

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

_____ COUNTY

No. _____

ADOPTION OF _____ & M _____ H.

ON APPEAL FROM A JUDGMENT OF
THE _____ JUVENILE COURT

BRIEF OF THE APPELLEE-CHILDREN

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ISSUES PRESENTED

1. Photographs are not hearsay, are admissible if more probative than prejudicial and can be authenticated by a witness not present when they were taken if the person is familiar with the details pictured. Here, trial exhibits and trial testimony established that certain photographs accurately represented N■■■■'s healed, non-gruesome injuries, about which there was other unchallenged, graphic, testimonial evidence. Did the trial judge err in admitting these photographs?

2. A trial judge's findings must prove parental unfitness by clear and convincing evidence, and a decision terminating parental rights must be in a child's best interests. Here, the children were severely traumatized by abuse but Mother did not believe her children had suffered abuse and made absolutely no effort to better protect them. Must the judgment terminating Mother's parental rights be affirmed?

STATEMENT OF THE CASE

Nature of the Case

■■■■. ("Mother") appeals from an order of the ■■■■ Juvenile Court finding her unfit to parent her

daughter N [REDACTED]. and son M [REDACTED]. and terminating her parental rights to both children (RA:85).¹

Prior Proceedings

On May 21, 2010, the Department of Children and Families ("DCF") filed a care and protection petition against Mother regarding N [REDACTED] and M [REDACTED]. (RA:1, 8). The juvenile court entered an immediate order granting temporary custody of the children to DCF, Mother waived her right to a temporary custody hearing and the children never returned to Mother's care. (RA:1, 8).

The trial in this matter was held on June 7-10, 13-16, 23 and July 1, 2011 ([REDACTED]). (RA:4-5, 11-12). On August 4, 2011, the trial judge found Mother to be unfit, the children in need of care and protection, and Mother's parental rights were terminated. (RA:5, 12). Mother filed a timely notice of appeal. (RA:498).

STATEMENT OF THE FACTS

Introduction

In the words of the experienced Juvenile Court judge presiding over the trial in this case, "[t]his is one of the worst cases of child abuse that I have heard

¹The capital letters "RA" refer to the Record Appendix. The Transcript Appendix is cited as "T". The numbers following the colon refer to the sequential page number(s) where the cited reference appears.

in my 15 ½ years on the bench.” (F.367; RA: 73)².

N■■■■ bore the brunt of the physical abuse, which left her with disfiguring scars on her hands from burns by boiling hot water and on her body from beatings with an electrical cord. M■■■■ was traumatized by witnessing N■■■■ being abused. Mother testified that her children were exclusively under her care, but had no explanation for the marks on N■■■■'s body.

Throughout this case, Mother refused to acknowledge her traumatized children's belief that abuse occurred. Mother made no attempts to rectify her lapses in parenting which had either failed to protect her children from suffering abuse, or because of which she herself inflicted the physical and emotional damage on the children. This is not a close case: the trial court's judgment terminating Mother's parental rights must be affirmed.

Who's Who

N■■■■. was born on February 1, 2001. (RA:87). Her parents are Mother and R■■■■., who is not part

²The trial judge's Findings of Fact are cited as "F" and her Conclusions of Law are cited as "CL", followed by the number of the cited Finding or Conclusion and the page number of the Record Appendix upon which such Finding or Conclusion can be found.

of this appeal.³ (RA:87). At the time of trial in June 2011, N█████ was ten years old, and she is now eleven years old. N█████ is a very cute girl with a striking smile who presents as precocious. (T:645-646; RA:273).

M█████. was born on February 9, 2006 to Mother and ██████. ("Father").⁴ (RA:88; T:1412). At the time of trial, M█████ was five years old and he is now six years old. (T:1007). M█████ likes playing outside, animals and going to Chuck E Cheese. (T:686). At trial, M█████'s paternal grandmother ("Mrs. B.") testified that she was ready, willing and able to take custody of M█████ and raise him together with his seven year old cousin, H█████. (T:845, 851-852, 1007). She filed an application to undergo a DCF home study so that she could get custody of M█████. (T:531). Mrs. B. was denied due to a CORI issue and prior DCF involvement. (T:533). Ultimately, the trial judge endorsed this plan and M█████ was placed with his paternal grandmother on September 8, 2011. (T:2053).

A figure central to the children's expressions of trauma is Mother's boyfriend, S█████ ██████, known as

³ ██████'s parental rights were not litigated in this trial, and he is not a party to this appeal.

⁴ Father. did not appeal the judgment terminating his parental rights and is not a party to this appeal.

"Bee-Bee". (T:1016). Mother had been in a dating relationship with Bee-Bee for about three years prior to the trial. (T:898).

The Case Begins

On May 13, 2010, DCF received a report pursuant to G.L. c. 119, § 51A ("51A Report") alleging that N [REDACTED] had come to school but was hiding and refused to come inside. (RA:103). The school nurse examined N [REDACTED] and found a welt on her inner right lower leg and several older bruises on her lower back. (RA:103). N [REDACTED] denied being hit. (RA:103). DCF initiated a non-emergency response, but Mother was uncooperative and refused a home or office visit. (RA:128). On May 20, 2010, DCF received another 51A Report alleging the physical abuse of N [REDACTED] by Mother based upon burn marks, scratches and scars on N [REDACTED] in different stages of healing. (RA:109). Mother was not able to explain these injuries. (RA:113).

On May 21, 2010, DCF removed both N [REDACTED] and M [REDACTED] from Mother's care. (RA:136). N [REDACTED]'s injuries and scars were photographed that day. (RA:136).

M [REDACTED]

In May 2010 when M [REDACTED] was first placed into foster care, he would throw tantrums that would last for two to three hours. (T:596-597). N [REDACTED] was present for

this, and told him to stop the behavior because "she did not want to go back to mom."⁵ (T:598-599). M [REDACTED] also had violent outbursts directed at the foster parents and their son. (T:632-634). At the time of trial and after many medication changes, M [REDACTED] was easier to calm down, was not as impulsive and was "doing much better". (T:516, 692, 698). At the time of trial, M [REDACTED] was seeing a therapist weekly in order to help him control his explosive, angry, impulsive behaviors. (T:690-691). He had diagnoses of Post Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder for which he took Clonidine. (T:516).

Upon arrival at their first foster home in May 2010, both M [REDACTED] and N [REDACTED] would shove food in their mouths with their hands instead of using utensils. (T:605). Both children made clear they weren't used to eating regularly and "just ate and ate and ate. Anything they could get their hands on." (T:635). M [REDACTED] would have nightmares every night and slept poorly. (T:610). M [REDACTED] would not let the foster Mother bathe him, and would not let any woman touch him. (T:611). This improved over time. (T:612). M [REDACTED]

⁵Statements of the children were admitted not for the truth, but for the state of mind of the child. (T:598).

told the foster mother that he liked living at her house because it wasn't a "whacking house". (T:608).

M█████ believed that Mother had hit him in the head with a belt buckle, and that Mother hit N█████ "quite a bit". (T:615).

M█████ lived at his first foster home until October 2010. (RA:229). M█████ was then moved to a therapeutic home until January 2011 when he was placed with his second foster family. (T:684). M█████ told his second foster mother, Ms. C., that he missed his mother and sister and that he wished he could live with his mother. (T:694).

█████ G█████, a forensic evaluator at Children's Charter, was qualified as a expert in trauma and as a Licensed Independent Social Worker. (T:338, 343). Ms. G█████ performed trauma evaluations on N█████ and M█████. (T:344). The evaluator's expert opinion was that both M█████ and N█████ had experienced some type of trauma. (T:468).

At the time of the evaluation, M█████ was five years old. (T:345). Ms. G█████ told M█████ that she wanted to talk about what happened when he and N█████ lived with Mother. (T:347, 351). To this, M█████

responded "N [REDACTED] got burned."⁶ (T:352). Later, M [REDACTED] stated that "she had burnt N [REDACTED]" referring to Mother. (T:372). Because of M [REDACTED]'s demeanor when making these statements, the evaluator formed the clinical opinion that M [REDACTED] was very clear about what occurred and was telling to the best of his memory what occurred. (T:373). When M [REDACTED] shared memories of what had happened with Mother, Bee-Bee and N [REDACTED], he abruptly would change the subject. (T:373). Clinically, this signified to the evaluator that M [REDACTED] was flooded with a "thought, feeling or memory that they don't want to experience. So they'll change the subject." (T:373). Based upon M [REDACTED]'s statements and his play during sessions, the evaluator formed an opinion that M [REDACTED] witnessed N [REDACTED] being physically abused. (T:381).

M [REDACTED] also reported that Mother hit him and N [REDACTED] with a belt. (T:356, 372). According to M [REDACTED], Mother hit the children because they took food from the kitchen when they were hungry. (T:356-357). M [REDACTED] seemed very startled when the trauma evaluator talked about "Bee-Bee". (T:357).

⁶The statements of M [REDACTED] and N [REDACTED] to the trauma evaluator were admitted for the state of mind of the children and not for the truth. (T:353).

M■■■■'s play in the trauma evaluation focused on themes of secrecy, hidden dangers and unpredictable violence. (T:369). The evaluator concluded from this that M■■■■ had likely been exposed to an environment like this in the past, specifically one "which was characterized by chaos and unpredictability". (T:370, 376). According to the evaluator, M■■■■ was recovering from trauma at a faster rate than his sister N■■■■, likely because N■■■■ "took the brunt of the abuse in the household". (T:428).

N■■■■

At the time of trial, N■■■■ had prominent disfiguring burn marks on her hands, and scars on her arms, legs and back. (T:508, 678; RA:328-335). N■■■■ had diagnoses of Post Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder, for which she took medication. (T:517). N■■■■'s impulsivity and difficulty controlling her behaviors have improved over time. (T:517, 662). Despite being academically "very, very smart", N■■■■ had an individual education plan in school for emotional issues which allowed her to take frequent breaks and featured many therapeutic interventions. (T:515, 663). At the time of trial, N■■■■ was in therapy for her anger and concerns about boundaries. (T:652).

When N [REDACTED] was first placed into foster care in May 2010, she was in the same home as M [REDACTED]. (T:596). When N [REDACTED] first came into foster care, she spoke a lot about "Bee-Bee". (T:601). She became nervous and wide-eyed when speaking about him. (T:602). She told her foster mother that Bee-Bee was "the one that would hurt her." (T:602). N [REDACTED] also told her foster mother that Mother had said she was worthless. (T:602).

N [REDACTED] was moved to another foster home with Mrs. "U" after three weeks due to her sexualized behavior with the first foster parent's son who had Asperger's Syndrome. (T:599-600, 645). Mrs. U described N [REDACTED] as having a "striking smile", but with a "loop-type of mark" on her left arm and what appeared to her to be burn marks on both of her hands. (T:645-646).

Over the year prior to trial, N [REDACTED] had disclosed abuse to Mrs. U on at least six occasions. (T:671). Nkiru told Mrs. U about being gagged, being put in hot water, having to stand in the corner for hours and not being allowed to go to sleep, and that Mother held a knife to her throat and threatened to kill her. (T:648-649). N [REDACTED] was consistent in her story that Bee-Bee put her hands under hot water burning her. (T:673).

N [REDACTED] told Mrs. U that she loves Mother, that she'd like Mother to protect her, but she thinks that "maybe

her mom may not love her." (T:654). N [REDACTED] was disappointed that Mother hadn't done what Mother needed to do in order for N [REDACTED] to go home. (T:674).

The trauma evaluator, Ms. G [REDACTED], also evaluated N [REDACTED]. (T:381). According to the evaluator, N [REDACTED] was an engaging, eager-to-please and emotionally-vulnerable child of average intelligence and processing ability (T:410-411). When asked to recount her past history, N [REDACTED] had significant holes in her memories where she was either not willing or not able to talk about the sequence of events. (T:388). The evaluator concluded that N [REDACTED]'s "sense of her own experiences is fragmented and disjointed." (T:388). Either her life story was too distressing for N [REDACTED] to recount, or N [REDACTED] when living through it and cut herself off from experiencing it. (T:388). So, although N [REDACTED] understood the evaluator's questions, she was not able to produce the answer for emotional reasons. (T:411).

N [REDACTED] showed the evaluator scars on both of her hands, and then lifted up the back of her shirt to show the evaluator other marks on her body. (T:398). N [REDACTED] demonstrated how Bee-Bee held her hands under running hot water and said, "It hurt so much." (T:399). Of Bee-Bee, N [REDACTED] said, "I hate him." (T:400). N [REDACTED] said Bee-Bee held her hands under the hot water until she saw

some of her skin peel away around the running water. (T:402). N█████ appeared frightened when telling this story to the evaluator. (T:402). N█████ variously talked about this incident saying Mother wasn't there, then saying that Mother was there. (T:401). However, over the five sessions with the evaluator N█████ never wavered that her state of mind was that Bee-Bee held her hands under running water and injured her hands. (T:404). N█████ stated that after the burn Mother kept her from going to school or to the doctor "because then people will know what's going on in our house." (T:401). The trauma evaluator testified that N█████ did not present as a child with a sensory disorder. (T:459).

N█████ described the blisters on her hands as being so big that she couldn't use her hands to change the television channel on the remote, or to wipe herself after using the bathroom. (T:403). Her hands felt so hot as they were healing, that N█████ would wave them to create a breeze to cool them down. (T:404). The level of detail provided by N█████ about her injuries suggested to the evaluator that she was sharing the best of her memory of what happened to her. (T:405). The evaluator did not believe that either N█████ or M█████ were being coached about disclosing their experiences. (T:464).

N [REDACTED] also told the evaluator that Bee-Bee had hit her with a metal broom, a wooden broom, an electrical cord, a plastic clothes hanger, a belt and his fists. (T:406-407). She further told the evaluator that Bee-Bee had held her by the ankles and swung her upside down against the wall. (T:407). According to N [REDACTED], Bee-Bee did this because "she was rude". (T:407). N [REDACTED] stated to the evaluator that Bee-Bee had kicked her in the genitals repeatedly until she bled. (T:407).

Of Mother, N [REDACTED] said that at times she tried to protect her from Bee-Bee but Bee-Bee kept hurting her anyway. (T:401, 408). N [REDACTED] also said that Mother "Just went along with it. Just did what he did." (T:401). The evaluator took this to imply that N [REDACTED] thought Mother had also hurt her physically. (T:401). N [REDACTED] identified that Mother hit her with a metal broom, a wooden broom, electrical cord, clothes hanger and a belt. (T:409).

N [REDACTED] also talked about being denied food by Mother and Bee-Bee. (T:410). She described being beaten for taking a bite of Mother's muffin, that Bee-Bee burned her hands for "stealing" food out of the family's refrigerator, that she had to wait to eat until M [REDACTED] ate and that she would only receive half the amount of food that M [REDACTED] received. (T:409-410).

N█████ presented to the evaluator as a child "with a sort of hole inside of her....She doesn't have a sense of her entitlement to the world, and she kind of presents as someone who always expects the world to give her less than she deserves." (T:412-413). Because N█████ had been groomed to believe that she deserved to be treated poorly, she was at high risk for re-victimization throughout her life. (T:413).

Without caregivers to protect N█████ from hostile forces or people and to encourage her to develop her strengths, "she has a very bleak future." (T:413-414). "So what N█████ needs to hear is 'I believe you. I'm sorry that happened. That wasn't okay, and its never going to happen again,' over and over and over and over again." (T:422).

Mother

Mother had been in a dating relationship with Bee-Bee for about three years prior to the trial. (T:898). Bee-Bee testified at trial that he and Mother were just "friends" at that time. (T:1020). Bee-Bee denied ever hurting N█████ or M█████ and denied seeing Mother hurt the children. (T:1024-1025). Mother denied ever striking N█████ or M█████, and denied ever seeing another adult strike or engage in inappropriate behavior with either child. (T:1462-1463).

Mother never met with DCF social worker [REDACTED] [REDACTED] monthly in her home as required by the service plan. (T:481). This was because Mother insisted on all contact with DCF being in written form, and all in-person meetings must include her attorney. (T:481-482). Consequently, at the time of trial the DCF social worker did not even know for sure where Mother was living because four letters sent to Mother at her purported address came back as "return to sender". (T:482-483, 514). At trial, Mother testified she was living temporarily in a battered women's shelter but refused to disclose the address. (T:1699).

In addition to failing to meet with the social worker monthly, Mother also either failed to do the following service plan tasks or failed to give the DCF social worker any information about the tasks:

- Participate in the assessment process by providing information about herself and the children (T:486);
- Schedule a psychological evaluation (T:486);
- Openly communicate to the social worker regarding her progress with services or difficulties arranging services (T:486);
- Enroll in a parenting class (T:487); and

- Provide identifying information for "Bee-Bee" (T:488).

The DCF social worker thought it was important for Mother to obtain a psychological evaluation in order to figure out how to help Mother help the children through their trauma. (T:489). Because Mother would not discuss "Bee-Bee" with the social worker, Ms. [REDACTED] was not clear at trial if Mother continued to live with Bee-Bee and have a relationship with him. (T:523-524).

Mother did complete these service plan tasks:

- Sign releases for collaterals (T:485);
- Confirm supervised visits twenty-four hours in advance and bring appropriate snacks and activities for the children (T:486); and
- Not discuss with the children Mother's concerns with their foster homes, the case or the children's allegations (T:488).

Although Mother did sign a release for the social worker to speak with her treatment providers at Aid to Incarcerated Mothers ("AIM"), these providers never called back the social worker. (T:498-499). On May 9, 2011 at a foster care review where Mother's AIM workers were present, the social worker first learned that Mother had participated in a parenting class but had not

started individual therapy. (T:502-503). As of the time of trial, Mother had not started therapy. (T:505).

At the time of trial, Mother visited with the children weekly. (T:494). One week Mother visited with N■■■■, and the next week she would visit with M■■■■. (T:494). Mother visited with the children separately because when the visits were with both children together, M■■■■ and N■■■■ fought so much in the car on the way home it became a safety concern. (T:521-522). Ms. ■■■■ stated that Mother was much more interactive with M■■■■ during visits than with N■■■■. (T:513). N■■■■ would repeatedly say "I love you, Mommy" like she was looking for validation, but Mother would say "I love you" back once and then not again. (T:513-514).

Ms. ■■■■ supervised visits between Mother and the children during the winter of 2011. (T:496). Ms. ■■■■ observed Mother looking tired and wearing "baggy clothes". (T:496). She observed Mother to have a pregnancy "bump" underneath Mother's heavy sweatshirt. (T:527). Mother's appearance changed in the beginning of March 2011. (T:497). Ms. ■■■■ suspected Mother had given birth to another child and asked Mother to tell her the truth, but Mother refused telling Ms. ■■■■ to call her attorney. (T:498).

A friend of Mother's testified that indeed Mother had given birth to a baby during the year prior to trial. (T:904). The baby's father was Bee-Bee. (T:905). Ms. ██████ was concerned about Mother having given birth to another child because if Bee-Bee was the father, he was recognized as being the abuser of M ██████ and N ██████. (T:498). At the time of trial, neither M ██████ nor N ██████ knew about Mother's new baby. (T:1884).

Mother told the DCF social worker that she felt that DCF was against her, that she didn't believe the children were ever abused or neglected and that someone at DCF or the foster parents were telling the children what to say. (T:491). Mother stated that she wanted her communications with DCF to be in writing or tape recorded because everything that she said was being used against her. (T:491).

Ms. ██████ testified that DCF wasn't asking Mother to admit that she hurt the children, but did ask that Mother acknowledge that the children's disclosures were their own and no one was telling them what to say. (T:518). Mother never validated her children's allegations. (T:518). Ms. ██████ denied that she or anyone at DCF ever told M ██████ or N ██████ what to say about what happened to them. (T:519).

Mother's explanation for the burns on N■■■■'s hands was that N■■■■ had put her own hands under the hot water. (T:1141). Mother did not take N■■■■ to the doctor immediately after the burn because "there was nothing that actually looked concerning at the time." (T:1708). Mother had no explanation for the loop scars on N■■■■'s back, and denied it was possible that Bee-Bee put those marks on N■■■■'s body. (T:1160, 1829). Yet, Mother insisted in her trial testimony that from 2008 until the children were removed in May 2010, the children were always with her and were never alone with another caretaker. (T:1659, 1836). Mother testified that the marks on N■■■■'s body shown in pictures in Exhibit 25 taken when the children came into care were the same as new marks on N■■■■ which Mother photographed at a visit three months later (admitted as Exhibit 32). (T:1844-1848).

Because Mother never recognized that the things that the children disclosed actually happened, the DCF social worker could never do any safety planning with Mother. (T:521-522). Without Mother's acknowledgment of the abuse and safety planning, the DCF worker was concerned that if the children were returned to Mother that the children would be at risk for more abuse. (T:522-523). Even as late as the time of her trial

testimony, Mother stated that she would not be empathetic and supportive if N [REDACTED] were to be returned to her and then she disclosed abuse. (T:1874).

Court investigator [REDACTED] was qualified as an expert able to give an opinion on Mother's mental health. (T:1149). Ms. [REDACTED] had concerns about Mother's mental health in part because of her level of agitation, her paranoia and her projection of blame and responsibility onto others. (T:1150). An example of Mother's anger and agitation occurred at trial, when Mother approached father and told father to "watch it" prompting the judge to admonish Mother for her outburst. (T:894; CL.10, RA:77). [REDACTED] recommended psychological testing to look at the possibility of a personality disorder. (T:1150). Without psychological testing and treatment, [REDACTED] had significant concerns about Mother's parenting capacity. (T:1151).

N [REDACTED]'s Injuries

Dr. [REDACTED] testified as an expert in child trauma, sexual abuse and pediatrics. (T:791). She examined N [REDACTED] and M [REDACTED] on June 1, 2010. (T:793). Dr. [REDACTED] noted that N [REDACTED] had scarring on the backs of her hands extending from the wrist to her fingers that was consistent with a healed burn. (T:794-795). She will have these scars "forever". (T:805). This

scarring was consistent with N■■■■'s hands being put under a faucet of hot water. (T:806). N■■■■ also "had a large number of looped, healed scars in the shape basically of a loop superimposed on top of each other" on her arms, back and upper thighs. (T:795). Dr.

■■■■ testified that photographs admitted as Exhibit 25 accurately reflected the injuries she saw. (T:795-796).

Dr. ■■■■'s opinion was that N■■■■ did not, and could not have, inflicted these injuries on herself. (T:796). In addition, Dr. ■■■■ testified that in her opinion N■■■■ did not have a sensory disorder. (T:802-803). Dr. ■■■■'s opinion was that N■■■■ had been subjected to physical abuse. (T:799-800). Also, Dr. ■■■■ found that N■■■■ had no hymenal tissue on the opening of her vagina, and was of the opinion that N■■■■ was subjected to penetrating trauma and chronic sexual abuse. (T:795, 800-801).

The Children's Life With Mother

When N■■■■ lived with Mother, she missed forty days of school in second grade. (T:1778). She stopped going to school in May 2009 and didn't return to school until March 2010. (T:1779, 1849, 1856). Mother moved frequently, and lived in nine residences between 2001 and the time of trial in 2011. (T:1866-1867). These frequent moves prompted Court Investigator ■■■■'s

concern that Mother's "nomadic" existence harmed the children. (T:1150).

From January to May 2010, Mother lived with the children, another female and two black males in an apartment at [REDACTED] in Medford. (T:1904-1905, 1906, 1909-1910). [REDACTED], Mother's neighbor during that time testified that constantly he could hear children being "smacked" and then heard crying. (T:1902-1903, 1911). The neighbor also heard constant verbal abuse of the children, including "sit the F down" and "shut the F up", after which he would hear children crying. (T:1910).

SUMMARY OF THE ARGUMENT

The Exhibit 25 photographs of N[REDACTED]'s injuries were properly authenticated through the trial testimony of the DCF social worker, the G.L. c. 119, § 51B investigation stating the facts of the date and place of the taking of the photographs which came into evidence without objection, and the date markings on the photographs themselves. See pp. 24-28. The photographs were also authenticated through the expert testimony of Dr. [REDACTED] and the testimony of Mother. See pp. 28-29. Photographs are not hearsay, so Mother's appellate argument challenging their admission as if they were hearsay is inapposite. See pp. 29-30.

Mother waived her argument that Exhibit 25 was more prejudicial than probative by failing to raise it at trial. See pp. 30-31. The photographs, though relevant, were not the "central issue" in the case, see pp. 31-34, they were not substantially more prejudicial to Mother than probative because the non-gruesome photographs of N■■■■■■s healed injuries were cumulative of other unchallenged but graphic testimony, see pp. 34-35, and the photographs were not used at trial to influence witness testimony. See pp. 35-43. The trial judge relied on the photographs for only six findings and one conclusion of law. See pp. 35-37, 39-43. Mother invited the trial judge to compare the Exhibit 25 photographs with her own photograph, and she cannot complain on appeal that the judge did exactly that. See pp. 43-44.

All of the trial court's factual findings were supported by the evidence, and Mother's implicit challenges to a handful of such findings fail. See pp. 45-47. The trial judge's findings proved Mother's parental unfitness by clear and convincing evidence, termination of Mother's parental rights was in the children's best interests and Mother makes no contention on appeal to the contrary. See pp. 47-49.

ARGUMENT

I. THE TRIAL COURT CORRECTLY ALLOWED PHOTOGRAPHS OF N■■■■'S INJURIES INTO EVIDENCE.

A. The Standard of Review

The admissibility of photographic evidence is left to the discretion of the trial judge, and this Court will overturn this decision only where the appellant is able to bear the heavy burden of demonstrating an abuse of that discretion. See Commonwealth v. Liptak, 80 Mass. App. Ct. 76, 82 (2011) (internal citations omitted). A trial judge has abused his discretion if there is evidence of "arbitrary determination, capricious disposition, or whimsical thinking." Berube v. McKesson Wine & Spirits Co., 7 Mass. App. Ct. 426, 433 (1979) citing Davis v. Boston Elv. Ry., 235 Mass. 482, 496 (1920). That was far from the case here.

B. The photographs of N■■■■'s injuries were properly authenticated and were not hearsay.

Mother argues that the photographs of N■■■■'s injuries admitted as Exhibit 25 were improperly admitted because these photographs lacked adequate foundation and met no exception to the hearsay rule. M.Brief at 11-14. This argument is mistaken as a matter of fact and law.

A photograph can be authenticated by someone not present when it was taken if there is "evidence

sufficient to support a finding that the matter in question is what its proponent claims." Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 646 (2002) quoting Prop. Mass. R. Evid. 901(a).⁷ In making this determination, the trial court has considerable discretion and is not bound by the rules of evidence. See id. "Once authenticated sufficiently for admission, remaining questions about a photograph's evidentiary value are for the trier of fact." Id. Any concerns surrounding the production of the image go to its weight, and not its admissibility. See Renzi v. Paredes, 452 Mass. 38, 52 (2008).

DCF Social Worker ██████████, through whom the photographs were admitted, was not present when they were taken but she found the pictures in the DCF case record at the DCF office. (T:510-511). Specifically, the DCF social worker found the pictures with the report produced pursuant to the G.L. c. 119, § 51B investigation. (T:511). As the on-going social worker she was responsible for maintaining the case record.

⁷The most recent and authoritative compilation of Massachusetts evidentiary principles can be found in the Massachusetts Guide to Evidence, 2012 edition. See Mass. G. Evid. s. 901(a), at 304, 306 (2012) (principle that authenticity may be proved by testimony of qualified witness that item is what proponent represents it to be is "applicable to photographs as well as other forms of documentary evidence").

(T:508, 510-511). She testified that she had seen N [REDACTED] two to three times per month, and the pictures depicted various scars and marks on N [REDACTED]'s body and the burn marks on her hands. (T:508). The DCF social worker testified that pictures of children's injuries were routinely taken when they came into care. (T:511).

The fact that these pictures of N [REDACTED] were taken on May 21, 2010 in the Malden DCF office in the presence of DCF workers [REDACTED] and [REDACTED] is documented in a investigation report filed pursuant to G.L. c. 119, § 51B ("51B Report") entered into evidence as Exhibit 9. (RA:136). Although this Exhibit was subject to redaction in response to Mother's motion *in limine*, Mother did not object to the portion of this 51B Report that recorded the fact that photographs of N [REDACTED]'s injuries and scars were taken on this date. (T:277-292, 336). A 51B Report is a required government report and may be considered for statements of fact, although not for purposes of diagnosis, prognosis, and evaluation. See Custody of Michel, 26 Mass. App. Ct. 260, 267 (1990). That photographs of N [REDACTED]'s injuries and scars were taken on May 21, 2010 at the Malden DCF office is a statement of fact, and was thus properly admitted into evidence.

In addition, the reverse side of the photographs in Exhibit 25 have the following date stamp: "5/26/10 TARGET PHOTO". (SA:2-9).⁸ Trial counsel for DCF specifically brought this date stamp to the trial judge's attention at trial, saying that the pictures "were dated 5/26/2010". (T:510). This date appears to be when the pictures were developed at "Target Photo", and the date is perfectly consistent with the pictures having been taken some days earlier on May 21, 2010.

The combination of the DCF social worker's testimony identifying N■■■■'s face, body and hands in the Exhibit 25 photographs and identifying the photographs as being found with the DCF case record, the date stamps on the reverse of the photographs themselves and the statement of fact admitted in the 51B Report as to when and where the photographs were taken provided an adequate foundation for their admission.

The case at bar is distinguishable from the case of Commonwealth v. Darby, 37 Mass. App. Ct. 650, 653 (1994) that Mother relies upon for her argument. See M.Brief at 12. In Darby, this Court ruled that the photographs at issue were not properly authenticated because there

⁸The abbreviation "SA" refers to the Supplemental Record Appendix of the children and DCF, and the numbers following the colon refer to the specific page number(s) in such Supplemental Appendix.

was no evidence of when the photographs were taken, who found the photographs, where and under what circumstances the photographs were found, and how they came into possession of the prosecution. See Commonwealth v. Darby, 37 Mass. App. Ct. at 653. Here, all those questions were answered through testimony and the exhibits. The trial judge did not abuse her discretion in finding the existence of a proper foundation for the admission of the Exhibit 25 photographs into evidence.

In addition, Dr. ██████████ testified that she examined N██████ on June 1, 2010, shortly after these pictures were taken. (T:793). Although not present when the pictures were taken, she testified that the Exhibit 25 photographs accurately reflected the state of N██████'s hands and injuries during such examination. (T:795-796). Even if the photographs had not been properly authenticated when they were admitted during the DCF social worker's testimony, Dr. ██████████'s testimony that the images accurately presented what they purported to be should cure any error. See Renzi v. Paredes, 452 Mass. at 52 (person authenticating photographs need not be the photographer but a person familiar with the details pictured).

Lastly, Mother herself testified on questioning by her own counsel that two photographs in Exhibit 25 of N■■■■'s leg were an "approximate" representation of the bruise when she saw it, and one picture of a scar was "the mark that was on my daughter's back". (T:1499-1500, 1519-1520). Mother's own testimony authenticated these three photographs, and this Court should consider Mother's appellate argument as to lack of authentication waived for this part of Exhibit 25.

Mother concedes that photographs are not hearsay because no declarant making an assertion is involved. See M.Brief at 12. This is a correct statement of the law. See Commonwealth v. Thornley, 400 Mass. 355, 361 (1987) *quoting United States v. Moskowitz*, 581 F.2d 14, 21 (2nd Cir. 1978) *cert. denied* 439 U.S. 871 (1978) (police sketch "is not a 'statement' and therefore can no more be 'hearsay' than a photograph identified by a witness.") *and State v. Packard*, 184 Conn. 258, 272-275 (1981) (a "photograph" is not a "statement" but is a "nonverbal mode[] of testimony"). Because the photographs were not hearsay, it is difficult to imagine how their alleged failure to meet either the business records or official records exception to the hearsay rule renders them inadmissible. Nevertheless, Mother presses an argument that because the trial judge

appeared to admit these photographs because they were part of the DCF file, the hearsay exceptions relating to business records and/or official records are implicated here. See M.Brief at 12-14.

This argument gets Mother nowhere. The rule is that if the photographs were properly admitted, "it is of no consequence whether the reason assigned by the judge was accurate." Commonwealth v. Signorine, 404 Mass. 400, 403 n.1 (1989) quoting Mathews v. Orlandella, 320 Mass. 386, 388 (1946). Here, the photographs were properly authenticated through the testimony of DCF Social Worker Stoker, Dr. [REDACTED] and Mother, the markings on the photographs, and the unchallenged facts in the 51B Report and thus were properly admitted. Whether the reason assigned by the judge was accurate is therefore of no consequence. No further inquiry is required to dispose of Mother's argument.

C. The Exhibit 25 Photographs were Not Substantially More Prejudicial to Mother Than Probative.

Mother argues that even if the photographs were properly authenticated, they should not have been admitted into evidence because the prejudicial effect on Mother's case outweighed their probative value. M.Brief at 14-16. Although trial counsel for Mother objected to the admission of the photographs on grounds they weren't

properly authenticated and because they fell under no hearsay exception, trial counsel made no objection that the prejudicial nature of the photographs outweighed their probative value. (T:509-512). Issues not raised by a losing party in the trial court are not addressed on appeal, absent exceptional circumstances. See Adoption of Mary, 414 Mass. 705, 712 (1993). No such exceptional circumstances exist here, and this Court should consider this issue to have been waived. See Adoption of Gregory, 434 Mass. 117, 120 n.1 (2001).

Even if this Court addresses the waived issue, it is meritless. Had Mother objected at trial to the photographs on the basis that they were too prejudicial, the trial judge would have been justified in exercising her considerable discretion to admit them into evidence. See Renzi v. Paredes, 452 Mass. 38, 52 (2008) (within trial judge's discretion to determine whether probative value of photographs outweighs any prejudice to the other party). A trial judge's determination of prejudicial effect will not be disturbed on appeal except for "palpable error." See Commonwealth v. Carey, 463 Mass. 378, 388 (2012) (internal citations omitted).

The probative value of the photographs must be "substantially outweighed by the danger of unfair prejudice" in order to be inadmissible on this basis.

Commonwealth v. Carey, 463 Mass. 378, 387-388 (2012).

The prejudice to Mother because of the admission of the Exhibit 25 photographs did not outweigh their probative value, much less "substantially" so.

1. The photographs were not the "central issue" in the case against Mother.

Mother characterizes the photographs as speaking to the "central issue in this case" defined as "the presence of various marks on N [REDACTED], the timing of their appearance, and their nature or explanation". See M.Brief at 14. This is wrong. The central issue in this case was whether Mother was currently unfit to parent two children who alleged they were abused and presented as being severely traumatized, when Mother refused to believe her children's suffering and made no progress in this case. (Intro. at ¶ 1; RA:15).⁹

Mother's position that the "central issue" is about the explanation of N [REDACTED]'s injuries only underscores Mother's continuing defensive approach to her children's undisputed trauma. Mother spent the entirety of this case focused on herself: that DCF was against her, that she was being made out to be the villain and that no-one

⁹The abbreviation "Intro." refers to the Introduction to the trial judge's Findings of Fact and Conclusions of Law In Support of Adjudications, Commitments and Decrees, appended hereto with the original Record Appendix pagination.

would hear her side of the story. (CL:9, RA:76). Utterly missing from this perspective was any acknowledgment of or interest in alleviating the suffering of her traumatized children. (CL:9, RA:76). This deficiency in Mother's parenting was a significant reason the trial judge terminated Mother's parental rights and the Exhibit 25 photographs, although very probative of N■■■■'s injuries, played little role in the trial judge's consideration of the real "central issue".

The injuries to N■■■■ were important to the trial judge's findings and conclusions of Mother's parental unfitness, but the photographs themselves were cumulative of unchallenged but equally graphic testimony describing N■■■■'s injuries. Dr. ■■■■■ testified as an expert in child trauma, sexual abuse and pediatrics. (T:791). She examined N■■■■ on June 1, 2010. (T:793). Dr. ■■■■■ noted that N■■■■ had scarring on the backs of her hands extending from the wrist to her fingers that was consistent with a healed burn. (T:794-795). She will have these scars "forever". (T:805). This scarring was consistent with N■■■■'s hands being put under a faucet of hot water. (T:806). N■■■■ also "had a large number of looped, healed scars in the shape basically of a loop

superimposed on top of each other" on her arms, back and upper thighs. (T:795).

Dr. ██████'s testimony about her examination of N█████'s physical injuries was the basis of ten of the trial judge's findings. (F.115, 116, 117, RA:34; F.118, 119, 120, 121, 122, RA:35; F.123, 124, RA:36). In particular, Finding No. 123 is completely based on Dr. ██████'s trial testimony as follows:

N█████'s pattern injuries consisted of curved markings, some of which were completely healed while some still had some pigment missing and were a bit raised. The curves consisted of two lines that ran together in a curve in a pattern seen when some sort of looped object (such as an electric cord or something that has two edges) is used to strike the skin. These scars were in different stages of healing and not easy to date; they could have been weeks or several months old. These will leave permanent marks on N█████. These marks predated N█████'s entry into foster care, otherwise she would have had scabs or fresh bruising. N█████ also had a large bruise on her thigh. (Dr. ██████'s June 9, 2011 testimony).

(F:123, RA:36).

The photographs were merely duplicative of Dr. ██████'s testimony and thus could not be more prejudicial to Mother than the unchallenged testimony itself.

2. The photographs were not inflammatory or gruesome.

Usually an appellant raises a prejudice-outweighing-probative-value argument when pictures are gruesome, bloody or depict sexual conduct of a shocking

nature. See e.g. Commonwealth v. Carey, 463 Mass. at 387-388 (no error in admission of eight photographs and a video depicting women being strangled to death); Commonwealth v. McNulty, 458 Mass. 305, 329 (2010) (no error in admission of bloody autopsy photographs). The pictures in Exhibit 25 were not inflammatory or gruesome, showing only healed scars and light bruising. (SA:2-9). Dr. ██████'s trial testimony describing N█████'s injuries was actually more graphic than the pictures of the injuries themselves. (T:794-795).

3. The photographs were not used at trial to influence witness testimony, and the trial judge relied for only a handful of findings on the Exhibit 25 pictures.

Mother attempts to paint a portrait of these Exhibit 25 photographs pervasively prejudicing the judge and many witnesses against Mother and her case. See M.Brief at 14-15. That does not comport with reality. In 2068 pages of trial transcript, in 367 factual findings and in twenty-eight conclusions of law, the Exhibit 25 photographs are referenced only in the following ways, none of which were unduly prejudicial:

- When the photographs were admitted into evidence after argument. (T:508-512);
- After Mrs. U, N█████'s foster mother, testified to not having seen if N█████ had marks on her back

(T:670), the DCF trial attorney showed the Exhibit 25 photographs to the foster mother prompting her to remember seeing a "bruise" on N■■■■'s back at a doctor's appointment. (T:677-679).

Although Mother makes much of this in her brief, the foster mother's testimony about N■■■■'s back was wholly duplicative of Dr. ■■■■■'s testimony as to the same injuries. (T:795). Mother does not and cannot dispute the existence of marks on N■■■■'s back at the time of removal given Dr. ■■■■■'s testimony. That the foster mother also saw a "bruise" or "big mark" on N■■■■'s back adds nothing to this case. Indeed, the trial judge made no findings that N■■■■'s foster mother saw a bruise on N■■■■'s back.¹⁰

- The DCF attorney showed the Exhibit 25 photographs to Father, but he made no response to the photograph of N■■■■'s hands (T:752) and couldn't say if N■■■■ ever had marks like that on her body when he last lived with her in 2006. (T:751-753). Mother argues that Father's vague testimony after being shown the photographs that he didn't know how the

¹⁰"Ms. U, N■■■■'s second foster mother, described her as a very cute, petite little girl with a striking smile. There are marks on both her left and right arms and she has what appear to be burn marks on both of her hands. (Ms. U's June 8, 2011 testimony)" (F.137, RA:37).

marks got there somehow influenced the trial judge to find in Conclusion of Law 16 that such injuries were "inflicted" on N[REDACTED]. See M.Brief at 19-20; CL.16, RA:79.¹¹ This argument is weak at best given the unchallenged testimony of Dr. [REDACTED] which is reflected in Finding No. 120: "Dr. [REDACTED] did not think it possible for any of N[REDACTED]'s injuries to have been self-inflicted". (T:796; F.120, RA:35). It strains credulity to suggest that the trial judge was at all influenced by Father's thoughts and beliefs about the cause of N[REDACTED]'s injuries when she expressly credited Dr. [REDACTED]'s expert opinion on that subject.

- The DCF attorney showed the Exhibit 25 photographs to Dr. [REDACTED], who testified that they accurately reflected the injuries she saw on N[REDACTED] as of her June 2010 physical examination. (T:795-796).

Mother does not specifically challenge the use of the photographs with Dr. [REDACTED]. Prior to being shown the photographs, Dr. [REDACTED] had already testified in graphic detail to N[REDACTED]'s injuries. (T:794-795). The photographs added nothing to Dr. [REDACTED]'s testimony, and

¹¹Conclusion of Law 16 provides in part, "Mother's parental shortcomings are clear in this case and are documented in the photographic exhibits depicting N[REDACTED]'s inflicted and permanent injuries." (CL.16, RA:79).

in fact the injuries sounded more extensive from her description than the photographs depict. (SA:2-9). In addition, Mother's trial counsel used the Exhibit 25 photographs to cross-examine Dr. ██████, and Mother rightly doesn't complain about this. (T:809-810).

- The DCF attorney showed the photographs to Mother's friend ██████, who thereafter testified she never saw N█████'s burned hands. (T:900-901).

Mother makes no argument that this testimony somehow prejudiced the judge against Mother or Mother's case. Although the trial judge made some findings based upon Ms. ██████'s testimony, she made no findings concerning any of her testimony based on the photographs. (F.70, 226, 242; RA:27, 52, 55).

- The DCF attorney showed the photographs to ██████ ("Bee-Bee") after which he acknowledged seeing the burns on N█████'s hands, but denied seeing the loop marks on her body. (T:1072-1077).

Mother makes no argument that the showing of the photographs to Bee-Bee had any role in the trial judge's determination that he was not credible when he denied abusing the children. (F238; RA:54).

- Mother's trial counsel showed the Exhibit 25 photographs to Mother during her direct testimony,

after which Mother testified that two of the pictures represented the "pencil" shaped bruise on N■■■■'s leg (T:1499-1500) and another picture was of the mark on N■■■■'s back. (T1519-1520).

Mother rightly does not argue that her own trial counsel's use of the photographs prejudiced her case.

The trial judge was careful to attribute each of her factual findings to the trial record. She relied on Exhibit 25 for only six of her 367 findings of fact, as follows:

- **Finding No. 75** - "N■■■■ had an unusual mark on her leg that looked like the length and width of a pencil. Mother said it was a new bruise and she had not seen it before. (Mother's June 15, 2011 testimony) (Exh. 25)" (RA:28).
- **Finding No. 87** - "There was a scab on her back, shaped like a sideways reverse question mark in the midsection of her back that Mother said she did not know about. (Exh. 25)" (RA:30).

Finding Nos. 75 and 87 are simply straightforward observations of what the photographs actually show. Just because it was prejudicial to Mother that N■■■■ had these injuries when she was removed from Mother's care was not enough to render the evidence inadmissible. See Commonwealth v. Carey, 463 Mass. at 389. Any prejudice to Mother from a photographic depiction of the injuries is far outweighed by the probative value of the photographs in showing the nature of the injuries

described by other witnesses in the trial record.

Further, such an unemotional description of what the photographs depict cannot support Mother's allegation that these photographs somehow biased the trial judge against her.

- **Finding No. 117** - "The second finding was that N██████ had multiple looped (healed scars in the shape of a loop) superimposed on top of each other over her arms, back, and upper thighs. These were 'pattern injuries' and accurately reflected in Exhibit 25. Pattern injuries imply the use of some sort of implement to create the injury, which would be extremely painful. (Dr. ████████'s June 9, 2011 testimony) (Exh. 25)". (RA:34).

Here again, Dr. ████████'s trial testimony, which is unchallenged by Mother on appeal, is utterly duplicative of the photographs of the "loop-type" injuries that Mother primarily challenges on appeal.

- **Finding No. 194** - "When shown Exhibit 25, photographs of N██████'s injuries, Ms. ████████ admitted that she would have concerns about allegations that left those marks and injuries." (RA:47).

Mother's argument is that all the positive things Ms. ████████ had testified to prior to being shown Exhibit 25 would have "impacted" the outcome of the trial more favorably for Mother had Ms. ████████ not been prompted to testify to a "concern" based on seeing the actual injuries to N██████. See M.Brief at 16-18. However, the entire purpose of this exchange was to

place into evidence that Mother had not been completely upfront about her DCF situation with Ms. [REDACTED] - a valid and fair point independent of the photographs. (T:1278-1279).

Despite Mother not having told Ms. [REDACTED] any specifics about the allegations against her, Ms. [REDACTED] refused to testify that she would have assisted Mother any differently, thus deflecting the main point the DCF attorney was trying to make with the photographs. (T:1279-1280). The fact that Ms. [REDACTED] had "concerns" about the injuries probably helped her credibility with the judge, for had she testified otherwise the trial judge could have fully discounted her credibility. Instead, the trial judge based several positive findings for Mother on Ms. [REDACTED]' testimony, including that Ms. [REDACTED] testified "credibly" that she was helping Mother with housing and other services to comply with her service plan, and that Mother had attended parenting and anger management classes. (F.68, F.211, CL.15; RA:27, 36, 78). But Ms. [REDACTED]' testimony was of limited use to Mother with or without the photographs. Ms. [REDACTED] had only a GED degree and no specialized training in teaching parenting classes or being a counselor. (F.211; RA:50). The trial judge discounted the "impact" of her testimony for that

reason, entirely independent of the showing of the photographs. (CL.15; RA:78).

- **Finding No. 234** - "N■■■■'s hands are disfigured as a result of the burns (Ex. 25) and it is not clear to the court whether she has any loss of function as a result of the burns." (RA:54).

It is undisputed that N■■■■'s hands were disfigured by the burns, but this information came into evidence during the unchallenged testimony of Dr. ■■■■. (T:794-795). In addition, the trial court did not find that N■■■■ had loss of function, which shows a balanced and fair view of the evidence on this point. There is no hint in this finding that the trial judge was somehow blinded to the merits of Mother's case due to her reaction to the photographs.

- **Finding No. 252** - "Ms. ■■■■ testified that aside from the burns on N■■■■'s hands and the pencil-shaped bruise on her thigh, she never saw any other marks such as those depicted in Exhibit 25." (RA:57).

Mother complains that the DCF attorney showed the Exhibit 25 photographs to Mother's former roommate ■■■■, after which she "reluctantly" conceded those marks could have been present on N■■■■ while she lived with her. See M.Brief at 21. This information could have been elicited from Ms. ■■■■ without the photographs by way of questioning using Dr. ■■■■'s unchallenged physical findings as the factual basis.

Nevertheless, the use of the photographs did not unduly prejudice Mother. From the photographs, Ms. [REDACTED] only identified the mark on N[REDACTED]'s leg that looked like a pencil as something she had seen before. (T:1354). This comports perfectly with the trial judge's finding about her testimony. (F.252, RA:57).

Also, Ms. [REDACTED] testimony was not damaging to Mother's case even after she saw the photographs because she denied seeing any other marks on N[REDACTED]'s body and then flatly denied that it was possible that Mother or Bee-Bee were beating N[REDACTED] because she was professionally trained to look for abuse. (T:1355-1356). That the trial judge did not credit Ms. [REDACTED] "professional" powers of observation was unrelated to the use of the photographs and perfectly within the trial judge's discretion. See Adoption of Larry, 434 Mass. 456, 467 (2001) (trial judge in the best position to assess credibility).

4. Mother invited the trial judge to compare Mother's photographs with Exhibit 25.

The final use of the Exhibit 25 photographs at trial of which Mother complains is that the trial judge compared the "loop marks" shown in Exhibit 25 to marks that Mother saw and photographed during a visit after N[REDACTED] went into DCF custody. See M.Brief at 21-23.

There was no error, but even if there was Mother invited it by making this comparison in her own testimony. This Court has questioned whether invited error is reviewable at all on appeal, and if so the standard for reversal is extremely stringent. See Commonwealth v. Wallace, 76 Mass. App. Ct. 411, 416 (2010).

Mother testified that N [REDACTED] suffered a loop-type injury while in foster care similar to those found on her back when she was removed from Mother's care, and Mother took a picture of this purported new loop mark which came into evidence as Exhibit 32. (T:1716-1717, T:1830, T:1844-1849; F.236, RA:54). In Finding 176 and during trial, the trial court did exactly what Mother invited the court to do: compared the Exhibit 32 photograph taken by Mother of an injury to N [REDACTED] occurring after her removal with the loop marks on her back shown in Exhibit 25. (T:1941; F.176, RA:30). The trial judge straightforwardly determined the marks were not similar. (F.176, F.236; RA:30, 54). There was no error of any kind here.

II. THE JUDGMENT OF THE TRIAL COURT DISPENSING WITH MOTHER'S CONSENT TO N [REDACTED] AND M [REDACTED]'S ADOPTION IS BASED UPON CLEAR AND CONVINCING EVIDENCE OF THE MOTHER'S PARENTAL UNFITNESS, AND THE TRIAL JUDGE CORRECTLY DETERMINED THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS TO BOTH CHILDREN WAS IN THEIR BEST INTERESTS.

A. The Trial Court's Subsidiary Findings With Respect to Mother Are Supported By the Evidence and Are Not Clearly Erroneous.

_____A trial court's findings must be left undisturbed absent a showing that they are "clearly erroneous." Custody of Eleanor, 414 Mass. 795, 799 (1993). A finding is "clearly erroneous" when there is no evidence to support it or when, although there is evidence to support it, the reviewing court after a review of the entire evidence is "left with the definite and firm conviction that a mistake has been committed." Id.

The trial judge made 367 separate findings of fact, none of which Mother explicitly challenges as clearly erroneous. However, Mother appears to indirectly challenge the trial court's factual findings that the children's story of abuse was consistent, that N■■■■'s bruises were not self-inflicted, that N■■■■ did not have a sensory disorder and that the children were not adequately fed by Mother. See M.Brief at 23-25. These arguments that the trial judge "deemphasized" evidence positive towards Mother boil down to dissatisfaction with the trial judge's weighing of the evidence and her credibility determinations. See Adoption of Quentin, 424 Mass. 882, 886 n.3 (1997).

According to N■■■■'s foster mother Mrs. U, over the year prior to trial, N■■■■ had disclosed abuse to her on

at least six occasions, and N█████ was consistent in her story that Bee-Bee put her hands under hot water burning her. (T:671, 673). Ms. ██████, the trauma evaluator testified that over the five sessions with the evaluator N█████ never wavered that she believed that Bee-Bee held her hands under running water and injured her hands. (T:404). Ms. ██████, the court investigator, testified that because the children's statements that they were abused were consistent over time, that those experiences were real. (T:1172). The trial judge's finding that the children's statements of abuse were consistent is not clearly erroneous. (F.165; RA:43).

Dr. ██████ testified that in her medical opinion N█████ did not have a sensory disorder, nor was it possible that her injuries were self-inflicted. (T:796, 802-803). The trauma evaluator testified that N█████ did not present as a child with a sensory disorder. (T:459). The trial judge's findings that N█████ did not have a sensory disorder are not clearly erroneous. (F.186, 296, 337; RA:46, 63, 69).

The children's first foster mother testified that both children made clear they weren't used to eating regularly and "just ate and ate and ate. Anything they could get their hands on." (T:635). N█████ also talked with the trauma evaluator about being denied food by

Mother and Bee-Bee. (T:410). The trial judge's finding that Mother did not provide N████ with adequate food is not clearly erroneous. (F.329; RA:68).

There was evidence to support each of the trial judge's findings on the topics that Mother implicitly challenges and a review of all the evidence shows no mistake was made. See Custody of Eleanor, 424 Mass. 882 at n.3. There is no basis for this Court to disturb the trial judge's view of the evidence. See Adoption of Quentin, 424 Mass. at 886 n.3.

B. Taken Together, the Trial Court's Findings Clearly and Convincingly Prove that Mother is Unfit to Parent N████ and M████ and that Termination of Mother's Parental Rights was in Their Best Interests.

When deciding whether to terminate a parent's rights, a judge should evaluate whether the parent is "able to assume the duties and responsibilities required of a parent and whether dispensing with the need for parental consent will be in the best interests of the children." Adoption of Mary, 414 Mass. 705, 710 (1993). This inquiry is a two part analysis. See Adoption of Nancy, 443 Mass. 512, 514-515 (2005). First, after evaluating the fourteen statutory factors in G.L. c. 210, § 3, the trial judge must make findings which taken together prove parental unfitness by clear and

convincing evidence. See Adoption of Cadence, 81 Mass. App. Ct. 162, 167 (2012).

Here, the trial judge carefully considered each of the factors enumerated in G.L. c. 210, §3(c), and concluded that factor (ii) applied in reaching her conclusion that Mother was unfit to parent N [REDACTED] and M [REDACTED]. (CL.22(ii); RA:80-82). The trial judge correctly concluded that Mother either inflicted physical and emotional injuries on her children or failed to protect them from abuse. (CL.11, RA:77; CL.22(ii), RA:80). Mother was utterly unable to meet her children's needs or to show them even basic empathy. (CL.9, RA:77; CL.22(ii), RA:80). Mother failed to engage in services to correct her inability to provide acceptable care to her children and she continued to present a danger to them. (CL.16, CL.17, RA:79; CL.22(ii), RA:80). Other than asserting that the admission of the Exhibit 25 photographs prejudiced the fairness of her trial - a contention that has no merit either legally or factually - missing from Mother's appeal is any argument that clear and convincing evidence of her parental unfitness was not proven. The trial judge's conclusion of Mother's parental unfitness was fully supported by the evidence, was free from legal

error or abuse of discretion, and this Court should affirm the trial court's judgment.

The second inquiry is whether it was in the children's best interests to terminate Mother's parental rights, and this issue includes consideration of the permanency plan. See id. at 167. Here, the trial judge correctly found that termination was in the children's best interests because Mother's unfitness was likely to continue into the indefinite future. (CL.21, RA:80). The trial judge sent M██████ to the permanent custody of his paternal grandmother, reserved judgment on N██████'s adoption plan until after her biological father's rights were adjudicated and provided for post-termination contact with Mother due to the children's love for and bond with her. (CL.24, 27, 28; RA:83, 84). The trial judge did not abuse her considerable discretion in making these rulings, and Mother does not contest them. This Court should affirm the trial court's judgment.

CONCLUSION

For the foregoing reasons, the trial court's judgment finding N██████ and M██████ in need of care and protection and dispensing with Mother's consent to their adoption must be affirmed.

Respectfully submitted,

██

By their attorney,

[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

Dated: October 22, 2012

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k)

The undersigned [REDACTED], Esquire,
hereby certifies that the foregoing brief complies with
the rules of court that pertain to the filing of briefs,
including, but not limited to: Mass. R. A. P. 16(a)(6);
Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A.
P. 16(h); Mass. R. A. P. 18 and Mass. R. A. P. 20.

[REDACTED]

ADDENDUM

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1. Text of G.L. c. 119, § 51B	Add.1
2. Text of G.L. c. 210, § 3	Add.4
3. Findings of Fact and Conclusions of Law in Support of Adjudications, Commitments, and Decrees (██████████ ██████████), dated December 9, 2011	Add.7