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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2/19/09 E.L.A. Grant, D.C.

2007-SC-000436-DGE
AND
2007-SC-000821-DGE

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND A.J.M., A CHILD — APPELLANT/CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2006-CA-001008
JEFFERSON FAMILY CIRCUIT COURT NO. 05-AD-500119

T.G., MOTHER — APPELLEE/CROSS-APPELLANT

OPINION OF THE COURT BY JUSTICE ABRAMSON

REVERSING AND REINSTATING

The Commonwealth of Kentucky, Cabinet for Health and Family Services (the Cabinet) and A.J.M. have appealed a decision of the Court of Appeals reversing the Jefferson Family Circuit Court's termination of T.G.'s parental rights as to her daughter, A.J.M. Following a December 20, 2005 bench trial, and the submission of a subsequent deposition, the Jefferson Family Circuit Court entered an order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A.J.M.'s best interest for T.G.'s parental rights to be involuntarily terminated. In its opinion reversing the family court's order, the Court of Appeals found no substantial evidence to support the finding that A.J.M. was abused or neglected, and

no grounds for termination. Ultimately, the Court of Appeals held that the family court abused its discretion by terminating T.G.'s parental rights and awarding custody of A.J.M. to the Cabinet with authority to place her for adoption. On discretionary review to this Court, we find that the family court did not abuse its discretion in terminating T.G.'s parental rights and that the Court of Appeals erred in finding as such. Therefore, we reverse the Court of Appeals Opinion and reinstate the Jefferson Circuit Court's order terminating T.G.'s parental rights.

RELEVANT FACTS

Although A.J.M. is now only four years old, her mother, T.G., has been involved with Kentucky's Cabinet for Health and Family Services for over ten years. In 1996, following a petition filed by the Cabinet, the family court ordered the removal of T.G.'s then one-year-old son, N.M., from her care based on a pattern of domestic abuse between T.G. and N.M.'s father. In May 1997, T.G. stipulated to the neglect of her son and he was returned to her. In January 1998, the Cabinet filed a second petition with regard to both N.M. and B.M., (T.G.'s then infant daughter) alleging T.G. was non-compliant with necessary medical treatment. In March 2001, the Cabinet filed its third petition noting excessive school absences and abusive discipline. After T.G. stipulated to neglect of both children in May 2001, the children were allowed to remain in T.G.'s care under Cabinet supervision. Two months later, however, in July 2001, a fourth petition was filed alleging a lack of supervision and abusive discipline. The Jefferson Family Circuit Court subsequently removed N.M. and B.M. from T.G.'s care and, after finding both children to be abused or neglected, awarded permanent custody of them to their maternal grandmother in May 2002.

On January 7, 2004, T.G. gave birth to her third child, A.J.M.[1] Based on T.G.'s history of neglect, the family court granted the Cabinet's Emergency Custody Order (ECO) and placed A.J.M. in the Cabinet's custody on the day of her birth. After the Jefferson County Attorney rejected the Cabinet's petition, the family court dismissed the ECO and on January 12, 2004, returned A.J.M. to T.G.'s care.

Six months later, on or about July 29, 2004, the Cabinet received an allegation of neglect after a batting cage attendant reported that T.G. had placed A.J.M. on the concrete just outside of the batting cage where T.G. was practicing.[2] The Cabinet responded to this report by sending two social workers to visit T.G. at her residence in order to investigate A.J.M.'s home life. During this July 30, 2004 visit, T.G. reported that she owned three rental properties and that two of them were in the process of being remodeled. Although T.G. denied the social workers access to one of her units, she did show them the unit where she and A.J.M. were then living, unit #43.[3] The social workers observed this unit to have unsafe and unsanitary conditions throughout, such as large piles of clothes, toys, and other items stacked on the couch, tables and the floor; dirty carpet that had dog feces smeared on it; half-eaten containers of food and several plates of dog food piled on the kitchen floor; stagnant, dirty water in the kitchen sink; dirty dishes piled in and around the sink; and a brownish discoloration on the

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[1]A.J.M.'s alleged father was excluded by subsequent paternity testing and her biological father is unknown.

[2]During the termination of parental rights trial, T.G. testified that she had laid A.J.M. (then almost seven months old) down on a blanket on her stomach a few feet away from the door of the batting cage.

[3]Although the family court's findings of fact indicate that T.G. told the social workers that unit #35 was her primary residence, the pictures submitted by the Cabinet as Exhibit #5 and T.G.'s own testimony confirm that the unit referred to by the trial court as having unsafe and unsanitary conditions was actually #43. At the termination of parental rights trial, T.G. stated that she still lives in unit #43.

kitchen counters and around the sink. When the social workers visited T.G.'s third unit, unit #57, they observed that although it only contained a daybed and a playpen, it would be appropriate housing for a mother and child. Following their visit, T.G. signed a safety plan agreeing to reside at unit #57 until her primary residence, unit #43, was improved.

Several days after this home visit, on August 6, 2004, the Cabinet created a prevention plan for T.G., which she signed. This plan set forth five terms for T.G. to follow, including cooperating with the HELP Team to address the disarray of her home; consenting to a psychological evaluation and agreeing to follow all recommendations; signing a consent form so that the Cabinet could access her prior counseling records; and continuing to reside at unit #57 until her other rental unit was clean and safe. In complying with this prevention plan, T.G. participated in a psychological evaluation by Dr. Linda Bailey on August 16, 2004. Dr. Bailey concluded that T.G. suffered from an anxiety disorder, most likely an obsessive compulsive type with evidence of paranoia, and recommended that T.G. engage in supportive therapy and medication treatment.

On August 24, 2004, the Cabinet social worker followed up with T.G. by visiting her at the unit where she and A.J.M. had agreed to live, unit #57. Upon arriving, however, the social worker observed that T.G. was paranoid and disoriented. Furthermore, other than a daybed, playpen, and some clothes piled on the floor, the unit was still empty. Concerned that T.G. and A.J.M. were not actually living at this unit, the Cabinet obtained an ECO for A.J.M., and she was placed in the Cabinet's custody. A few days later, on August 30, 2004, the Cabinet filed a petition with the Jefferson Family Circuit Court alleging that A.J.M. was at a significant risk of neglect if left in the care of T.G. In its petition, the Cabinet cited evidence of this risk by noting the batting cage incident; the deplorable condition of T.G.'s primary residence, unit #43; the possibility

that T.G. and A.J.M. may not be living at the approved housing, unit #57; and the concerns expressed by the workers at A.J.M.'s day care over T.G.'s erratic behavior.[4]

After conducting a temporary removal hearing to address the allegations stated in the Cabinet's petition, the family court found on September 1, 2004, that there were reasonable grounds to believe the petition's allegations and that the Cabinet should have temporary custody of A.J.M. The family court also ordered T.G. to follow certain recommendations regarding treatment of her mental illness and improving the condition of her home. Furthermore, the Cabinet worked with T.G. to design a case plan with several tasks to be undertaken by T.G., such as completing parenting classes, attending counseling sessions, complying with the terms of her visitation with A.J.M., completing psychological and psychiatric evaluations, and contacting the Cabinet monthly.

Pursuant to her case plan, T.G. participated in a psychological and psychiatric evaluation performed by the Foster Care Clinic and Assessment Team (FORECAST) on September 23, 2004, and started attending a Parenting Skills class offered by Seven Counties. Despite these efforts, on October 5, 2004, a Cabinet social worker conducted a third home visit of T.G.'s residence and found the home to still be in the same deplorable condition, noting dog feces on the floor, items stacked on the couch, dirty

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[4] In its petition, the Cabinet stated that the staff at the Kindercare learning center, where A.J.M. attended daycare, "has indicated concerns over [T.G.]'s behavior, specifically stating there have been several times [T.G.] has brought the child into daycare with only a diaper on and has asked the teacher to dress the child. On morning of 8-18-04, [T.G.] brought child to daycare dressed. [T.G.] was asked to fill out a form, in middle of doing so she stopped, grabbed the child and stormed outside. [T.G.] then brought child back into daycare undressed, she asked teacher to dress child when she woke up (the child was already awake in [T.G.]'s arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day [T.G.] came to pick child up from daycare she did not recognize her child. [T.G.] looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicking *(sic)* asking where her child was."

dishes in the sink and on the kitchen counters, large boxes scattered throughout the home, and clothes and miscellaneous items piled in the kitchen. The next day, on October 6, 2004, the Jefferson Family Circuit Court held a dependency hearing to determine the status of A.J.M., ultimately finding that she was an abused or neglected child and that she was to remain in the Cabinet's custody.

In November 2004, T.G.'s father and step-mother began supervising visits between A.J.M. and T.G. so as to help T.G. regain custody of her daughter or to attain custody of A.J.M. themselves. Although these initial visits were successful, T.G.'s step-mother testified at trial that by February 2005, T.G. had become so difficult to deal with that they no longer sought custody of A.J.M. and were unwilling to supervise her visits with T.G. Also in November 2004, T.G. began attending therapy sessions with Allison Johnson, a licensed certified social worker and marital counselor, and participating in play evaluations with A.J.M. supervised by Seven Counties clinical psychologist, Dr. Katie LaJoie, Psy.D. Although Dr. LaJoie reported that A.J.M. was easily soothed by T.G., she also noted that T.G. did not enforce limits with A.J.M., that T.G. exhibited obsessive behaviors (cleaning the play area more than any other parent Dr. LaJoie had ever seen), and that further assessment was needed to determine if T.G. would be able to properly parent A.J.M.

In December 2004, despite the family court's order requiring T.G. to participate in counseling sessions, T.G. had a falling out with Allison Johnson after only four sessions. Johnson testified at trial that during her last session with T.G. in 2004, she had confronted T.G. very directly about her mental health issues and that their session had ended "in a good place, but not the best place." After T.G. left Allison Johnson, she began seeing Seven Counties therapist Aaron Bates for bi-monthly sessions. T.G. also

began attending two different group classes in early 2005, a group recovery class at Recovery Incorporated in January 2005, and a Seven Counties Young Families Group in February 2005. In March 2005, the Cabinet began supervising T.G.'s visits with A.J.M. Although the Cabinet observed that T.G. was loving and caring towards A.J.M., they also noted that T.G.'s behavior was erratic and bizarre, stating that she undressed and redressed A.J.M. several times during her visit and that she continued to demonstrate symptoms of severe anxiety and obsessive compulsivity.

Due to these observations and T.G.'s apparent inability to address her mental health issues, on April 4, 2005, the Cabinet filed a petition with the family court to terminate T.G.'s parental rights. Several months after the filing of this petition, starting in June 2005, T.G. participated in a psychological evaluation with Dr. Sally Brenzel, Psy.D., that lasted over a month; attended individual therapy sessions with Dr. Patricia Aulbach, Psy.D., for four months; briefly met with mental health counselor Dr. Daya Singh Sandhu, Ed.D.; and finally, in November 2005, returned as a patient to Allison Johnson. Prior to her termination of parental rights trial, which was held on December 20, 2005, T.G. had completed three sessions with Allison Johnson. In the termination trial, the family court primarily considered the testimony of the four therapists mentioned above[5] as well as Peggy Kinnetz, Ed.D., T.G.'s Seven Counties parenting group facilitator, and Sky Tanghe, a Cabinet social worker who had been involved with T.G.'s case since 1996.

Although T.G. herself explained in detail the circumstances surrounding the batting cage incident and the unsanitary condition of her home, the majority of the

[5]While both Dr. Brenzel and Allison Johnson testified at the trial, the family court also considered the depositions of Dr. Aulbach and Dr. Sandhu in making its determination.

Cabinet's case focused on T.G.'s long-standing hostile relationship with the Cabinet, her inability to develop a lasting relationship with a therapist, her refusal to accept and adequately deal with her mental health issues, and the effect that T.G.'s unstable mental health would have on her ability to parent A.J.M. After considering all the evidence, on March 14, 2006, Judge Stephen George of the Jefferson Family Circuit Court entered an order finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), that grounds existed under KRS 625.090(2) to support the termination of T.G.'s parental rights, and that it was in A.J.M.'s best interest for T.G.'s parental rights to be terminated and for the custody of A.J.M. to be transferred to the Cabinet for Health and Family Services.

In her appeal to the Kentucky Court of Appeals, T.G. raised three arguments. First, she argued that KRS 625.090(1)(a)1 was unconstitutional because it permitted a court to adopt a prior court's finding of abuse or neglect, and in so doing, hold that a child is neglected using a lower standard of proof than required in a termination proceeding. T.G.'s second and third arguments were that neither the family court's finding of neglect, nor its conclusion that several grounds supporting termination existed under KRS 625.090(2) were supported by substantial evidence. Although the Court of Appeals found that KRS 625.090(1)(a)1 was constitutional if correctly applied, it ultimately agreed with T.G. that no substantial evidence existed in the record to support the trial court's finding of neglect or its finding of grounds for termination. Following this Court's grant of discretionary review, the Cabinet now argues that KRS 625.090(1)(a)1 is constitutional on its face, the family court's findings were supported by substantial evidence, and the Court of Appeals engaged in an improper *de novo* review of the record in concluding otherwise. Having thoroughly reviewed the record in this case, we

agree with the Cabinet that the family court was not clearly erroneous in its holding and its findings were supported by substantial evidence.

ANALYSIS

I. Because the Family Court Expressly Found In Its Termination of Parental Rights Proceeding That A.J.M. Was An Abused Or Neglected Child Under KRS 625.090(1)(a)2, T.G.'s Constitutional Challenge to KRS 625.090(1)(a)1 Is Not Properly Before This Court.

Although T.G. did not raise this issue before the trial court, she argued to the Court of Appeals that KRS 625.090(1)(a)1 is unconstitutional because it allows a court to adopt a prior court's finding of abuse or neglect, and in so doing, find that a child is neglected using a lower standard of proof, preponderance of the evidence, than required in a termination proceeding, clear and convincing evidence.[6] KRS 625.090(1) states

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
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> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
>
> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or

[6]In T.G.'s case, A.J.M. was previously adjudged to be abused or neglected in a dependency proceeding using the preponderance of the evidence standard. However, the United States Supreme Court has held that in termination of parental rights proceedings, due process requires the trial court's findings to be supported by clear and convincing evidence. See Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). This case has an added twist because Family Court Judge Stephen George presided over both the dependency proceeding and the termination proceeding and thus, was in a position to assess all of the evidence.

> emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
> (b) Termination would be in the best interest of the child.

The Court of Appeals addressed this argument and implied that this statute could be unconstitutional if the circuit court did not make independent findings of abuse and neglect under the clear and convincing standard. We decline to address this issue because it is not before us in this case.

If the family court in this instance had only found under the first prong that A.J.M. had previously been adjudged to be an abused or neglected child, then it appears that T.G.'s argument regarding the statute's constitutionality would be relevant. However, in this case, the Jefferson Circuit Family Court not only found that the first prong was met, but also, expressly found that based on the evidence presented in the termination proceeding, A.J.M. was an abused or neglected child as defined in KRS 600.020(1). Because the statute indicates that only one of the three prongs listed in KRS 625.090(1)(a) needs to be met, and because the family court expressly found under KRS 625.090(1)(a)2 that A.J.M. was abused or neglected based on clear and convincing evidence, T.G.'s argument regarding the constitutionality of KRS 625.090(1)(a)1 is not properly before us.

II. Substantial Evidence Existed to Support the Family Court's Finding that A.J.M. Was Abused or Neglected.

When an appellate court reviews a decision to terminate parental rights, it must determine if the family court's conclusion was based upon clear and convincing evidence and, in so doing, must apply the clearly erroneous standard of appellate review. CR 52.01; J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, 239 S.W.3d 116, 120 (Ky. App. 2007). "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." M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 117 (Ky. App. 1998), *citing* Rowland v. Holt, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934). Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them. K.R.L. v. P.A.C., 210 S.W.3d 183, 187 (Ky. App. 2006). In this context, substantial evidence exists if the proof presented would have convinced a reasonable person by clear and convincing evidence that A.J.M. was an abused or neglected child. With this clear and convincing evidentiary standard in mind, we find that in T.G.'s case, the record contains the requisite evidence to support the trial court's finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1).

The relevant portions of KRS 600.020(1) state

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:
>
> * * * * *
>
> (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
> (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
> (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of

> the child;
>
> * * * * *
>
> (i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months;

Although the batting cage incident and the condition of T.G.'s home (during three home visits in July, August, and October 2004) were alleged as grounds to support the Cabinet's petition, the evidence relied upon by the trial court in its finding of neglect primarily related to T.G.'s unstable mental health and the significant risk it posed to A.J.M. Of particular importance was the evidence showing that although T.G. genuinely loved her daughter and had made efforts to regain custody of her, T.G.'s mental illness, which has not significantly improved since her diagnosis in 1997, will continue to go untreated and will render T.G. incapable of properly parenting A.J.M. The Cabinet presented five witnesses in support of its petition.

Sky Tanghe

> Sky Tanghe, a social worker employed by the Cabinet had been involved with T.G's family since September 1996. Tanghe gave a detailed history of the different mental health and parenting services offered to T.G. by the Cabinet since 1996, when the Cabinet filed its first petition against T.G. alleging neglect of her then one-year-old-son, N.M. Tanghe testified that in September 1996, T.G. was ordered to attend counseling sessions and allegedly did so in North Carolina, where her son's biological father was living. Nearly a year later, in May 1997, T.G. participated in her first psychological evaluation, performed by Dr. Dennis Cambron, Ph.D. Tanghe stated that Dr. Cambron assessed T.G. to be of high average intelligence, noted her weaknesses in understanding normal developmental expectations for an infant, and diagnosed T.G. as having Obsessive Compulsive Personality Disorder. Dr. Cambron recommended that T.G.

continue participating in co-dependency group classes and focus her individual therapy sessions on her personality disorder.

Tanghe then noted that in December 1999, after a referral was made by Seven Counties, T.G. received a parent-aid and services from the HELP Team. In October 2001, Seven Counties referred T.G. to the FACTs Team and T.G. began participating in supervised visits with her two children, N.M. and B.M., at Family Place. After three supervised visits, however, T.G. had a falling out with the Family Place staff and refused to have any further visits. This service was subsequently terminated.[7] In December 2001, Dr. David Winsch, Ph.D., performed another psychological evaluation of T.G., concluding that T.G. met the criteria for an Obsessive Compulsive Disorder and that her mental illness seriously interfered with her parenting skills. Dr. Winsch noted, however, that if T.G. had a positive response from the treatment services offered by the Cabinet, such as childcare, family counseling, and in-home monitoring, she could be capable of providing appropriate care for her children. Despite this recommendation, in May 2001, T.G. stipulated to the neglect of both N.M. and B.M.; in July 2001, the Cabinet filed its fourth petition alleging lack of supervision and abusive discipline; and in May 2002, the family court awarded permanent custody of both children to their maternal grandmother.

Continuing with T.G.'s history of mental health services, Tanghe stated that in August 2002, Dr. Anna Podolskaya, M.D., performed another psychological evaluation of T.G. After the session, Dr. Poloskaya noted that T.G. demonstrated paranoid behavior and blamed everyone but herself for the removal of her children. Tanghe stated that T.G.'s next instance of involvement with the Cabinet came after the birth of A.J.M. in January 2004.[8] Following the return of A.J.M. to T.G. on January 12, 2004, the Cabinet placed a HELP team with T.G. for a period of 45 days. Tanghe also stated that T.G. was receiving help from Seven Counties during this period. Following the removal of A.J.M. from T.G.'s care in September 2004, Tanghe noted that T.G. participated in psychological evaluations with the

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[7]Dr. Sally Brenzel's report of T.G.'s psychological evaluation, which was admitted into evidence at trial, notes that at the close of each of these supervised visits in October 2001, T.G. would engage in inappropriate, disruptive behavior that ultimately led to her being escorted from the building by a security officer.

[8]It does not appear from the record that T.G. engaged in any mental health counseling or treatment services from 2002 till 2004.

Foster Care Clinic Assessment Team (FORECAST) and with Dr. Sally Brenzel, completed a parenting class and "baby school" offered by Seven Counties, and was referred to Dr. Patricia Aulbach by Seven Counties for individual therapy sessions. Despite T.G.'s numerous opportunities since 1997 to address her mental health, Tanghe ultimately stated that T.G.'s lack of improvement in attending individual therapy sessions and developing an ongoing relationship with a therapist made a successful reunification with A.J.M. unlikely.

Regarding T.G.'s lack of improvement, Tanghe testified that after T.G. had been seeing Dr. Aulbach for four months, T.G. stopped attending her sessions and claimed that she did not trust Dr. Aulbach. Tanghe also stated that even though T.G. does well in structured, supervised settings, there was still a very high risk that T.G. would not be able to deal with the issues that would arise as A.J.M., who was almost two years old at the time of the trial, continues to develop. Furthermore, Tanghe noted that A.J.M. has flourished in her foster home and that her foster parents are interested in adopting her if T.G.'s parental rights are terminated. Tanghe testified that if T.G. had taken advantage of the many services that had been provided to her, she could have made progress. However, because T.G. has chosen not to be open to such improvement, Tanghe did not believe there was a likelihood of a successful reunification.

Dr. Peggy Kinnetz, Ed.D.

Dr. Peggy Kinnetz, Ed.D., was qualified by the trial court as a mental health expert. Dr. Kinnetz stated that she led two of the group classes T.G. completed with Seven Counties. From November 4, 2004 to January 5, 2005, T.G. completed a Parenting Skills class, and from February 23, 2005 to June 29, 2005, T.G. completed a Young Families class. Dr. Kinnetz testified that based on T.G.'s performance in these classes, she observed that T.G. had some difficulty properly setting boundaries for A.J.M. and that T.G.'s needs sometimes interfered with her daughter's. Dr. Kinnetz stated that T.G.'s anxiety impacted her ability to relate to others and that she has assumed very little responsibility for the alleged neglect of her children. With regard to specific areas still needing improvement, Dr. Kinnetz testified that T.G. needs to work on her ability to act on behalf of her child. Dr. Kinnetz explained that when T.G. has to interact with governmental agencies, her community, or society in general, she tends to react with suspicion and mistrust. Dr.

Kinnetz expressed concern that in these situations, T.G. could end up isolating herself and her child. When asked if additional group classes would help T.G., Dr. Kinnetz replied that since T.G.'s issues are more personal, such as relating to others, more group classes would not be particularly beneficial. Ultimately, Dr. Kinnetz did not recommend returning A.J.M. to T.G. at the time of the trial because she feared T.G.'s mistrust and paranoia could negatively impact A.J.M.

Dr. Sally Brenzel, Psy.D.

Dr. Sally Brenzel, Psy.D., was also qualified as a mental health expert by the trial court. From June 1, 2005 till July 18, 2005, Dr. Brenzel conducted four and a half hours of clinical interviews with T.G. and ultimately produced a psychological evaluation of T.G.[9] Dr. Brenzel testified that T.G. was very bright, cooperative in keeping appointments and answering questions, and initially conducted herself with an appropriate guardedness. When asked about T.G.'s ability to improve her mental health, however, Dr. Brenzel testified that although T.G. does verbalize a motivation to change, her prognosis for change is poor because she does not appear to learn from her experiences and consistently engages in a dysfunctional pattern of behavior. Dr. Brenzel explained that T.G.'s motivation to follow through with her treatments does not endure and is only in response to external circumstances, such as the Cabinet's insistence. In her evaluation report, Dr. Brenzel expanded on T.G.'s inability to recognize a need for improvement, noting that

> [i]n interviews with professionals, including this examiner, T.[G]. has assertively maintained that she has never abused or neglected her children and/or behaved inappropriately but rather that her family, associates, and Child Protective Services have wrongly accused, misunderstood and/or disagreed with her, worked against her, and have their own agendas regarding removing her children from her care. T.[G]. cited her only problems to be the stress involved with her job and related financial pressure, her 'stubbornness and over-confidence' that she can handle it all, her 'anger response' to outside interference in her

[9]In addition to her testimony about this evaluation, Dr. Brenzel's report regarding T.G.'s evaluation was admitted into evidence at trial.

life that 'takes energy and time away from the kids that I don't have to spare,' and an inadequate support system.

Dr. Brenzel also discussed T.G.'s anxiety and paranoia, which became evident after T.G.'s reaction to the Rorschach Inkblot Test, which requires patients to describe what they see in ten abstract designs, and the Thematic Apperception Test (TAT), which asks the examinee to tell a story in response to a set of pictures. Dr. Brenzel explained that although T.G.'s responses to the inkblot test undermined the soundness of her judgment and her ability to engage in functional relationships, T.G. initially responded well to the TAT. However, approximately two hours after their session had ended, T.G. left four extensive messages on Dr. Brenzel's voice mail in which she sought to clarify her answers and provide new stories for some of the pictures. Dr. Brenzel testified that in the messages, T.G. was very upset and accused Dr. Brenzel of showing her inkblot pictures that encouraged devil worship. T.G. also accused a Seven Counties employee she had seen upon leaving her session of being out to get her and of being in control of her evaluation. In her evaluation report, Dr. Brenzel further explained that she contacted T.G. by telephone the following day in order to discuss T.G.'s phone messages. T.G. stated that she just wanted to do well on the tests and would tell Dr. Brenzel what she wanted to hear. When Dr. Brenzel expressed a concern for T.G.'s emotional state, T.G. replied that she felt relieved after leaving the phone messages and noted that even if she lost all three of her children, she would not "go in a hole." T.G. stated that she had "a positive drive" and would "go onto something else" if that happened.

When questioned about T.G.'s specific mental illness, Dr. Brenzel stated that she diagnosed T.G. with Generalized Anxiety Disorder (GAD) and Borderline Personality Disorder with Obsessive Compulsive traits. Dr. Brenzel testified that these conditions dramatically affect T.G.'s ability to be a parent, noting that although T.G. has the intelligence and the genuine desire to be a good parent, her mental illness has consistently prevented her from being able to exercise good judgment regarding safety, supervision, discipline, and educational requirements. Furthermore, Dr. Brenzel stated that due to her illness, T.G. has been unable to navigate critical relationships with her family, school personnel, social service workers, and mental health professionals. In looking ahead to the future, Dr. Brenzel noted that as A.J.M. gets older and more able to assert herself, T.G.'s mental illness will make it more and

more difficult for her to properly parent A.J.M. Although Dr. Brenzel recognized the possibility for improvement if T.G. makes a lasting connection with a therapist, she also stressed that based on T.G.'s past experiences, she did not believe that T.G. could maintain such a connection over time. In conclusion, Dr. Brenzel testified that T.G.'s "prognosis to successfully parent A.J.M. was poor."

Dr. Patricia Aulbach, Psy.D.

The trial court also considered the deposition testimony of Dr. Patricia Aulbach, Psy.D., a clinical psychologist employed by Seven Counties who engaged in regular therapy sessions with T.G. from June 8, 2005 till September 27, 2005.[10] In describing her initial impressions of T.G., Dr. Aulbach stated that T.G. never acknowledged any responsibility for the removal of A.J.M. and had a difficult time coming up with areas of parenting with which she needed help. Dr. Aulbach noted that T.G.'s severe paranoia prevented her from focusing specifically on A.J.M. because she was consistently worried about a conspiracy against her involving the Court, the Cabinet, and Seven Counties. Dr. Aulbach further explained that in general, T.G. was unable to develop a therapeutic relationship with her because T.G. feared that anything done during her sessions would ultimately be used against her by the Cabinet. Although Dr. Aulbach agreed that this was an understandable concern for someone facing a termination of parental rights proceeding, she also stated that where she had been able to develop lasting relationships with other clients facing similar circumstances, she was not able to get past the worries and constraints with T.G.

After several sessions with T.G., Dr. Aulbach eventually diagnosed T.G. with Generalized Anxiety Disorder, Paranoid Personality Disorder, and a rule-out of Delusional Disorder, which means there is some evidence present but not enough to make a complete diagnosis. Dr. Aulbach stated that although Generalized Anxiety Disorder is responsive to medication, treatment for a Paranoid Personality Disorder requires "a long-term, trusting therapeutic relationship where the therapist and the client work together to establish new patterns of behavior and new experiences in response to those patterns of behavior that are corrected."

[10]This deposition was conducted on January 13, 2006, several weeks after the termination of parental rights trial.

In explaining why she was unable to develop a relationship with T.G., Dr. Aulbach noted that during their August 12, 2005 session, T.G. was unable to deal with her emotional issues and was pre-occupied with the upcoming parental rights hearing.[11] After the hearing was re-scheduled for December, however, T.G.'s next session was much better and she showed an interest in improving. At the conclusion of this session, Dr. Aulbach asked T.G. if she could make a choice between focusing on her mental health issues with Dr. Aulbach as her therapist versus Dr. Aulbach as a court representative. Despite this hope for improvement, at T.G.'s next appointment on August 30, 2005, Dr. Aulbach stated that T.G. had an altercation with the receptionist over her co-pay, expressed a lot of paranoid thinking towards Dr. Sally Brenzel, and complained about a conspiracy among Seven Counties, Dr. Brenzel, and the Cabinet. Dr. Aulbach noted that T.G. was unresponsive to her attempts at breaking through this paranoid-thinking process. It appears from Dr. Aulbach's testimony that T.G. did not attend another session with her until September 27, 2005. During this final session, T.G. was angry with Dr. Aulbach for sharing T.G.'s diagnosis with Dr. Brenzel and expressed distrust with their relationship. Dr. Aulbach stated that since T.G. was not willing to work with her on her mental health issues, they terminated their relationship on that day.

When asked how T.G.'s condition could affect her ability to parent a two-year-old, Dr. Aulbach explained that her main concern would be T.G.'s potential for distorting the motivations of people genuinely trying to help and be involved in A.J.M.'s life. Dr. Aulbach also noted that she often felt like T.G. was more concerned with not looking bad in front of people rather than with A.J.M.'s well-being. Ultimately, Dr. Aulbach stated that at the time she stopped seeing T.G., which was two and a half months before the termination of parental rights trial, T.G.'s prognosis for improvement was poor unless T.G. became willing to really work on her mental health issues with a therapist.

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[11]T.G.'s termination of parental rights hearing was originally scheduled for August 18, 2005. However, after T.G.'s counsel made a motion to withdraw and T.G. expressed a desire to proceed pro se, the family court reluctantly granted a continuance. In delaying the trial, the family court explained that the serious nature of a termination proceeding required it to ensure that T.G.'s rights were adequately represented and it was not comfortable allowing her to proceed pro se. At this point, the family court set T.G.'s trial for December 20, 2005.

Dr. Daya Sandhu, Ed.D.

> The trial court also considered the deposition testimony of Dr. Daya Sandhu, Ed.D., which was taken on August 3, 2005. Dr. Sandhu testified that he met with T.G. for approximately three or four sessions in July 2005. Dr. Sandhu stated that when he first met with T.G., she was overwhelmed and anxious. Although he suggested that she start taking medication for her anxiety, T.G. replied that she was afraid to take medication because the Cabinet would then think she was a psychiatric patient and not give her child back. Dr. Sandhu stressed in his deposition that he really was not able to make predictions about T.G.'s ability to improve or to parent a child because he felt like he had only seen the "tip of the iceberg." He did note, however, that he and T.G. were still planning on having counseling sessions once a week, and that after at least six months, he should be able to assess her parenting abilities. Although Dr. Sandhu seemed hopeful and willing to engage in a therapeutic relationship with T.G. at the time of the deposition, T.G. soon stopped attending her sessions with him. (In her trial testimony, T.G. stated that she ended their relationship because she was uncomfortable meeting with Dr. Sandhu in the same office where her former attorney also worked.)

In addition to the witnesses called by the Cabinet, Allison Johnson, a licensed social worker and marriage counselor, testified on behalf of T.G. at the termination proceeding.

Allison Johnson

> Johnson originally met with T.G. for four sessions in November 2004. During these sessions, Johnson stated that T.G. was very anxious and paranoid. Johnson revealed that their sessions stopped after she confronted T.G. very directly about her mental health. Although Johnson noted that this session ended in a good place, it was not "the best place," and T.G. subsequently ended their therapeutic relationship. One year later, in November 2005, T.G. returned to Johnson in order to seek therapy again. At the time of the parental rights trial, in December 2005, Johnson had completed three sessions with T.G. Based on these meetings, Johnson testified that T.G. appeared less anxious and more willing to cooperate and work on her issues. Although Johnson stated that she could not predict whether their relationship would continue, she recognized that it felt

> connected so far. Johnson also noted that even though T.G. has the ability to become an effective parent, she needs to understand that it will require intensive and long-term therapy. Lastly, Johnson acknowledged that at some point, if T.G. continues to engage in therapy, T.G. would be capable of a systematic and supervised return of A.J.M. However, at the time of her testimony, Johnson could not recommend returning A.J.M. to T.G.'s care. Rather, Johnson recommended that eventually, there be a "structured, systematic transition."

The testimonies and depositions of the above-mentioned therapists and social workers constitute substantial evidence of a clear and convincing nature supporting the trial court's finding that

> [t]he mental illness of the respondent and her history of resultant abuse or neglect to her children create a substantial ongoing risk to [A.J.M.]. [T.G.]'s cooperation in various treatment services has not remedied her symptoms or improved her condition to a point that she can safely provide for [A.J.M.]. Her behaviors remain volatile, erratic, paranoid, obsessive and compulsive, and contrary to the provision of a safe, stable environment for the infant petitioner.

Not including T.G.'s opportunity for improvement following the removal of her two oldest children in 1996, since the removal of A.J.M. in September 2004, T.G. has seen four different therapists: Allison Johnson in November 2004, Aaron Bates in March 2005, Dr. Patricia Aulbach from June 2005 till September 2005, Dr. Daya Sandhu in July 2005, and then back to Allison Johnson in November 2005. Furthermore, through her psychological evaluations and Seven Counties services, T.G. has had the opportunity to improve her mental health situation through her interactions with Dr. John Gallehr, M.D., and Dr. Larry Meyers, M.D., of the FORECAST Team; Katie LaJoie, Psy.D., of Seven Counties; Peggy Kinnetz, Ed.D., of Seven Counties; Sky Tanghe of Seven Counties; and Dr. Sally Brenzel, Psy.D.

Of these therapists and social workers who testified, no one could recommend

the reunification of A.J.M. and T.G. at the time of the trial. As a matter of fact, other than Allison Johnson, the therapists who expressed an opinion on T.G.'s prognosis for improvement all agreed it was poor. Sky Tanghe stated that reunification would be unlikely because of T.G.'s history of avoiding her mental health issues and her lack of improvement. Peggy Kinnetz did not recommend returning A.J.M. for fear of the impact of T.G.'s mistrust and paranoia on A.J.M. Dr. Brenzel testified that T.G.'s prognosis is poor because she is unable to recognize a need for improvement. Dr. Aulbach stated that T.G.'s paranoia prevented her from focusing on A.J.M.'s needs, expressed concern that T.G. would distort the motivations of people trying to genuinely help A.J.M., and concluded that T.G.'s prognosis for improvement was poor. Although Allison Johnson seemed hopeful that her relationship with T.G. would continue and that T.G. could improve over time, even she could not recommend reuniting A.J.M. with T.G. at the time of the trial. Based on the aforementioned testimonies and depositions, we find that substantial evidence exists in the record to convince a reasonable person by clear and convincing evidence that A.J.M. was an abused or neglected child as defined in KRS 600.020(1). Therefore, the trial court was not clearly erroneous in making its findings and we will not disturb its ruling on appeal.

Before turning to the grounds for termination, we note that the Court of Appeals reviewed this same evidence but focused almost exclusively on the fact that T.G.'s mental illness was "treatable" and the fact that A.J.M. had suffered no physical or emotional injury. However, the trial court properly recognized that the extensive efforts to address T.G.'s mental issues over many years had been unsuccessful, in large part due to T.G.'s failure to follow through with various mental health providers. Thus, while theoretically treatable, T.G.'s mental illness had been for years, and promised to

remain, a serious obstacle to effective parenting. Moreover, the absence of actual physical or obvious emotional harm to two year-old A.J.M. is not dispositive because, as the trial court recognized, the "substantial ongoing risk" created by T.G.'s conduct brought A.J.M. clearly within the definition of an abused or neglected child as defined in KRS 600.020(1)(b).[12] We cannot overemphasize that the Cabinet and the courts need not wait for actual physical or emotional injury in order to protect an abused and neglected child.

III. Substantial Evidence Existed to Support the Family Court's Finding that One Or More Grounds Were Present to Justify Terminating T.G.'s Parental Rights of A.J.M.

KRS 625.090(2) states that

> No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds.

The statute then enumerates ten grounds justifying termination. In its findings of fact, the trial court determined that two of these grounds, KRS 625.090(2)(e) and (g), were present in T.G.'s case, stating

> The respondent, [T.G.], 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 petitioner child, [A.J.M.], and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.
> The respondent, 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 petitioner child's well-being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.

[12]KRS 600.020(1)(b) expressly applies to situations where the parent or guardian "creates or allows to be created a risk of physical or emotional injury. . . ."

Although the Court of Appeals found that the trial court was clearly erroneous in making these findings,[13] the Cabinet argues adamantly on appeal that substantial evidence exists in the record supporting the family court's determinations on this issue. We must agree with the Cabinet.

First, there was substantial evidence relied upon by the trial court that since September 2004, and for reasons other than poverty alone, T.G.'s mental illness has rendered her incapable of providing essential care, protection, and basic necessities for A.J.M. Sky Tanghe testified that T.G.'s history of neglect and her lack of improvement had created a high-risk that T.G. cannot adequately care for A.J.M. Tanghe also noted that T.G.'s difficulties will increase as A.J.M. grows into a toddler. In recommending that A.J.M. not be reunited with T.G., Peggy Kinnetz testified that it is difficult for T.G. to act on behalf of A.J.M. and that T.G. will likely isolate herself and A.J.M. because of her paranoia and mistrust of others. Dr. Brenzel stated that T.G.'s mental illness has consistently prevented her from being able to exercise good judgment regarding A.J.M.'s safety, supervision, discipline, and educational requirements; T.G. cannot form relationships essential for child-rearing; and T.G.'s inabilities will only get worse as A.J.M. gets older. Dr. Aulbach stressed that T.G.'s paranoia has consistently prevented her from being able to focus on A.J.M. basic needs. Furthermore, the trial court

[13]The Court of Appeals made no reference whatsoever to the trial court's finding regarding failure to provide "essential care and protection." As to "essential food, clothing, shelter or medical care," the appellate court concluded summarily there was no substantial evidence of record that A.J.M. had been denied these things and then stated: "This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels." Again, the termination may be due to a failure to provide or because the parent "is incapable of providing essential food, clothing, medical care, shelter or education." *(Emphasis supplied).* While this ground is a much closer call than the failure to provide "essential parental care and protection," the trial court's finding was not clearly erroneous.

considered the results of several supervised play evaluations with T.G. and A.J.M., noting that T.G. had trouble setting proper boundaries for A.J.M.; T.G. obsessively cleaned the play area more than anyone the supervisors had ever seen; T.G. insisted on undressing and redressing A.J.M. completely several times during each visit; and T.G. demonstrated ongoing symptoms of anxiety and obsessive compulsivity. Based on this evidence, we conclude that it was not clearly erroneous or an abuse of discretion for the family court to find that T.G. was substantially incapable of providing essential parental care, protection, and the basic necessities for A.J.M.'s well-being.

Secondly, regarding T.G.'s reasonable expectation for significant improvement, we reiterate our previous conclusion that there was ample evidence in the record supporting the trial court's finding that even at the time of the termination trial, T.G. remained "volatile, erratic, paranoid, obsessive and compulsive," and that ultimately, T.G.'s likelihood of improvement was poor. Both Dr. Aulbach and Dr. Brenzel stated that T.G.'s prognosis for improvement was poor because she was unable to recognize a need to address seriously her mental health. In addition, Sky Tanghe noted that it was T.G.'s almost decade-long history of a lack of improvement that made reunification unlikely in this case. Although Allison Johnson expressed some hope of improvement if T.G. continued their therapeutic relationship, the fact remains that T.G. waited to reestablish this relationship until November 2005, only one month before her termination hearing, and that T.G. had only completed three sessions prior to her trial. T.G. was informed of her mental illness and her need to establish a lasting, therapeutic relationship as for back as 1997. Other than the one month she spent with Allison Johnson in November 2004, T.G. had shown no signs of improvement and had made no real effort to address her mental health issues in the ten years preceding the order

terminating her parental rights to A.J.M. Furthermore, even T.G.'s witness, Johnson, could not recommend that A.J.M. be returned to T.G. at the time of the trial. Therefore, since the proof presented at trial would convince a reasonable person by clear and convincing evidence that T.G. had no reasonable expectation of significant improvement, we find that the trial court was not clearly erroneous in its finding that grounds existed to support termination of T.G.'s parental rights to her third child.

CONCLUSION

The crux of T.G.'s argument throughout this case was that the family court did not have substantial evidence to support its decision to terminate her parental rights as to then two year-old A.J.M. However, the family court heard testimony from several therapists and social workers regarding T.G.'s lengthy history of neglect and abuse of her older children; her consistent failure to adequately address her mental health issues; her extreme paranoia and mistrust toward people in a position to help her and A.J.M.; the detrimental effect her unstable mental health has had and will have on her ability to parent A.J.M; and her apparent inability to maintain a lasting relationship with a therapist, an absolute necessity given her mental health status. Despite T.G.'s expressed desire to improve and retain custody of A.J.M., the trial court correctly concluded that in this instance, T.G.'s past behavior serves as the best predictor of her future behavior. Having found that substantial evidence exists in the record to convince a reasonable person by clear and convincing evidence that A.J.M. is an abused or neglected child and that termination of T.G.'s parental rights is in A.J.M.'s best interest, we reverse the Court of Appeals decision and reinstate the Jefferson Circuit Family Court's March 14, 2006 Order terminating T.G.'s parental rights as to A.J.M.

All sitting. All concur.

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