

RENDERED: OCTOBER 10, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

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

NO. 2007-CA-001808-ME

D.G.

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 07-AD-00017

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY SERVICES,  
B.B., AND MINOR CHILD, T.L.

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: D.G. (hereinafter Mother) has appealed from the August 10, 2007, order of the Daviess Circuit Court which terminated her parental rights to

T.L. (hereinafter Child),<sup>1</sup> her biological daughter.<sup>2</sup> For the following reasons, we affirm.

In March 2005, the Cabinet for Health and Family Services (“Cabinet”) opened an investigation into Mother’s alleged physical abuse of Child’s older sibling. As a result of this investigation, the Cabinet filed a petition in the Daviess District Court alleging Child, then eleven years old, was neglected due to the risk of harm from the physical abuse, Mother’s untreated mental illness, refusal to cooperate with the Cabinet’s offered services, and Mother’s suicidal threats. Child and her siblings were ultimately removed from Mother’s home in March 2005 and were placed with a maternal aunt. Although it is unclear from the record how or when, Mother later regained physical custody of Child.

In February 2006, the Cabinet filed a second petition in the district court alleging Child was neglected and again requesting her removal from Mother’s home. This petition alleged ongoing issues with the supervision and care of the child. According to the Cabinet, Child had over twenty unexcused absences from school; Mother was using methamphetamines and marijuana in Child’s presence and was allowing the child to smoke cigarettes and marijuana; Child was unsupervised at night; the child had been caught by the police in the company of several boys in an abandoned home after midnight; Mother’s home was filthy;

---

<sup>1</sup> Pursuant to the policy of this Court, to protect the privacy of minor children, we refer to them only by their initials.

<sup>2</sup> The parental rights of the child’s father, B.B., were also terminated in the action below. However, as the father has not appealed the decision, we shall not address his interests nor include him in our analysis of this matter.

Mother was screaming at her children; and Mother was refusing to address her mental health issues although she admitted she was having a “nervous breakdown.” On February 2, 2006, Child was removed from the home and placed in the Cabinet’s custody where she has remained. On February 20, 2006, the district court found Child to be neglected following Mother’s stipulation to that effect.

An ongoing caseworker began working with Mother, including case planning, to address concerns raised in the petition as well as to provide services to Mother in an effort to reunite the family. Mother was directed by the court and the Cabinet to attend mental health appointments, enter a drug rehabilitation program, clean and unclutter the home, pay child support, and cooperate with the Cabinet. Over the next eighteen months, Mother failed to make reasonable progress on her case plan. She admitted using marijuana daily and sometimes in the home, refused at least two drug tests, failed to attend court-mandated mental health therapy sessions, refused to enter drug treatment, failed to pay child support, and generally refused to cooperate with the Cabinet.

Based upon these actions, on March 6, 2007, the Cabinet petitioned the Daviess Circuit Court for involuntary termination of Mother’s parental rights in and to Child. Counsel was appointed to represent Mother’s interests, and a bench trial was held on July 30, 2007. The trial court heard testimony from the ongoing caseworker, the family therapist assigned to assist Mother and her family, and Mother’s sister. At the conclusion of the hearing, the trial court found Mother had

failed to complete the items she had been ordered to accomplish, and concluded termination of her parental rights was in Child's best interest.

Specifically, the trial court found Child's parents were incapable of providing her essential parental care and protection; Mother had substantially failed to complete her case plan to allow for family reunification by refusing to complete substance abuse treatment; Mother had refused to submit to drug testing; Mother's sister's statement--that although Mother had made some progress, she was not yet ready to take the child back--was persuasive; Mother had failed to consistently attend mental health therapy sessions; Mother had failed to maintain a safe and stable home in that she allowed pet feces, soiled clothing, and dirty dishes to accumulate, and generally failed to maintain a clean home; Mother failed to cooperate with the Cabinet by missing appointments, failed to communicate, and failed to maintain her children's needs when they were in her care; and there was no reasonable expectation of improvement in the foreseeable future. The trial court further found Child was a neglected child pursuant to the definition set forth in KRS<sup>3</sup> 600.020(1), and also noted Child had previously been adjudicated a neglected child by a court of competent jurisdiction.

Having made these factual findings, the trial court found the statutory guidelines for termination of parental rights set forth in KRS 625.090(2)(e) and (g) were present. Further, the trial court ruled Mother had failed to make reasonable efforts in her circumstances, conduct or conditions to make it in Child's best

---

<sup>3</sup> Kentucky Revised Statutes.

interest to return home, under KRS 625.090(3)(d), and Mother had failed to pay reasonable support for the child as required by KRS 625.090(3)(f). Thus, the trial court found the Cabinet had carried its burden of proving by clear and convincing evidence that termination of Mother's parental rights was in Child's best interest, terminated Mother's rights, and transferred custody of the child to the Cabinet.

This appeal followed.

First, in contravention of CR 76.12(4)(c)(iv) and (v), Mother does not cite to us within the record the factual basis supporting any of her legal arguments. Further, she cites precious little legal authority supporting her position. Her brief is also devoid of citations to the record supporting her recitation of the factual evidence presented. Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Mother's brief for its omissions and flagrant noncompliance. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990). However, due to the important nature of the matter presented herein, we have chosen to review the issues presented. We caution counsel that such latitude may not be extended in the future.

Mother contends there was no competent evidence presented upon which the trial court could have reasonably based its legal conclusions. She contends the trial court overlooked the improvements she had made in her life and improperly discounted evidence presented which was favorable to her. After a careful review of the record, we disagree.

To grant a petition for involuntary termination of parental rights under KRS 625.090, a trial court must have clear and convincing evidence of three elements: the child is abused or neglected as defined in KRS 600.020(1); one or more of the grounds stated in KRS 625.090(2) exist; and termination would be in the best interest of the child. *See Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *N.S. v. C. and M.S.*, 642 S.W.2d 589 (1982). There is no requirement the evidence be uncontradicted, only that it be of sufficient “probative and substantial nature . . . to convince ordinarily prudent-minded people.” *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)); *See also Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172, 175 (Ky.App. 2004); *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-117 (Ky.App. 1998). As an appellate Court, we are directed to review the trial court's fact findings for clear error under CR<sup>4</sup> 52.01 and to affirm those findings unless “there exists no substantial evidence in the record to support them.” *V.S.*, *supra*, 706 S.W.2d at 424. In the case *sub judice*, the trial court made the required findings and all three statutory elements were supported by clear and convincing evidence.

The court below found Child had previously been adjudicated as neglected, and went on to find, as discussed earlier in this opinion, that the child currently satisfied the definition for a neglected child and adjudicated her as such.

---

<sup>4</sup> Kentucky Rules of Civil Procedure.

After making additional findings, the trial court went on to determine termination of parental rights was in the child's best interests.

A trial court has broad discretion in determining whether a child satisfies the definition of an abused or neglected child and whether such abuse or neglect is sufficient to warrant termination of parental rights. *See R.C.R., supra*, 988 S.W.2d at 38 (citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977)). We will not substitute our judgment for that of the family court unless there is no substantial evidence in the record to support such a finding. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986).

The testimony before the family court revealed, among other things, numerous instances of illicit drug use, continuous failure to comply with the Cabinet's requests, failure to pay child support, refusal to submit to drug testing, continuous failure to consistently participate in mental health therapy, failure to maintain a safe and healthy home, refusal to undergo drug abuse treatment or admit the need for same, and general neglectful behavior by Mother, all of which were an appropriate foundation upon which the trial court relied in making its determination. As a result, this testimony is sufficient to convince us the trial court correctly concluded the child was neglected.

Further, our review of the statutory factors which must be considered prior to terminating parental rights convinces us the trial court did not commit clear error in determining termination was in the best interest of the child. Although

Mother disagrees with the trial court's decision, and vehemently argues she had made improvements in her life which she alleges the trial court failed to consider, there was clearly sufficient testimony adduced at trial to support the finding that two or more of the grounds for termination listed in KRS 625.090(2) existed. A finding of one of the grounds is all that is required. Even in light of the conflicting testimony and the differences of opinion of the parties, we will not substitute our decision for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Therefore, as the evidence presented at the termination hearing was sufficient to support the trial court's findings of neglect and to terminate Mother's parental rights, there was no clear error and we will not disturb the judgment on appeal. CR 52.01.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion. Upon review of the record, it is my opinion that the court appears to have oversimplified the facts and overlooked the improvements Mother made once she got her mental health issues under better control.

This Court's standard of 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. *V.S. v. Commonwealth, Cabinet for Human Resources*, Ky. App., 706 S.W.2d 420, 424 (1986).

“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.” *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

*M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 - 117 (Ky. App. 1998).

After reviewing the video recording of the termination hearing, it appears as though the court was incorrect in some of its findings. First, Mother did not refuse to go to substance abuse rehabilitation. She entered or tried to enter two substance abuse treatment facilities. One removed her because it couldn't drug test her due to her mental health medication, Xanax, and the other removed her because she threatened to bring a defamation suit against one of the employees. Additionally, there was evidence and testimony that Mother may not even need to enter a drug rehabilitation facility.

Also, no one testified as to her missing appointments or failing to communicate with social services. In fact, the Cabinet caseworker stated that if she had to miss an appointment, she would call and reschedule.

There was also no evidence of Mother not having enough food or being unable to clothe Child. In fact, the opposite was true. The caseworker stated that when she went to the home, there was always plenty of food there.

As for Mother's mental health issues, she testified that she had been seeing a mental health specialist of some sort since 2005. The only documentation to prove this was a letter the Cabinet received in April, 2007. However, the Cabinet caseworker testified that she was not aware whether Mother was keeping regular appointments with a mental health specialist.

As for the lower court finding there is no reasonable expectation of improvement in the near future, I believe it is in error. From Mother's testimony, she has been on many different medications for her mental health problems, none of which helped. It was not until late 2006, when she finally began taking Xanax, that her condition improved. Both she and her sister testified that it was when she began taking Xanax that her depression and anxiety improved. Further, since beginning this medication she has cleaned up her house, including removing the dirty carpet in the living room. Also, Mother's sister has seen a dramatic improvement in Mother's attitude and overall demeanor since she began taking Xanax.

There was testimony concerning past drug use and a period of time where Mother did nothing and just "gave up," but it appears that this was due to her mental health issues, and Mother testified as such. The lower court focused on these past instances and seemed to ignore the progress Mother has made. My view of the evidence convinces me that since she has recently gotten her mental health problems under control, has cleaned up her living conditions, and has given some documented proof as to her attending therapy sessions that there is a reasonable

expectation of further improvement in the near future. I would find that there was not substantial evidence to terminate Mother's parental rights as to Child and find that the lower court's decision was clearly erroneous.

**BRIEFS FOR APPELLANT:**

Edward A. Baylous, II  
Owensboro, Kentucky

**BRIEF FOR APPELLEE:**

Kristy Abel Fulkerson  
Assistant Counsel  
Cabinet for Health & Family Services  
Owensboro, Kentucky