alone cannot be the basis for finding that Mother has failed to plan, the Court is

concerned about how she plans to keep up with her two jobs and her involvement in various programs related to her sobriety all while carting around a child who will be turning four shortly, as well as a baby. As to provision for Child's care, Mother testified that she would place Child in the same childcare program as S-----, but that Father and her friend, M-----, could also assist with caring for the two children in the evening should Mother be otherwise occupied at work.

Conclusion

Mother's progress since the Court issued its Guardianship Order in March 2017 is nothing short of impressive. Presently, she has stable housing, prolonged sobriety, an extensive support network of treatment professionals, and sufficient sources of income. Previously, she had none of these essential elements. Therefore, despite the Court's relatively minor concerns discussed above, the record reflects that Mother has adequately planned for Child's physical needs or mental and emotional health and development, or to put it in the framework of the statutory requirements, there is no clear and convincing evidence that Mother has failed to do so.

b. Child has resided in the home of Guardians for at least one year

It is uncontroverted that Child has continuously resided in the home of her guardians Maternal Great Aunt and Great Uncle since February 2017, beyond the statutory requirement to establish failure to plan. Although Guardians' attorney argued during the hearing that the time requirement had been met by tacking on Child's previous period of care with Maternal Aunt from September 2016 to February 2017, the Court does not believe that the statute permits tacking on various stints in the households of various guardians or relatives. Promoting tacking on does not support the inherent goal of achieving stability for children. Moreover, the express language of 13 *Del. C.* § 1103(a)(5)(b) is singular: "*the* stepparent, guardian, permanent guardian or blood relative." (Emphasis mine). However, the Court believes the statutory time requirement is met for a different reason. Unlike 13 *Del. C.* § 1103(a)(2) that expressly marks time to show abandonment dating back from the filing of the petition, 13 *Del. C.* § 1103(a)(5)(b) does not expressly state whether it is marking time to show failure to plan dating back from the filing of the petition or the date of the final hearing, only whether "[t]he child has resided in the home [...] for a period of at least 1 year." Therefore, the Court concludes that had the Legislature intended to date back from the time of the filing of the petition that the statute would have expressly so stated as it does in 13 *Del. C.* § 1103(a)(2), and because the statute does not so state that the intent of the statute is to measure the residency period dating back from the date of the TPR hearing and not the date of the

petition.

c. Mother is presently capable of discharging parental responsibilities, and there appears to be a strong likelihood that she will be able to discharge such parental responsibilities in the future

As detailed above, Mother is presently capable of discharging her parental responsibilities. She has stable housing where Child can reside. She has a daycare lined up for Child. She has the ongoing support of Ms. Estelow and others with regard to her child rearing. She is employed and also receives other sources of additional income. Perhaps most importantly, she has maintained a lengthy period of sobriety.

Furthermore, the evidence supports the Court's belief that there is a strong likelihood that Mother will continue to be able to discharge her parental responsibilities in the future. First, the Court credits the testimony of Mother's expert witnesses who uniformly opined that they believe that Mother is making the right decisions and taking the correct steps toward continuing to maintain her sobriety. Second, Mother is actively engaged in the extensive programs that have helped her get to her present place of stability. She is still voluntarily participating in the maintenance program at Connections, still taking her daily doses of methadone, and still regularly attending AA and NA. She is also engaged in the first year of a four-year parenting assistance program with Ms. Estelow and Children and Families First. Mother further recognizes that, even if she moves out of Oxford House or even though she has completed New Expectations, these contacts can continue to be a support for her going forward. Third, the Court appreciates that Mother is not rushing the process of moving out of the Oxford House, but recognizing the benefits that remaining there has on her ongoing path to recovery.

The Court also received no evidence that Mother plans abruptly to move from her current residence, as she did from her prior Oxford House and her friend's home, before she is ready to move into housing of her own. Fourth, despite the evidence that Mother has moved from one job to another in 2018, Mother has not had a period of unemployment since she became sober and Mother's explanations for her moves seem entirely reasonable and all positive progress toward being able to provide financially for Child and S-----. Changing jobs to increase hours, increase financial remuneration, and to better coordinate with available transportation cannot be considered as a negative, but rather as positive steps of advancement. Fifth, Mother exudes a confidence in her current process all while being self-aware of the mistakes she has made in the past that have caused her to relapse into drug use and overall instability and that have caused her relationships to

suffer. Among them, Mother testified that she now knows that she cannot maintain stability on her own, and she needs to take personal responsibility when problems arise rather than turn toward drugs and to rely upon positive available support systems.

However, all of Mother's future indicators are not positive. Adding an active almost four-year-old to her already busy schedule will no doubt tax her. She may find it more challenging to continue to engage in all her services all while carting around Child along with a 10-month-old toddler. Furthermore, the Court is concerned about the ambiguity and uncertainty of Mother's present relationship with Father, and that Mother has always lived in the company of at least one other support person during her recent period of sobriety. Based on her history, it is unclear what will happen if Mother moves out of the Oxford House to live on her own or if Father's and Mother's relationship hits a rocky patch such as occurred in 2016 when Mother admits that Father's actions were her excuse to relapse back into drug use.²¹ Finally, Mother has had several past periods of sobriety, including one that was longer than her present string of sobriety, prior to returning back into drug use.

All that said, these potential obstacles are not sufficient to override the general optimism that Mother will do right by Child. Mother appears to have surrounded herself by a high quality team of professionals who care about her. If she stays involved in these programs that have helped her get to where she is today, the Court believes that Mother can effectively provide for Child going forward as she has for S-----, and that this time she will be able to avoid the specter of relapse that has plagued her at times in the past. Therefore, the statutory grounds for termination of her parental rights in Child on the basis of failure to plan have not been met by Guardians.

C. Grounds for Termination of Father's Parental Rights – Failure to Plan

In Delaware, when determining whether parental rights in a child should be terminated, a trial judge must conduct a two step analysis.²² First, one of the grounds listed in 13 *Del. C.* § 1103 must be established by clear and convincing evidence.²³ Second, after finding a statutory ground to terminate parental rights exists, the trial judge must also find by clear and convincing evidence that termination of parental rights is in the best interest of the child as defined in 13 *Del. C.* § 722.

²¹ Mother also admitted to Ms. Lattomus that she had suicidal ideations during a low point in the relationship at some indeterminate time in the past.

²² *Barr*, 974 A.2d at 93-94; *Division of Family Servs. v. Hutton*, 765 A.2d at 1271.

²³ *Barr*, 974 A. 2d at 94; 13 *Del. C.* § 1103(a).

At the conclusion of the hearing, Guardians sought termination of Father's parental rights in Child only on the grounds of 13 *Del. C.* § 1103(a)(5) known as "failure to plan."

Title 13 *Del. C.* § 1103(a)(5)(b) provides a ground to terminate parental rights of a child in the care of her guardians/blood relatives if the Court finds that the parent is not able or has failed to plan adequately for the child's physical needs or mental and emotional health and development; the child has resided in the home of the guardians/blood relatives for at least 1 year; and the parent is incapable of discharging parental responsibilities, and there appears to be little likelihood that the parent will be able to discharge such parental responsibilities in the near future.²⁴

a. Father is not able or has failed to plan adequately for Child's physical needs or mental and emotional health and development

Father's Housing

Father admitted that, at the time of the hearing, he did not have stable address and that he was staying with friends. Father also reported that in the last year or so, prior to his current residence, he spent about "three to six months" in an Oxford House in Newark, DE and another "three months" in the home of another friend. Pet. Ex. #1. According to Mr. Wister, Father moved out of that Oxford House voluntarily. Ms. Lattomus further testified that Father told her that Child could not reside with him in his current residence. Regardless of the fact that Father is not requesting that Child live with him, the Court must find that Father has failed to plan for Child's needs, health and development under this crucial factor.

Father's Employment and Budget

Father testified that he cannot recall the last time he was unemployed, and that he believes that he can adequately provide for Child. At present, he is employed part-time at an Applebee's location as a prep cook, making \$12.00 per hour, where he has worked since about September 2018. Father added that he works about four mornings per week for a total of about 20-30 hours per week. Prior to that, but still since he and Mother returned to Delaware in the middle of 2017, Father has also worked at Grotto Pizza, IHOP, Café Napoli and Mad Macs. Father admitted that after working at Grotto Pizza for about five months he was fired because he took a pizza for which he did not pay. The Court is unaware of Father's present budget other than the car-related payments that he and Mother are sharing, and is also unaware if Father is currently paying rent in his present

²⁴ 13 *Del. C.* § 1103(a)(5)(b).

residence. Without more evidence, the Court finds insufficient bases to conclude that Father has failed to plan as to his financial circumstances.

Father's Substance Abuse Treatment

Like Mother, Father is actively participating in the methadone program at Connections. Additionally, Father's hair follicle test from October 31, 2018 came back negative for all substances other than marijuana. Pet. Ex. #3. The Court is unaware of any evidence showing the last time that Father was using heroin, which he reported to Ms. Lattomus that he started using in 2010. Pet. Ex. #1. However, Maternal Great Uncle reported that he has never seen Father under the influence of any illicit drugs since Father started engaging in visits with Child in early 2018. Although the Court cannot ignore Father's recent, and possibly ongoing, use of marijuana, this fact only is not dispositive in the Court's view under a failure to plan analysis.

Father's Criminal Record

Father does not have any active capiases for his arrest in Delaware and he has not picked up any new non-motor vehicle charges in Delaware since he returned from Florida in the middle of 2017, by way of Maryland. However, he does have active warrants for his arrest in both Florida and Maryland. Father admitted that he was in Delaware at the time of the Court dates for the two pending felony charges in Florida from February and March 2017, and that he has not yet attempted to resolve the outstanding criminal charges in Florida. Father admitted that he is also aware of the active warrant in Maryland for violation of probation on the drug possession charges that he and Mother picked up in May 2017, but that he had not previously returned to Maryland to address the matter because he believed that it would negatively impact his ability to regain custody of Child if he were incarcerated in Maryland. Father also admitted that he is aware that he has felony convictions in Delaware from 2014 and 2015 for tampering with evidence and theft of a senior, and that he is therefore not permitted to possess a firearm as a convicted felon. Despite that, Father chose to post a picture of himself, holding a friend's handgun, to one of his social media accounts on December 6, 2017.

Based on these facts, the Court expresses even more concern about Father's recent and ongoing criminal record than it has with Mother's record. Although his active warrants in not one but two states are not alone dispositive of his failure to plan, the Court gives this factor considerable weight, especially when combined with his extremely poor judgment in taking a picture with a

friend's gun. Father must understand the severity of these active warrants and therefore diligently and appropriately address them in both states.

Father's Visitation with Child

Like Mother, Father has been consistent in attendance at visits with Child. He has only missed two visits, even though he has not had Mother's luxury that most of the exchanges since December 2017 have occurred at Mother's then residence. Prior to December 2017, Father also had visits with Child in January 2017 and the fall of 2016 when Child was in the care of Maternal Aunt, including some overnights, again with no reported concerns.

Child's Medical and Other Needs/Parenting Skills

Although there is no evidence that Father has been preparing himself to care for Child's distinct needs, Father has shown a consistent commitment to parenting S----- in S-----'s first ten months of life. Father testified that he sees S----- daily and that he watches her in the evening when Mother is working at Café Verdi. He added that he and Mother go together to drop S----- off at daycare and they also go together to S-----'s medical appointments. Although caring for an infant is much different than caring for a nearly four-year-old, and the Court has no knowledge that Father has ever raised a four-year-old child, the Court finds that Father has adequately prepared for caring for Child by demonstrating his involvement with S-----, all while noting that his involvement is secondary to Mother's role as S-----'s primary caregiver.

Conclusion

Unlike Mother, Father has not made great progress since the Court issued its Guardianship Order in March 2017. Presently, his strengths are that he is employed, he has a vehicle, he is receiving methadone doses, and he is consistently engaged with both Child and S-----. However, his weaknesses are numerous and outweigh his strengths. Presently, his housing is unstable, he is still using marijuana, he does not have a support network of family or professionals other than Paternal Grandmother, and he has active capiases for his arrest in two states, one on pending felony charges. As such, the Court finds that Guardians have established by clear and convincing evidence that Father has failed to plan for a possible reunification with Child.

b. Child has resided in the home of Guardians for at least one year

It is uncontroverted that Child has continuously resided in the home of her guardians Maternal Great Aunt and Great Uncle since February 2017, beyond the statutory requirement to establish failure to plan.

c. Father is incapable of discharging parental responsibilities, and there appears to be little likelihood that he will be able to discharge such parental responsibilities in the near future

Father has never had Child (or any child for that matter) in his primary care and has not had regular daily contact with her since September 2016. Moreover, at present, Father's housing is not suitable for Child. Therefore, by his own admission, Father is incapable of presently discharging parental responsibilities on his own. This can be in part attributed to Father's apparent goal of simply being a support person for Mother's desire to assume primary care of Child, rather than a primary parent himself, and in part attributed to Father's ongoing record of poor decision making.

Based on these same factors, there is also little likelihood that he will be able to discharge these responsibilities in the near future. Father did not present the Court with any clear timeline when he plans to find housing that would be suitable for Child (other than that he hopes to get a place someday where Child and S----- can visit), or whether he has any plans to stop using marijuana. He also has no supports in place to help him care for Child other than Paternal Grandmother and Mother. Furthermore, the Court is not convinced by Father's reassurance that he will turn himself in to Maryland authorities with regard to his violation of probation within the next year. The only future prospect that the Court has confidence in is the element that has been the most consistent for Father, that he is striving to find a full-time position in food service that offers benefits. But, that alone, without housing and other indicators of stability will not be enough bases for Father to care for Child. As such, the Court finds that Guardians have established by clear and convincing evidence that Father has failed to demonstrate that he will be able or even plan to be able to begin discharging his parental responsibilities as to Child in the near future.

Therefore, the statutory grounds for termination of his parental rights in Child on the basis of failure to plan have been met.

D. Best Interests of the Child

Even when one or more of the statutory grounds for termination of parental rights have

been established, the petition should not be granted unless it is determined by clear and convincing evidence that the termination is in the child's best interests.²⁵ According to the Delaware Supreme Court, "one of the important objectives of the termination of parental rights statute is to insure that children are not denied the opportunity for a stable family life."²⁶ In making this determination, the Court must consider all relevant factors including those set forth in 13 *Del. C.* § 722²⁷. Although the Court has found that the statutory grounds for termination of parental rights have been established as to Father only, the Court will proceed, for convenience, to analyze the best interests of Child as to Mother as well.

a. The wishes of Child's parent or parents as to her custody and residential arrangements;

Father and Mother both oppose the termination of their parental rights in Child. They also agree that they want Child to return to Mother's primary care immediately whether that means living in the Oxford House or in a separate two-bedroom residence that Mother is eventually able to locate. Ms. Estelow added that Mother believes that it is in Child's best interest to live with Mother and S-----. Therefore, this factor favors denying the TPR as to both Father and Mother.

b. The wishes of Child as to her custodian(s) and residential arrangements;

Due to her very young age, the Court did not speak with Child about her wishes. In addition, neither Mother nor Father nor Guardians testified about Child's stated preferences regarding these matters. As a result, the Court finds this factor to be inapplicable.

c. The interaction and interrelationship of Child with her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of Child, any other residents of the household or person who may significantly affect Child's best interests;

Child's Relationship with Guardians and their household

During the time that Child has resided in the home of Guardians, Child has developed a positive relationship with each of the members of the residence. Although the testimony was short on specifics, all of the people who testified with personal knowledge of Child's interrelationship with everyone in the home had nothing but good things to say. Maternal Great Uncle testified that Child gets along "great" with A----, and E--- and A-----, and that she especially likes to watch A-

²⁵ See *Hutton*, 765 A.2d at 1272.

²⁶ *Shepherd v. Clemens*, 752 A.2d 533, 538 (Del. 2000) (citing *In re Hanks*, 553 A.2d 1171, 1179 (Del. 1989).

²⁷ *Harper v. Div. of Family Servs.*, 953 A.2d 719, 721 (Del. 2008).

--- compete on his high school sports teams. Maternal Aunt testified that both Maternal Great Aunt and Great Uncle are “amazing” with Child. Mother also admitted that Child loves Guardians and that regardless of the outcome of this matter that she would support that relationship continuing “to bloom.” Furthermore, despite the express concerns of Mother and Father, the Court finds Child’s relationship to the two teenage boys in the home to be healthy. The Court also finds no basis for concern that a three-year-old, who certainly wants to dress herself, at times, presents as “mismatched” and “disheveled.”

Child’s Relationship with Maternal Aunt, K---- and their household

Maternal Aunt testified that under the current guardianship arrangement that Child sees her biological brother/legal cousin, K----, twice a month. She said their relationship is “very close” and that Child acts like she is K----’s mother. Maternal Aunt also noted that she believes that she and her husband, as Child’s short-term caregivers, have a great relationship with Child.

Child’s Relationship with Mother, Father and S-----

Guardians both testified almost entirely positively about Child’s present relationship and recent interactions with Mother, Father and S-----. They said that Child calls her parents “Mommy and Daddy,” that her parents love her and that Child is “fine” going to visits. Although Maternal Aunt prohibited Mother, but not Father, from visiting with Child in the fall of 2016 when Child was in Maternal Aunt’s care because Maternal Aunt believed that Mother was actively using drugs at that time, there was no testimony from any party that Mother, in her current circumstances, should not have contact with Child. However, after Maternal Aunt attempted to cut off Mother’s contact with Child and then Mother and Father moved to Florida in January 2017, Child did not have in person contact with her parents until Court-ordered visits began in December 2017. Since then, they have had no more than three hours per week of contact. Naturally, Child’s relationship with her parents has not been able to develop as naturally and deeply as it has with Guardians and their family during that same span.

As to Child’s relationship with Mother, Ms. Tisdell testified that while Mother was residing at New Expectations that she observed Child happy and excited to be with Mother, that Mother demonstrated obvious affection for Child, and that they interacted by playing games and reading books. Mother also testified to the positive interactions she has had with Child during the visits such as Child “light[ing] up” at the start of visits. Additionally, Mother described trying to fit fun

activities into the short visit windows such as going out to eat with Child, going to the park or going shopping. Mother also testified about interacting at the Oxford House with Child through playing with stickers, painting Child's nails, and playing dress up with Mother's jewelry.

As to Child's relationship with Father, Paternal Grandmother testified that Father and Child had a "very close" relationship prior to their extended separation from January 2017 to December 2017. A specific case in point for Paternal Grandmother is the positive way she witnessed Father and Child interact at Child's second birthday party in January 2017. Father's Ex. #3. Paternal Grandmother has been present at some of the 2018 scheduled visits as well and noted Child's clear love for having her parents around. Father also spoke warmly about his almost daily contact with Child in Florida in 2016, and his regular visits with Child in Delaware in the fall of 2016 when she was in Maternal Aunt's care, referring to Child as "my princess." After the extended separation in 2017, Father admitted that he was a stranger to her when in-person visits resumed in December 2017 but that now Child "lights up" at the start of visits.

As to Child's relationship with her younger sister S-----, Mother testified that Child loves "her baby sister," and that she likes to change S-----'s diaper, feed her, and kiss her.

Therefore, based on the positive relationship that Child has developed with both her parents and S-----, this factor favors denying the TPR as to both Mother and Father.

d. Child's adjustment to her home, school and community;

Child appears to be well-adjusted to her home with Guardians and their children. It is almost undeniable that after living with them for the most of the last two years that she must feel more comfortable in Guardians' home than in Mother's current Oxford House residence. However, Maternal Great Uncle testified that Child is "very extroverted" and makes friends "very easily." From the recent pictures of her with Mother, Father and S-----, Child appears very adjusted to that relationship as well. Mother's Ex. #6.

In her current weekday routine, Child has been attending the same daycare since shortly after she came into Guardians' care. However, if she was returned to Mother's and Father's care, Mother testified that Child would transition to the daycare that S----- attends. Additionally, Maternal Great Aunt described Child as being very adjusted to her daytime and evening routine, and that Guardians have tried to maintain a very structured life for Child.

However, despite Child's present comfort in her current routine, this does not automatically dictate that this factor should favor granting TPR. Child is not yet four, an age when even an introverted child can quickly adjust to a different environment. Furthermore, Child is already familiar with Mother's residence, and having S----- in her daycare should make that transition relatively smooth as well. Finally, Guardians and Mother both reside in Newark and Mother appears open to maintaining a relationship with Guardians. Therefore, notwithstanding the strong relationship Child has with Guardians, this factor still slightly favors denying the TPR.

e. The mental and physical health of all individuals involved;

Maternal Great Aunt and Great Uncle both testified that they have no significant physical or mental health conditions that would prevent them from continuing to provide primary care for Child. Additionally, there is no evidence that Guardians are presently drinking alcohol to excess or using any kind of illegal drugs. However, Mother chose to highlight that Maternal Great Uncle has told her that he used to drink alcohol to excess at times over two decades ago, but that now she views him as a "successful man," as evidence she can too can move beyond her past substance use.

In contrast to the limited testimony under this factor as to Guardians, the parties spoke extensively about Mother's and Father's mental and physical health history. As stated previously, Father tested positive for marijuana use on October 31, 2018. Pet. Ex. #3. According to Maternal Aunt, Father also tested positive for marijuana around the time of K----'s birth in September 2016. Father further told Ms. Lattomus that he started using marijuana some time before 2010. Pet. Ex. #1. The Court is also aware that Father has admitted to using heroin in the past and that he is currently participating in a methadone program. However, the Court is unclear if he has any recent relapses into drug use aside from marijuana. In addition to a history of illicit drug use, Father also admitted to smoking about a pack of cigarettes every four days, but denied ever smoking in a car. However, Maternal Great Uncle and daycare worker L---- M--- both testified to seeing Father recently smoke in close proximity to an idling car.

As to Mother's mental health, she admitted to past diagnoses for bipolar disorder and periods of hospitalization in mental health treatment facilities, but she also asserted that these diagnoses were not proper because she was under the influence of illicit substances at the time of each diagnosis. More than Mother's assertion as to the invalidity of her past diagnoses, the Court

credits Mother's current therapist's testimony that Mother does not have any present mental health diagnoses other than substance abuse disorder.

As to Mother's physical health, she, like Father, has a long history of illicit drug use starting almost ten years ago intermixed with periods of sobriety.²⁸ Prior to her current stretch of sobriety that was at about 13 months at the time of these hearings, Mother was sober from some time in 2014 until early 2016.²⁹ The parties dispute whether she was sober for about 16 or about 20 months, but regardless, that sobriety coincided with the end of her pregnancy with Child through about the first year of Child's life. As described above, Mother blames her relapse into drug use in about April 2016 to her discovery of Father's impregnation of another woman. Ms. Lattomus testified that, after this relapse, Mother returned to "heavy" use of drugs such as marijuana, amphetamines, and heroin. Maternal Grandmother testified that when she visited Mother in Florida at the time of K----'s birth in September 2016 that Mother looked "really bad," her face was gaunt, and she looked like "B----- on drugs." Maternal Aunt added that Mother admitted to her at that time that she was buying drugs off the street. Between September 2016 and October 2017 (the beginning of her current period of sobriety), Mother admitted to ongoing use of drugs aside from relatively brief stints in treatment centers in Delaware in between.

In addition to a history of illicit drug use, Mother also admitted to smoking about a pack of cigarettes every four days, but denied ever smoking in a car or in front of Child or S-----. Mother added that residents are not permitted to smoke inside the Oxford House, and that she and Father are trying to quit smoking cigarettes. Ms. Estelow confirmed that Mother still smokes but that Ms. Estelow has not seen Mother smoke in S-----'s direct presence. Finally, Mother admitted that she also has un-medicated thyroid disease, and that she and Father both have Hepatitis C.

Maternal Aunt testified that when Child came into her care in September 2016 that Child would pull her own hair and make herself throw up. Ms. Lattomus added that Child had respiratory issues at birth. Maternal Great Uncle reassured that the symptoms of distress have stopped and that Guardians have learned how to manage Child's asthma. Following a January 2018 appointment with a pulmonologist, Maternal Great Aunt testified that Child had no significant respiratory issues from about February or March 2018 until a flare up in October 2018. Maternal Great Uncle

²⁸ Mother testified that she believes she has accumulated about three years of sobriety over the last decade.

²⁹ The parties dispute at what point during her pregnancy with Child that Mother began her sobriety. Maternal Aunt believes it was not until about three months before Child was born. Mother told Ms. Lattomus that it was several months earlier than that.

testified that he believes that Child's flare up was due to a smoke-induced asthma attack following a visit with Mother and Father. However, Mother countered that S----- was sick with rhinovirus at the time, and she believes that Child picked up her symptoms from contact with S----- and not Mother or Father. Regardless of the cause, Maternal Great Aunt added that Child was still recovering from the flare up at the time of these hearings, about two weeks after the incident.

Despite there being no evidence that Mother and Father smoke in the direct presence of either S----- or Child, or that Mother uses a humidifier for S-----, based on the breathing issues that both Child and S----- have, it does not take a medical expert to conclude that even residual smoke smells on Mother and Father's clothing cannot be beneficial for either young child's lung development. Therefore, the Court believes it is in Child's best interest that her parents stop smoking. However, the Court declines to find that exposure to second-hand cigarette smoke, Father's ongoing marijuana use, and the threat that Mother may someday relapse from her more than one-year long sting of sobriety are sufficient bases when considered together to conclude that this factor should favor granting TPR. As such, the Court finds that this factor minimally favors denying TPR as to both Mother and Father.

f. Past and present compliance by both parents with their rights and responsibilities to their children under § 701 of this title;

Pursuant to 13 Del. C. § 701, even without a Court Order, parents are responsible for the support, care, nurture, welfare, and education of their children. The Court believes that the statutory intent of this factor is to not only consider Mother's and Father's compliance in their care of Child but of all their other biological children.

As stated previously, in addition to Child and S-----, Mother and Father have a third biological child, K----, in whom they agreed to voluntarily terminate their parental rights three months prior to these hearings. Prior to the termination of their parental, from birth until he was almost two years old, K---- was never in Mother's and Father's care. They left him in the NICU in Florida, where he was born drug positive, and returned to Delaware, about three weeks prior to when hospital staff and the Florida division of family services released K---- into Maternal Aunt's care.

Mother also has two older children, C----- and M------. The Court takes judicial notice of a May 2, 2013 Order of the Court, wherein C-----'s father was given sole custody of him following

a hearing that Mother failed to attend (File No. CN07-01904, Pet. No. 13-04060). C-----'s paternal grandmother, Ms. H---, testified that C----- and his father have resided in her home for the last four to six years, but that she is not aware of Mother having any contact with C----- since February 2013 when Maternal Grandmother stopped supervising Mother's visits. She added that she is not aware of Mother providing any financial support for C----- during that time either. In response, while Mother did not recall seeing either C----- or M----- since October 2012, she testified that she has tried to contact them since then but that their fathers will not permit Mother to see the children. Mother also added that she has been told that C----- hates her and does not want to see her, and that she has been advised by her treatment team to focus her efforts on her sobriety and reunifying with Child before trying to reunify with her oldest two children. Ms. Lattomus added that Mother was substantiated by the Division of Family Services in 2010 as to both C----- and M----- for severe neglect due to drug use and mental health concerns, among others.

As to Mother's and Father's provision for Child's and S-----'s financial needs, as previously stated, Father currently provides \$210 per month in Court-ordered child support to Mother for S-----, in addition to his assistance with other expenses related to S-----'s care. Mother and Father both testified that they have not provided any financial support directly to Guardians for Child because Maternal Great Uncle has encouraged them to focus on caring for S----- and has directly declined past offers to pay for things for Child. As a result, Mother and Father have purchased several hundred dollars of clothing items for Child, as well as books and toys, and kept them in Mother's residence for Child's use during her scheduled visits and for possible future reunification.

As to their care of S-----'s medical needs, none of Mother's professional witnesses expressed any concern about the level of care and attention that Mother has been providing S----- . Likewise, Paternal Grandmother testified that Father is a responsible parent and that Mother and Father make sure "everything" is taken care of with S----- such as taking her to daycare and to her medical checks. Mother also testified at length about all the efforts they have expended in addressing S-----'s "wheezing" that finally culminated in a pulmonologist's recent conclusion that she has tracheomalacia. Ms. Estelow confirmed that Mother has taken S----- to the hospital many times to address her respiratory issues and also testified, from her medical experience, S-----'s breathing sounds worse than it is. In contrast, Ms. Lattomus critiqued Mother's care from a single

September 2018 visit to Mother's current Oxford House residence for, among others, propping up S-----'s bottle with a towel all while S----- appeared to Ms. Lattomus to be in distress.

Finally, if Child is returned to Mother's and Father's care, Maternal Great Uncle expressed concern that they never ask about Child's health despite her ongoing respiratory issues.

Despite Guardians' concerns about how Mother is addressing S-----'s medical needs, the Court credits Ms. Estelow's lack of concern about Mother's treatment of S----- and makes the positive inference that Mother will also adequately provide for Child's needs if she were returned to Mother's full-time care. Likewise, although there are understandable concerns about Mother's lack of involvement in C-----'s and M-----'s life, the Court credits that Mother has made considerable progress in her own stability since 2012 and that she is interested in reunifying with them, and therefore will not excessively prejudice Mother for her parenting history as to her older two children, or K---- for that matter. All while considering past serious parenting lapses related to other children, the Court's ultimate focus is on evidence of the parents' compliance with their rights and obligations as to Child. Therefore, based on the evidence presented, the Court finds that Mother and Father have demonstrated, of late, that they have complied with those rights and obligations as to Child and that this factor now slightly favors denying TPR.

g. Evidence of domestic violence as provided for in Chapter 7A of this title; and

Pursuant to 13 *Del. C.* § 706A, "(a)ny evidence of a past or present act of domestic violence, whether or not committed in the presence of the child, is a relevant factor that must be considered by the court in determining the legal custody and residential arrangements in accordance with the best interests of the child." There was no evidence that either Maternal Great Aunt or Great Uncle have ever been perpetrators of domestic violence. However, Mother was arrested on August 24, 2009 following an altercation with M-----'s father wherein Mother reportedly came at him with a knife and then threw it at him. As a result of the altercation, Mother was found guilty of offensive touching. Ms. Lattomus testified that Mother told her that C----- and M----- were both present during the altercation, but that she was the victim and not the perpetrator. Maternal Aunt reported that Mother was also incarcerated in Florida in early 2017 after a domestic dispute she had with Father. However, the Court is unaware if she was incarcerated pre-trial or following a conviction. Father was also arrested following a domestic violence incident

with an ex-girlfriend on February 18, 2010 wherein he reportedly struck her in the face with the back of his opened hand. He was arrested on an assault third degree charge but found guilty of offensive touching. Finally, Father was charged in Florida in early 2017 with attempting to strangle Mother, but Mother later went to Court to deny the allegations of other witnesses which led to the dismissal of the charge. Therefore, based on Father's and Mother's history of domestic violence in their relationship with each other and with others, this factor favors granting TPR even though Father and Mother both testified that they are no longer co-habiting.

h. The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

Maternal Great Aunt, Maternal Great Uncle and their daughter, A-----, all do not have criminal records in Delaware other than motor vehicle convictions. However, Maternal Great Uncle voluntarily disclosed that he has a "drunk driving" conviction from when he was a teenager, nearly forty years ago.

Mother has an active capias for her arrest for failure to pay related to a 2013 vehicular infraction, but no pending charges in Delaware. In addition to the above described 2010 conviction for offensive touching, Mother also has convictions in Delaware for criminal impersonation in 2014,³⁰ and conspiracy third degree in October 2017 related to an incident from 2014. Father also has no pending charges in Delaware. However, in addition to the above described 2010 conviction for offensive touching, he has multiple convictions in Delaware for both felony and misdemeanor-level offenses. In 2009, he was convicted of possession of marijuana. In 2014, he was convicted of tampering with physical evidence, and possession of drug paraphernalia. In 2015, he was convicted of theft from a senior, shoplifting and criminal impersonation. In addition, both Mother and Father have criminal convictions or pending charges in Maryland and Florida. Mother was convicted of drug possession in Maryland in May 2017 for which she was incarcerated for 90-days, and convicted of grand theft and forgery in Florida in March 2017. Father was also convicted of drug possession in Maryland in May 2017, convicted of drug possession and grand theft in Florida, and he has pending felony criminal charges in Florida from February and March 2017. As described above, Mother also has an active capias for her arrest in Florida for violation of

³⁰ Mother admitted that this conviction and Father's theft from a senior conviction were both related to their theft of gold and other personal items from Father's grandmother.

probation, and Father has a *capias* for his arrest in Maryland for violation of probation and in Florida for failure to appear in court on his pending charges. According to Ms. Lattomus, Mother attributed her criminal history to her drug addictions.

Finally, the other adult residents in the Oxford House where Mother and S----- are currently residing did not have criminal records of any concern to the Court, and the Court did not investigate the criminal records of the other adults residing with Father because Father is not requesting to have Child reside with him.

Therefore, based on Mother's and Father's relatively recent criminal convictions, and the active *capiases* for their arrest in Maryland and/or Florida, this factor slightly favors TPR as to both Mother and Father.

Thus, considering all the factors of 13 *Del. C.* §722 and the evidence presented at the hearing, Guardians have failed to prove by clear and convincing evidence that it is in Child's best interests to sever her family relations as to either Mother or Father at present. Although both of them have pasts that raise the Court's concern, especially as they relate to their criminal records, domestic violence history and substance use history, the Court gives special weight to the evidence presented related to their conduct in the twelve months preceding these hearings and how that conduct has influenced Child positively as seen in factors 3 and 4.

E. Conclusion

The Court concludes, based on the absence of clear and convincing evidence, that Mother's parental rights should not be terminated because she has adequately planned for Child as set forth in 13 *Del. C.* § 1103(a)(5) and that Father's parental rights should not be terminated because it is not in Child's best interests that the TPR be granted. Therefore, the Court *denies* Maternal Great Aunt and Great Uncle's Petition for the Termination of Parental rights, and Mother's and Father's parental rights in Child are not terminated.

D. PERMANENT GUARDIANSHIP

A. Standard for Permanent Guardianship

In Delaware, pursuant to 13 *Del. C.* § 2353(a), permanent guardianship in a three-year-old child not in the care of foster parents can only be granted upon a showing, by clear and convincing

evidence, that four factors have all been met. First, that one of the statutory grounds set forth in 13 *Del. C.* §1103(a) for termination of parental rights has been established. Second, that adoption of the child is not possible or appropriate. Third, that permanent guardianship would be in the best interests of the child. Fourth, that the proposed permanent guardians: a) are emotionally, mentally, physically and financially suitable to become the permanent guardians; b) are guardians who have been caring for the child for at least 6 months or held guardianship for at least 6 months at the time of filing of the petition or are relatives; c) have expressly committed to remain the permanent guardians and assume the rights and responsibilities for the child for the duration of the child's minority; and d) have demonstrated an understanding of the financial implications of becoming permanent guardians. As stated previously, the clear and convincing standard of proof requires greater certainty about the factual conclusions than a preponderance of the evidence standard.

B. Grounds for Termination of Mother's and Father's Parental Rights - Failure to Plan

As discussed in great detail above, Guardians were unable to prove by clear and convincing evidence that Mother failed to plan. However, they did meet their burden of proof as to Father that he had failed to plan for Child. Therefore, Guardians have met this first factor as to Father but not as to Mother. Because the permanent guardianship statute requires that all four factors must be met to grant a petition for permanent guardianship, the Court can deny Guardians' Petition as to Mother without the necessity of analyzing the other three factors. Nevertheless, the Court will briefly address the below three factors as to both Mother and Father.

C. Adoption of the Child is Not Possible or Appropriate

Adoption is presently not possible or appropriate, as the Court has found that the statutory grounds for termination of Mother's parental rights do not exist at this time.

D. Best Interests of the Child

As discussed in great detail above, Guardians were unable to prove by clear and convincing evidence that termination of Mother's and Father's parental rights in Child was in Child's best interest. Much of the same analysis provided above can be replicated here when considering the best interest of Child in the context of permanent guardianship. First, Mother and Father are opposed to permanent guardianship. Second, Child is too young to have an opinion on this matter.

Third, Mother and Father both have a very positive and warm relationship with Child and are very committed to having as much contact with Child as the Court has permitted since December 2017. Fourth, Child appears very adjusted to her interactions with Mother and Father, and there is no evidence that Child would be in any way unsettled if she were to be returned to their primary care. Fifth, although Mother and Father have a long history of substance abuse and Child has ongoing medical needs, Mother is currently maintaining a long period of sobriety and she has experience caring for Child's sibling with similar medical needs. Sixth, despite their past failings with other children, Mother and Father presently have an effective and healthy co-parenting relationship as it pertains to Child's young sister. Seventh, Mother and Father have a history of domestic violence against others more than eight years ago, no findings of domestic violence between them, and they are not currently co-habiting. Eighth, Father has pending charges and both parents have warrants for their arrest in other states. Although some of the facts against the parents are cause for alarm, the Court concludes, overall, it is not in Child's best interest to grant Maternal Great Aunt and Great Uncle permanent guardianship over her.

E. Characteristics of the Proposed Permanent Guardians

Guardians meet all four characteristics under this factor. First, there is no evidence that they are emotionally, mentally, physically or financially unsuitable to become Child's permanent guardians. They have no known mental health or physical health concerns, they are successfully parenting three other children, and they have stable employment and housing. Second, they are related to Child by Mother, and they have been caring for Child for over six months. Third and fourth, it is undisputed that Guardians are committed to remain the permanent guardians for Child for the duration of Child's minority, and that they have an understanding of the financial implications of becoming permanent guardians.

F. Conclusion

The Court finds that Guardians have failed to establish by clear and convincing evidence that Mother is not able or has failed to plan adequately for Child's physical needs or mental and emotional health and development, thereby not satisfying the grounds specified under 13 *Del. C.* §1103(a)(5). Furthermore, the Court finds that Guardians have failed to meet their burden of proof with regard to the permanent guardianship being in Child's best interest. Therefore, the Court must

deny Maternal Great Aunt and Great Uncle's Petition for Permanent Guardianship.

G. RESCISSION OF GUARDIANSHIP

A. Standard for Rescission of Guardianship

The General Assembly enacted Chapter 23 of Title 13 of the *Delaware Code* in 2001 to establish a framework for the proper procedures for guardianship of a minor child in Delaware.³¹ The grounds for the rescission of a guardianship over a child are set forth in 13 *Del. C.* § 2332(c), which states that the Court may rescind a guardianship if the “petitioner has made a preliminary showing the guardianship is no longer necessary for the reason(s) it was established;” unless the guardian establishes by a preponderance of evidence that the child will be “dependent, neglected, and/or abused” in the petitioner’s care *or* the guardian establishes by clear and convincing evidence that the child will suffer “physical or emotional harm” if guardianship is terminated.

B. Reasons for Establishment of Guardianship

Mother and Father have made a preliminary showing that the guardianship is no longer necessary for the reason it was established. Mother and Father initially consented to guardianship of Child going to Maternal Great Aunt and Great Uncle, as reflected in the Order from March 8, 2017, when Mother and Father were still living in Florida. In their Petition to Rescind Guardianship, they alleged that they initially consented because Mother was “struggling with a substance use disorder” at that time. Mother added during her sworn testimony during the hearings that she consented to guardianship initially going to Maternal Aunt in September 2016 because she was afraid that Child would go into foster care in Florida if she did not transfer care over to Maternal Aunt. Maternal Aunt, Maternal Grandmother, Mother and Father all agreed that the initial understanding was that guardianship of Child would be temporary until Mother and Father got stable. Mother’s notarized letter from September 2016 also expressly references “temporary guardianship” going to Maternal Aunt. Mother’s Ex. #4. Since that time, Mother has achieved thirteen months of sobriety, dating back from October 2017, and Mother has maintained primary care of S----- since her birth in February 2018 without intervention of the Division of Family

³¹ 13 *Del. C.* § 2301. 73 Del. Laws, ch. 150, § 1.

Services. In addition, both Mother and Father now oppose the continuation of the guardianship and they have been residing in Delaware since some time in the summer of 2017. As a result, the guardianship is no longer necessary for the reasons it was initially entered into in March 2017. However, even with this finding, the Court may still continue the guardianship if Guardians prove that Child: 1) would be dependent, neglected or abused if returned to Mother's care; or, 2) will suffer physical or emotional harm if the guardianship is terminated.

C. Dependency, Neglect and/or Abuse

Based upon the testimony presented at the final hearings, the Court finds that Guardians have not established by a preponderance of the evidence that Child will be dependent,³² neglected or abused if she is returned to Mother's full-time care. The following is a brief summation of the detailed discussion above of the evidence of Mother's adequate planning and ability to presently discharge her parental duties.

Mother is presently residing in a Mommy and Me Oxford House for recovering addicts. Although she only rents out one bedroom in the home, Mother is permitted to have both Child and S----- stay with her in the home. Additionally, Mother already has a bed, toys, and clothing prepared for Child in the room. Furthermore, Mother is actively considering moving out of the one-bedroom arrangement once she is able to save her money and find a two-bedroom residence to her liking.

Mother is also employed in part-time positions at both Café Verdi and Wilmington Psychiatric Services. The Court found her current income appropriate to provide for Child and S-----, with Father's continuing financial help, even without factoring in the possible increase in income if her Wilmington Psychiatric Services job transitions to a permanent position.

Mother has also been sober since October 11, 2017 when she began receiving extensive treatment services from New Expectations, Connections, and more. Even though she was successfully discharged from New Expectations in April 2018, she has continued to voluntarily engage with the Connections methadone program, NA and AA meetings, Oxford House programs, and various professionals who have supported her during her current period of sobriety. Although

³² 10 *Del. C.* § 901(8) provides in pertinent part: "Dependency" or "dependent child" means that a person:

- a. Is responsible for the care, custody, and/or control of the child; and
- b. Does not have the ability and/or financial means to provide for the care of the child; and
 1. Fails to provide necessary care with regard to: food, clothing, shelter, education, health care, medical care or other care necessary for the child's emotional, physical or mental health, or safety and general well-being...

she has been diagnosed with bipolar disorder in the past, her current treatment team does not believe she has any mental health issues other than substance abuse disorder which she is effectively addressing.

Mother has also not picked up any new criminal charges in the last year that she has been on her current period of sobriety and stability. Although the Court has already expressed its concern about her violation of probation active warrant in Florida, Guardians have not presented evidence that Mother will be required to return to Florida and face incarceration in order to remove that warrant from her record and return to compliance with the terms of her probation.

Finally, Mother has shown a consistently high level of interest in and love for Child. This is especially clear from the fact that Mother has not missed a scheduled visit with Child since they began in December 2017. As a result, all evidence suggests that Mother and Child have a very healthy and warm relationship, and also that Child adores her baby sister, S-----. Mother has also demonstrated a commitment, in the past year, to enhancing her parenting skills through participation in a parenting course and through her involvement with her Children and Families First visiting nurse, Ms. Estelow. Mother appears to be caring for S----- appropriately and Mother will continue to benefit from the services of Ms. Estelow for the next three years. Therefore, there is no basis to conclude that Mother cannot appropriately care for Child as she has for S-----.

Although Father is not planning to serve as a secondary residential placement option for Child, he is interested in co-parenting with Mother to raise Child, as he has been doing for S-----. All evidence suggests that, since February 2018, Father and Mother have been effectively co-parenting S-----. Father provides integral services for the family that Mother cannot, at present, provide, such as transportation to and from daycare and medical appointments, and childcare in the evenings when Mother is working. Based on the pictures and testimony presented during the hearings, Father also appears to have a healthy relationship with both Child and S-----.

D. Physical or Emotional Harm

Based upon the testimony presented at the final hearings, the Court also finds that Guardians have not established by clear and convincing evidence that Child will suffer physical or emotional harm if the guardianship is terminated. There is no disputing that Child is bonded to Guardians and their children after living with them for almost two years. At her young age, she may not even remember living primarily with anyone else. However, Guardians also testified that she is very extroverted and that she makes friends easily. Although the Court has never had the

pleasure of meeting Child, the pictures of her indicate that she is very comfortable in her relationship and interactions with Mother, Father and S----- . If Mother and Father were of the position that they never wanted Child to see Guardians or their children again, then Child would very likely grieve the loss of that relationship. However, Mother testified that even if Child is returned to her care, she would like to let Child continue to develop that loving relationship she has with Maternal Great Aunt and Great Uncle. As a result, there is no basis for the Court to conclude that Child will suffer emotional harm if she is removed from Guardians' home and returned to Mother's primary care. There is also no basis by which the Court can conclude that Child will suffer physical harm. Neither Maternal Great Uncle nor any of Mother's treatment team have ever observed Mother or Father inappropriately discipline or abuse Child during any of her visits with her parents in the last year, or likewise physically harm S----- since she was born. Just as the Court has found by extensive evidence that Mother is a much different person than she was in September 2016 when she voluntarily handed Child's care over to Maternal Aunt, she is clearly also a very different person than she was in 2010 when she was convicted of offensive touching following a very alarming domestic dispute with C-----'s father, in the presence of both C----- and M-----.

H. CONCLUSION

The Court is filled with cautious optimism that Mother will be able to maintain her current stability, break free from the cycle of relapse, and provide Child with a continuation of the loving and safe environment that she has come to know with Maternal Great Aunt and Great Uncle. Child deserves nothing less. If the Court did not believe that, the Court would not have made the above findings. However, the Court encourages Mother that she must stay humble and commit herself daily to doing what it takes to stay sober, as she has been doing. The Court also repeats what Mother already knows that she cannot overcome the obstacles of her past and present by herself, and that she should not have to. Maternal Great Aunt and Great Uncle clearly love Child very much, and they have done a laudatory job as her primary caregivers the last almost two years. As such, the Court sincerely believes that it is in Child's best interest that Mother and Father allow that relationship that Child has formed with Maternal Great Aunt and Great Uncle to continue to blossom, and the Court hopes that Mother and Father facilitate that relationship. Furthermore, the Court hopes that, going forward, the return of Child to Mother's care also does not further sever Mother's relationship with the rest of her family, or create an unnecessary wedge in between

Child's relationship with K----. Rather, may this change in Child's placement somehow usher in a period of reconciliation and reunification between Child's maternal family. Lastly, although the Court cannot order Mother to do so, it also hopes that she will someday tangibly act on her desire to build a positive relationship with her older two children.

ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

1. Maternal Great Aunt and Great Uncle's Petition for Termination of Parental Rights is ***DENIED***.
2. Maternal Great Aunt and Great Uncle's Petition for Permanent Guardianship is ***DENIED***.
3. Guardianship of S----- S----- (DOB 1/24/15) previously granted to Maternal Great Aunt and Great Uncle is hereby ***RESCINDED***.
4. Joint legal custody of S----- is granted to her mother, B----- S-----, and her father, S--- S-----. Mother shall have primary residence with S-----, and Father's contact shall be under conditions and times as mutually agreed between the parents. If, for some reason, there comes a time when Mother and Father can no longer agree on the conditions and times of Father's contact with S-----, then Father or Mother may file a Petition for Visitation with the Court.
5. If the parents wish to modify the terms of Father's current visitation and contact with Child, they may do so by mutual agreement in writing.

IT IS SO ORDERED.

/s/ **ROBERT BURTON COONIN, JUDGE**

Date Emailed to Attorneys for the Parties: _____

RBC/plr