

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NOT TO BE PUBLISHED

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

NO. 2007-CA-002218-ME

G.F.W.E.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DONNA DELAHANTY, JUDGE  
ACTION NO. 07-AD-500118

CABINET FOR HEALTH AND  
FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY  
AND D.L.E., AN INFANT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: G.F.W.E. (the mother) appeals from an order, entered  
by the Jefferson Circuit Court on October 4, 2007, which terminated her parental

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

rights in her daughter. The father of the child has voluntarily terminated his parental rights and is not an appellant in this action.

The child was temporarily removed from her parents on June 22, 2006, following a hearing on a verified dependency action petition filed by the Cabinet for Health and Family Services. The petition alleged that the child was abused or neglected within the meaning of Kentucky Revised Statutes (KRS) 600.020(1). The report in support of the petition stated that the mother, the father and the child, who was nine years of age at that time, had been evicted from their home and were now residing with the maternal grandmother and her paramour, a registered sex offender who was convicted of three counts of sexual abuse in the first degree (victim under twelve years of age) in 1996 and imprisoned until July 2004. According to the report, witnesses stated that the four adults residing at the home were often intoxicated and physically violent toward each other in the child's presence. The witnesses also observed that the parents did not interact with, feed or bathe the child. The witnesses also stated that the father's regular cocaine use resulted in the eviction of the family on three or four occasions in the last year. The mother reported having a history of mental health issues (she suffers from schizophrenia) for which she was not taking her medication, and the author of the report stated that she believed the mother suffers from reduced mental capacity. The family also had a history with Child Protective Services relating to cocaine use by the mother and the father accompanied by ongoing domestic violence. The

father had a criminal history of several drug-related charges. The mother and father refused to submit to a random drug screen.

Following the hearing, the Cabinet placed the child in the temporary custody of some family friends. This placement proved to be unsuccessful, and the child was placed in a foster home. The court ordered the mother to have JADAC (Jefferson Alcohol and Drug Abuse Center) and psychiatric assessments, to follow the resulting recommendations, and to secure regular employment and suitable housing. On August 24, 2006, the mother and father entered a stipulation that the child was abused or neglected within the meaning of KRS 600.020(1) in that their “substance abuse rendered them unable to provide consistent parenting and exposing her [to] unstable living arrangements and contact with inappropriate adults.”

In the following months, the mother and father attempted to follow a case treatment plan formulated by Lois Fisher, a social worker employed by the Cabinet. The father began attending an intensive outpatient treatment for his drug abuse, but was discharged from the program for noncompliance in September 2006. He stopped attending scheduled drug screens and treatment meetings, and began avoiding the social workers. In December 2006, the Cabinet received reports that he was using drugs again, and that he was providing the mother with alcohol. In January 2007, the father tested positive for marijuana use and admitted that he was using marijuana regularly with co-workers. The mother tested negative in drug screens on July 11, 2006 and August 11, 2006, with a diluted result on July

27, 2006. She participated in psychiatric treatment and counseling, although she failed to complete parenting classes.

During this time, the mother and father maintained contact with the child through telephone calls and weekly visits supervised by her foster parents. The mother continued to reside with the maternal grandmother. Neither parent provided financial support in any form for their daughter. On April 17, 2007, the Cabinet for Health and Family Services filed a petition for involuntary termination of parental rights against the mother and father.

A trial was held on August 13, 2007. The father voluntarily terminated his parental rights at the outset of the trial. Testimony on behalf of the Cabinet was presented by Lois Fisher, who stated that her primary concerns regarding the mother as a parent were her unhealthy relationships with the father and maternal grandmother, her inability to see how these relationships could hurt her child, and her inability or unwillingness to provide for the child in any way. Fisher specifically referred to the alarming presence of the convicted sex offender at the maternal grandmother's house. Fisher explained how on one occasion the child had been inadvertently slapped by him when he attempted to strike the grandmother. Fisher also testified that the child was deeply upset when she heard the sex offender torturing a pet dog at night. The child tried to protect the dog by having it sleep with her, but the grandmother refused to allow this when the paramour was present.

Fisher explained that the mother had been offered free housing services and assistance through New Directions, but had declined these services, continuing instead to reside with the grandmother.

Fisher also related her concerns about the mother's ability to care for the child, providing as an example an incident in February 2007, when the mother became confused and stopped taking her medication for schizophrenia. This resulted in her becoming catatonic and requiring hospitalization.

The mother testified that she had obtained housing for herself and the child, but there was no projected date when she would move as the home was being painted. Also, she testified that the rent for her new residence would be \$551 dollars per month, yet the amount of her social security income check was only \$500 to \$600 per month. The family court entered findings of fact and conclusions of law, and an order terminating the mother's parental rights. This appeal followed.

The Kentucky termination statute, KRS 625.090, provides that a circuit court may involuntarily terminate parental rights only if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the child must be deemed abused or neglected, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination of parental rights must be in the child's best interest, and the court is provided with a series of factors that it shall consider when making this determination. KRS 625.090(1)(b); KRS 625.090(3). Third, the

court must also find at least one of a number of grounds listed in the statute. KRS 625.090(2).

When reviewing a family court's decision to terminate parental rights, we review the decision to determine if it was based upon clear and convincing evidence under the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. With this in mind, we are required to give considerable deference to the trial court's findings, and we will not disturb those findings unless no substantial evidence exists in the record to support them. 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.

*J.M.R. v. Commonwealth, Cabinet for Health and Family Services*, 239 S.W.3d 116, 120-121 (Ky. App. 2007) (citations and quotation marks omitted).

In her first argument, the mother contends that the trial court's findings of fact on three issues: (1) the effect of the mother's mental illness; (2) the separation of the mother and the father; and (3) improvements in the child's behavior since her removal from the home, were unsupported by the evidence.

The trial court found that the mother's mental illness "renders her unable to provide appropriate care and protection for her daughter," and that "although she has complied with counseling, there has been little improvement in [her] mental health and she had to be hospitalized for mental health treatment as recently as February 2007." The appellant contends that these findings are contradicted by the testimony of Lois Fisher. Fisher testified that her major concern was the mother's relationship with the maternal grandmother, her

paramour and the father, and that the mother's mental illness was not a concern in her ability to parent when she took her medication. Fisher also acknowledged that the mother was not taking medication at the time of the trial due to pregnancy, yet was showing no psychotic symptoms. The appellant contends that there was simply no evidence that her mental illness prevented her from caring for her daughter and that the trial court's findings were contrary to the testimony presented at the trial by the Cabinet.

Mental illness is a factor that the Court shall consider in determining the best interest of the child under KRS 625.090(3)(a). In this case, the trial court did not state that the mother's mental illness was the sole, or even the primary, reason for terminating her parental rights, but rather noted that the mother's mental health problems had contributed to her complete dependency upon her spouse, and her inability to support herself or her child. Furthermore, Fisher's testimony contained the important qualification that, **if properly treated**, Mother's mental illness was not the primary cause of her problems. Evidence of the episode in February 2007, when the Mother stopped taking her medication, became catatonic, and had to be hospitalized, showed that the mental illness was not always properly treated. Substantial evidence supported the trial court's conclusion that the mother's mental illness was a factor in her inability to provide a safe home for her child.

The mother's next argument concerns the evidence of her continuing relationship with the child's father, and the trial court's finding that "[a]lthough

initially indicating that their relationship was over, it became clear during the testimony at trial that the relationship between the parents was not over.” Fisher testified that the main reason for seeking termination of parental rights was the mother’s failure to refrain from unhealthy relationships, such as that with the father, who had failed to comply with the Cabinet’s directives for reunification, and with the maternal grandmother, who drank heavily and was in a relationship with a convicted sex offender. The father explained that he and the mother were currently separated, and would probably reunite in the future after he got “straightened out financially and in a program” but that this was not currently possible because he was working out of town. The mother testified that she and the father had been separated for at least two months prior to the trial, and that in order for them to reunite the father would have to be drug free, as the Cabinet required.

The mother argues that the Cabinet therefore simply failed to produce any evidence that her relationship with the father continued. But Fisher also testified that, in spite of the mother’s reports that she and the father had separated, the paternal grandmother had reported to her that the father continued to visit the mother covertly at night. Civil Rule 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses. The trial judge’s finding that the relationship between the parents continued is precisely such a credibility determination, and is not clearly erroneous.

Finally, the trial court found that before being placed in foster care by the Cabinet, the child had lacked the ability to care for herself, often needing to be prompted to use soap or shampoo. The court also noted that the child was “far behind academically upon entering foster care but she has received an education assessment and provided the special tutoring required for her to improve academically, going from ‘unsatisfactory’ school grades to ‘needs improvement’ school grades during the 2006-2007 academic year.” The mother argues that the court failed to determine whether these deficiencies were caused by her poor parenting skills or were instead attributable to the child’s ADHD. She argues that the Cabinet provided no evidence that the mother had caused the unsatisfactory school grades or the hygiene problems. As we have already noted, it is the role of the trial court to weigh the evidence. In this case, the fact that the improvements in the child’s behavior, performance at school and hygiene coincided with removal from the mother amply supported the trial court’s findings. Furthermore, there is evidence that the child’s ADHD improved after her removal from the parents. At that time, she was assessed by an expert who recommended that initially she be allowed to proceed without medication for her ADHD. The child made such significant improvements that she has not required medication for her condition and has received an “outstanding” grade in conduct at school.

The mother’s second main argument is that the Cabinet’s evidence failed to meet the requirements for termination under KRS 625.090(2)(e) or (g). In order to terminate parental rights, the court must find the existence of at least one

of the enumerated grounds in KRS 625.090(2); sections (e) and (g) are the only grounds applicable in this case. They require the court to find as follows:

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

The record in this case indicates that the Cabinet provided extensive social services to the mother, including offers of housing assistance, for well over a year after the removal of child. She was nonetheless unable or unwilling to make the improvements necessary to allow the return of the child. We agree with the trial court's finding that clear and convincing evidence showed the absence of any reasonable expectation that the mother's abilities or performance would significantly improve in the immediately foreseeable future under (e). Although this finding would be sufficient to justify termination, the trial court also found evidence to support a finding under section (g). The appellant argues that this finding was erroneous because it was impermissibly based on the mother's poverty, and ignored the fact that she had begun to receive social security disability

assistance and had managed to find a residence by the time of trial. But, as we have already noted, the mother refused housing assistance on previous occasions, even when acceptance of such assistance could have led to a reunion with her child.

Finally, the mother also argues that the Cabinet unfairly used the fact that she had made maternal grandmother the payee for her social security assistance to imply that she was unable to care for her child. But the Cabinet's concern was the possibility that this choice of a payee could further perpetuate the relationship between the mother and paternal grandmother, and continue to expose the child to the harmful environment at the grandmother's home.

For the foregoing reasons, the findings of fact, conclusions of law and order of the Jefferson Circuit Court are hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shannon Fauver  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brenda L. Bourgeois  
Louisville, Kentucky