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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-1604-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500417

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND N.L.P., A CHILD

APPELLEES

NO. 2018-CA-1607-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500418

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-1608-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500419

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND S.E.P., A CHILD

APPELLEES

NO. 2018-CA-1609-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500422

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., JR., A CHILD

APPELLEES

NO. 2018-CA-1610-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500423

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-1611-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500634

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-1612-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500335

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-1613-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500336

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-1615-ME

J.L.P., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500337

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001616-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500417

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
N.L.P., A CHILD

APPELLEES

NO. 2018-CA-001618-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500418

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001619-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500419

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
S.E.P., A CHILD

APPELLEES

NO. 2018-CA-001621-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500422

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., JR., A CHILD

APPELLEES

NO. 2018-CA-001622-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500423

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001623-ME

L.D., MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500634

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001624-ME

I.N.T., MOTHER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500335

CABINET FOR HEALTH AND FAMILY

SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001625-ME

I.N.T., MOTHER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500336

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND
J.L.P., A CHILD

APPELLEES

NO. 2018-CA-001626-ME

I.N.T., MOTHER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 17-AD-500337

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.L.P., FATHER; AND

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MCNEILL, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: These consolidated appeals from Jefferson Circuit Court concern the termination of parental rights (TPR) of three individuals, J.L.P. (the Father), L.D. (Mother A), and I.N.T. (Mother B), to nine children (the Father’s six children with Mother A and his three children with Mother B; collectively, the Children).¹ We affirm.

The Cabinet for Health and Family Services (the Cabinet, or CHFS) became involved with the family in late 2015, when Child G was born with marijuana and cocaine in his system. Children H and I were later born with illegal substances in their systems in November 2015 and May 2016, respectively. Initially, the Cabinet worked with the family to attempt to resolve the ongoing issues affecting the Children, but the Parents were for the most part uncooperative in following the case plans. Also, further investigation revealed the communal

¹ For purposes of this opinion, the Children, whose initials are very similar not only to each other but also to the Father, shall be distinguished by letters A through I, according to the chronological order of their dates of birth, to protect their privacy. Mother A and the Father are the parents of Children A, B, C, E, F, and H. Mother B and the Father are the parents of Children D, G, and I. The Children were born between 2002 and 2016. The three Parents and nine Children lived together as a family unit in one household.

lifestyle; this led to multiple concerns regarding the family's situation. In the ensuing dependency, neglect, or abuse (DNA) petitions (of which there were several), the allegations against the Parents included medical neglect, educational neglect, failure to comply with ongoing orders, sexual abuse, domestic violence, drug use, exposure to pornography, human trafficking, and untreated mental health issues. Multiple hearings were held over the course of the next year or so.

The cases were consolidated in May 2017, all in a single division of the family court. Later that month, the goal was changed to adoption. New counsel and guardians *ad litem* were appointed for the Parents and the Children. TPR actions were filed in August 2017. A trial was held on August 21 and 22, 2018. On September 27, 2018, the family court entered its consolidated findings of fact and conclusions of law and nine separate orders terminating the parental rights of each child. The Parents filed notices of appeal; the matters were ordered consolidated by this Court upon motion of the Cabinet.

We note at the outset that the Cabinet has not filed an appellee brief.

These are the options ordinarily afforded us:

If an appellee brief has not been filed within the time allowed, the court may:

- (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error

and reverse the judgment without considering the merits of the case.

Kentucky Rules of Civil Procedure (CR) 76.12 (8)(c).
“The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.”
Roberts v. Bucci, 218 S.W.3d 395, 396 (Ky. App. 2007).
Because the issues and facts are straightforward, we choose not to penalize [the Cabinet] for its failure to file a brief.

Cabinet for Health and Family Services v. Loving Care, Inc., 590 S.W.3d 824, 826 (Ky. App. 2019). However, we are mindful that “[w]hile a party’s failure to file a brief may be taken as a confession of error, CR 76.12(8)(c), such a sanction is inappropriate in appeals involving child custody or support.” *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky. App. 2014) (citing *Galloway v. Pruitt*, 469 S.W.2d 556, 557 (Ky. 1971)). Because these matters involve termination of parental rights for three parents (concerning nine children), we shall not impose any of the three penalties but rather shall consider the merits of the appeals. But we feel compelled to comment on the Cabinet’s lack of participation at the appellate level,² especially when so much is at stake for these parties. We accept the Parents’ statements of the facts as correct, insofar as they do not conflict with the record, and proceed to

² The Cabinet actively participated in the early stages of these appeals: it filed a motion to consolidate the seventeen separate cases and to file a single consolidated brief (granted), and it filed a motion to dismiss all appeals, based on the appellants’ requests for additional time in which to file briefs. This Court entered its order denying the motion to dismiss and granted appellants additional time. Nothing has been submitted on the Cabinet’s behalf since appellants filed their briefs.

the merits of these appeals. Furthermore, we conclude that neither the Parents' briefs nor the circuit court's findings justify reversal.

We first address the Father's appeals. In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), counsel for the Father has included a request to withdraw representation at the conclusion of the *Anders*³ brief wherein he concedes that there is no merit to his appeals. Considering the motion to withdraw, "we are obligated to independently review the record and ascertain whether the appeal is, in fact, void of nonfrivolous grounds for reversal. *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400." *A.C.*, 362 S.W.3d at 372. After review of the record and the parties' briefs, we affirm, and grant counsel's motion to withdraw by separate order.

Courts in Kentucky allow a parent's rights to be involuntarily terminated "only if there is clear and convincing evidence that the child has been abandoned, neglected, or abused by the parent whose rights are to be terminated, and that it would be in the best interest of the child to do so." *Cabinet for Health & Family Servs. v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006). Additionally, at least one of the conditions set forth in Kentucky Revised Statutes (KRS) 625.090(2) must be established through clear and convincing evidence.

³ *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

The Father was found by the family court to have abandoned his nine children, many of whom were sexually abused by him. He failed to provide for the children's material, educational, medical, and emotional needs; subjected them to domestic violence; and made minimal (at best) efforts at remediation. There was no evidence to the contrary.

We have conducted an independent review of the record and conclude there is sufficient evidence contained therein to support the family court's order terminating the Father's parental rights to the Children. There was substantial compliance with the "clear and convincing" evidence standard enunciated in *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403, 71 L. Ed. 2d 599 (1982); accord *J.E.H. v. Department for Human Resources*, 642 S.W.2d 600, 603 (Ky. App. 1982). We have "reviewed the circuit court's (1) neglect and abuse determination; (2) finding of unfitness under KRS 625.090(2); and (3) best-interests determination. In light of our review, we agree with counsel's estimation and perceive no basis warranting relief on appeal." *A.C.*, 362 S.W.3d at 372.

The orders of the Jefferson Family Court terminating the Father's parental rights to the Children are affirmed. Counsel's request to withdraw shall be granted in a separate Order entered simultaneously with this Opinion.

We turn next to the issues pertaining to Mother A, namely, whether there was sufficient evidence to support the family court's finding of abandonment

and its determination that termination was in the best interests of Mother A's six children.

The family court made the following findings concerning the allegations of abandonment by the Parents:

Regarding the ground of abandonment, the evidence presented at trial indicates clearly that the [Parents] have abandoned her or his children, for a period of not less than ninety (90) days. Abandonment, though not defined in the statute, has been interpreted by the appellate courts of this Commonwealth to be a matter of intent. *See J.H. v. Cabinet for Human Resources*, Ky. App., 704 S.W.2d 661 (1985). In this action, all three parents have been subject to no contact orders with any of the children for more than ninety (90) days; [Mother B and the Father] with [their] children since March 29, 2017, and [Mother A, the Father, and Mother B] with any of [the other] children since May 25, 2017. Both clearly [are] periods of more than ninety (90) days. The cause for the denial of visitation with any of the children was due to non-compliance with treatment orders by the parents. It was the parents' own inaction which [led] to them not being able to have contact with the children. Further, each parent went a period of no less than ninety (90) [days] when she or he did not maintain contact with the Cabinet workers and did not inquire as to the well-being of their children. Both [Cabinet witnesses] testified that, since the children were first removed from parental custody, the parents have not availed herself/himself of the reunification services referred to or provided by the Cabinet or has otherwise failed to make sufficient progress in the court-approved case treatment plan to allow for the safe return of the children to parental care. From the totality of the evidence, this Court finds that [Mother A, Mother B, and the Father] have abandoned his/her children.

Mother A insists that this finding should be reversed because she had “contacted the Cabinet with **some** frequency and has complied **in part** with the requirements of her case plan; she attended **at least some** drug screenings, had a drug assessment, gotten into individual counseling and parenting classes, and had secured housing and employment.” (Emphasis ours.) By her own admission, this was not complete compliance, and was, at best, too little and too late. The family court acknowledged that Mother A was “somewhat compliant with her treatment plan,” but characterized it as “sporadic” and noted that Mother A failed to complete any of the programs (which included substance abuse evaluations, random drug screens, individual therapy, parenting classes, and a psychological evaluation). Most importantly, Mother A “has only had one (1) supervised visit since her children were removed from her care.”

In *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998), we recognized that:

The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky. App., 552 S.W.2d 672, 675 (1977). 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).

Furthermore, “[t]he findings of the trial judge may not be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses.” *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995) (citing CR 52.01; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986)).

The family court’s finding that Mother A had abandoned her children is supported by substantial evidence, and we decline to disturb it. *V.S.*, 706 S.W.2d at 424.

We likewise find no error in the family court’s finding that termination was in the best interests of Mother A’s six children. Here again Mother A repeats her partial compliance with the treatment plan as evidence that she was making efforts on behalf of her children. She also questions the findings regarding her failure to provide for the children’s needs because she had been deemed indigent and was not required to pay child support.

“In determining whether termination of parental rights is in the child’s best interest, the factors set forth in KRS 625.090(3)(a)-(f) must be considered. In the case *sub judice*, there was substantial evidence presented regarding the best interest factors set forth in KRS 625.090(3).” *J.L.C. v. Cabinet for Health and Family Services*, 539 S.W.3d 692, 696 (Ky. App. 2018) (footnote omitted). The family court placed great emphasis on the statutory factors in its 38-page findings and conclusions, all of which are supported by the record. “As a result, we do not believe the family court erred by determining that it was in the [children’s] best interest to terminate [Mother A’s] parental rights.” *Id.* at 697.

Mother B argues that the Cabinet failed to make reasonable efforts to reunite her with her three children. Mother B lists her attempts to better herself by moving to another county, finding employment and housing, and seeking mental health and drug counseling on her own.

“KRS 625.090(3)(c) requires the court to consider ‘whether the cabinet has, prior to the filing of the petition[,] made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents[.]’” *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 212 (Ky. 2014). “Reasonable efforts are defined by KRS 620.020(11) as ‘the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available . . . which are necessary to enable the child to safely live at home[.]’” *Id.*

The family court listed the services offered to the family, including “appropriate referrals to substance abuse assessments, parenting classes, individual, domestic violence counseling, random drug screens, supervised visitation sessions and various other services.” The court repeated the witnesses’ testimony and held that it was “unaware of any other services which the Cabinet could provide or refer the [Parents] to that would allow for the safe reunification of [Parents] with the . . . children within a reasonable period of time considering the ages of the children.” These findings are not clearly erroneous but rather are based on the clear and convincing evidence in the record. CR 52.01; *M.P.S., supra*; *V.S., supra*.

Accordingly, the orders of the Jefferson Circuit Court terminating the parental rights of Mothers A and B are also affirmed.

ALL CONCUR.

ANDERS BRIEF FOR APPELLANT NO BRIEFS FOR APPELLEES
J.L.P. (Father):

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BRIEF FOR APPELLANT L.D.
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