

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000932-ME

R. S.<sup>1</sup>

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE JANIE MCKENZIE-WELLS, JUDGE  
ACTION NO. 09-AD-00001

CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY; A.L.S.; C.K.;  
AND HON. JANIE MCKENZIE-WELLS,  
MARTIN FAMILY CIRCUIT COURT JUDGE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: LAMBERT, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: R.S. (“Father”) has appealed from the Martin Family Court’s  
March 26, 2010, order involuntarily terminating his parental rights to his minor

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<sup>1</sup> Pursuant to the policy of this Court, to protect the privacy of the parties involved in termination proceedings we refer to them only by their initials.

child, A.L.S. (“Child”), and from the denial of his motions for a new trial and to alter, amend or vacate. For the following reasons, we affirm.

### **FACTS**

Child was removed from Father’s home by the Cabinet for Health and Family Services (“Cabinet”) in 2006 based on reports of physical abuse and Father’s obvious impairment due to drug usage. Upon completion of various recommended assessments, drug screenings and supervised visits, Child was returned to his care in February 2007.

On November 1, 2007, Father was arrested for driving under the influence. At the time of the traffic stop and his arrest, Child was in the vehicle.<sup>2</sup> The Cabinet assigned a worker to investigate the incident to determine whether intervention was necessary at that time. The worker was unable to contact Father so she determined to make a home visit.

On November 7, 2007, the worker went to the home accompanied by a sheriff’s deputy. On the way to Father’s home, the worker and deputy happened to be following Father’s car. They noticed the car was weaving, and that Child, her siblings, and her mother were also in the car with Father. Upon contact with Father, it was noted that Father had pill residue coming from his nose and was in possession of drug paraphernalia. He was again arrested for DUI. Child was immediately taken into temporary custody.

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<sup>2</sup> Father would later enter a guilty plea to the charged offense.

A petition alleging Child was neglected was filed in the Martin Family Court and an adjudication hearing was scheduled for December 7, 2007. The trial court found Child to be neglected and continued her placement with the Cabinet. Social workers began offering services aimed at reunifying Father with the Child. Father refused to cooperate and participate in the offered services, claiming he had already done so for a previous worker. He was clearly impaired during the meeting with the social worker and admitted to having a substance abuse problem.

Throughout 2008, the Cabinet continued to meet with Father and attempt reunification. Father resisted the Cabinet's attempts to provide services, such as substance abuse treatment, and informed the workers he believed Child's mother should regain custody since she had done nothing to justify Child's removal from the home. The Cabinet did not believe Child could be safely returned to the home because neither parent had taken appropriate steps to alleviate the risks of harm to Child. In November of 2008, the Cabinet requested permission to change the permanency goal from reunification to termination and adoption. On November 13, 2008, the trial court granted the request.

A petition for termination of Father's parental rights was filed on February 6, 2009. Extensive efforts to locate Father were made, but Father was not served with the petition until nearly a year later. A trial on the petition was held on March 24, 2010. At the conclusion of the trial, the court orally informed the parties it was sustaining the petition and Father's parental rights to Child would be

involuntarily terminated. A written order containing findings of fact, conclusions of law and judgment comports with the oral ruling was entered on March 26, 2010. Father's motions for a new trial and to alter, amend or vacate the trial court's ruling were denied and this appeal followed. We affirm.

Father contends the trial court failed to make specific findings of fact as required by CR<sup>3</sup> 52.01, thus requiring reversal. He further contends the trial court erroneously admitted hearsay evidence. Finally, he argues the trial court's decision to terminate his parental rights was based, at least partially, upon Father's previous criminal convictions and, thus, the decision constituted an impermissible second punishment for those crimes.

### **STANDARD OF REVIEW**

The trial court has broad discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.

*R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 38-39 (Ky. App. 1998), *as modified* (Jan. 29, 1999) (internal quotation marks and citations omitted). "In a trial without a jury, the findings of the trial court, if

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<sup>3</sup> Kentucky Rules of Civil Procedure.

supported by sufficient evidence, cannot be set aside unless they are found to be clearly erroneous. This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility.” *Id.* at 39 (internal quotation marks and citations omitted).

## **ANALYSIS**

Father first argues the trial court failed to make adequate findings of fact in its order terminating his parental rights. He alleges that the findings did not include a discussion of the specific evidence upon which the trial court relied in making its determination and, thus, the findings were clearly erroneous. We disagree.

In its judgment, the trial court made several specific findings of fact supportive of its decision. It specifically found Child had previously been adjudicated as neglected by a court of competent jurisdiction. It found Child had been exposed to risks of harm, domestic violence and substance abuse. It likewise found that Father had failed to provide the necessities of life, essential parental care, had failed to complete services offered by the Cabinet for fifteen of the previous twenty-two months, and that Child had “remained in foster care under the responsibility of the Cabinet for Health and Family Services for more than 15 of the last 22 months.” The trial court also found Father had failed to protect and preserve Child’s fundamental right to a safe and nurturing home, and “for periods of not less than six months, [has] continuously or repeatedly failed or refused to provide or [has] been substantially incapable of providing essential parental care

and protection” for Child. For reasons other than poverty alone, the trial court believed Father had failed to provide for the essentials of life, including food, clothing, shelter, medical care and education. The trial court found there to be no reasonable expectation of improvement in the foreseeable future. The court went on to find Father had not made sufficient efforts to comply with the Cabinet’s efforts to reunite the family, and that it would not be in the Child’s best interests to return to Father’s care, but rather that Child would be best served by terminating Father’s rights.

The trial court made sufficient findings of fact. Although the findings mimic much of the language set forth in the statutes governing this action, all of the findings were clearly supported by substantial evidence of record. The findings reveal the trial court was well-familiar with the facts and evidence. Had Father desired more detailed facts in the court’s judgment, it was incumbent upon him to make such a request. CR 52.04; *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004). He did not do so and cannot now be heard to complain. Even so, we are unable to conclude the findings of the trial court were clearly erroneous.

Next, Father argues the trial court erred in admitting the Cabinet’s case files because they constituted inadmissible hearsay evidence. He contends the admission of these files was prejudicial to his rights and constitutes reversible error. However, a careful review of the record reveals Father’s contention is not well-founded. At the beginning of the termination hearing, the Cabinet moved to admit the juvenile court records for Child. These records were certified copies of

the file maintained by the Martin Circuit Court Clerk, and not the Cabinet's records, as Father alleges. Although these court records contained some documents from the Cabinet's files, they had previously been admitted in Child's related neglect case in juvenile court which had been presided over by the same judge. The trial court would have been within its authority to have taken judicial notice of the contents of these records. *See* KRE<sup>4</sup> 201; *Collins v. Combs*, 320 S.W.3d 669, 678 (Ky. 2010). Thus, we are unable to conclude there was any error in admitting the certified court records.

Finally, Father alleges the trial court's decision to terminate his parental rights improperly violated his right to be free from double jeopardy, because the decision was at least partially based upon his previous criminal convictions. However, Father fails to cite to any fact or statement in the record which would indicate the trial court based its decision upon his prior convictions. Further, Father cites to no relevant statutory or caselaw supportive of his position. Taken to its logical conclusion, Father's contention is that trial courts should be prohibited from receiving any knowledge of a party's criminal history in termination cases, because the use of any such knowledge in making the decision of whether to terminate a parent's rights would violate the constitutional prohibition against double jeopardy. Such an argument is wholly without merit. While it is true that incarceration for an isolated incident may not alone justify termination of parental rights, *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 2005),

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<sup>4</sup> Kentucky Rules of Evidence.

a parent's criminal history is a factor to be considered by the court. *See also M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114 (Ky. App. 1998). Our review of the record reveals that, even without the introduction of Father's criminal history, sufficient evidence was presented to support the trial court's decision to terminate his parental rights. Thus, even were we to lend any credence to Father's argument, the alleged error would have been harmless at best. Nevertheless, we discern no error.

For the foregoing reasons, the judgment of the Martin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Stayton  
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BRIEF FOR APPELLEE, CABINET  
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