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NOT TO BE PUBLISHED OPINION

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RENDERED: JANUARY 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000404-DG

FINAL

DATE 2/11/10 Kelly Klaber D.C.

DELORES MARIE KNIGHT — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2007-CA-001850-MR
LYON CIRCUIT COURT NO. 07-CI-00003

LINDA YOUNG — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING

We granted discretionary review of Delores Marie Knight's challenge of a decision of the Court of Appeals affirming a trial court's decision to award custody of her daughter to the child's paternal grandmother following the death of the child's father. We have focused our review in particular on whether the trial court committed reversible error when it admitted testimony of a licensed clinical social worker containing hearsay statements allegedly made by the child. We affirm the Court of Appeals because we conclude that any error committed by the trial court in admitting these hearsay statements was harmless and that the trial court otherwise properly applied controlling precedent and issued factual findings supported by substantial evidence.

I. FACTS.

At the time of the child's birth in 2000, Marie[1] was married to the child's father, Gerald Van Knight, Jr., who was known as "Jerry." Marie and Jerry divorced in 2003, while they lived in Indiana. The Indiana trial court awarded physical custody[2] of the child, a daughter, to Jerry. Marie was granted visitation rights and ordered to pay child support of $30.00 per week.

Following their divorce, Jerry and the child (H.L.K.) moved to Kentucky; and Marie moved to Iowa. Jerry's mother, Linda Young, lived in Lyon County and frequently cared for the child, who lived nearby with Jerry.[3] Marie visited H.L.K. on some occasions, but she concedes she did not exercise her visitation rights as often as the divorce decree allowed. Marie made a total of $240.00 in child support payments following the divorce; and she occasionally paid for other items, such as the child's clothing, but ultimately discontinued making

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[1] Friends and relatives refer to Delores Marie Knight by her middle name, Marie. Because there are several people with the surname Knight involved in this case, we will not use the surname "Knight" to refer to any individual person.

[2] It is unclear whether the Indiana decree actually awarded sole custody of the child to Jerry or whether the award of "physical custody" was akin to joint custody with Jerry as the primary residential custodian. *See Young v. Young*, 891 N.E.2d 1045, 1046 (Ind. 2008) ("In 2003, the trial court entered a decree of dissolution, awarding the parties joint custody of the three children with physical custody of the children awarded to Marla."). *See also* BLACK'S LAW DICTIONARY (8th ed. 2004) definitions of *physical custody* ("*Family law.* The right to have the child live with the person awarded custody by the court. — Also termed *residential custody*") and *joint custody* ("An arrangement by which both parents share the responsibility for and authority over the child at all times, although one parent may exercise primary physical custody. . . . In a joint-custody arrangement, the rights, privileges, and responsibilities are shared, though not necessarily the physical custody. In a joint-custody arrangement, physical custody is usu. given to one parent.").

[3] Jerry and H.L.K. lived in adjacent Caldwell County for a time. According to the trial court's findings, they lived with Young in Lyon County for some period before Jerry's death.

regular child support payments. Marie contends that she and Jerry had an unwritten agreement that she would quit making child support payments in exchange for Jerry's claiming the child as a dependent for income tax exemption purposes. The divorce decree allowed for Jerry and Marie to alternate claiming the child as a dependent.

Jerry was killed in an accident on December 22, 2006. The next day, Young instituted proceedings in district court to obtain emergency custody of the child. Young stated in documents[4] filed with the district court that Jerry had sole custody, that Marie had "very little contact" with the child, and that Young had daily contact with the child and often kept her overnight. Young also stated that Jerry and the child had recently been living with her and that it was in the child's best interest to remain with Young because she alleged that Marie "has a criminal history; a history of severe mental illness; prescription drug abuse; and instances of domestic violence in her home." In completing a portion of the pleading forms requesting information about the child's legal mother, Young listed Marie's name and phone number but indicated that her address was unknown, although it was believed to be in Iowa. The district court found the child to be dependent and placed her with Young through an Emergency Custody Order. Apparently, the child was placed in Young's emergency custody before Marie was informed of Jerry's death.

4 Young filed an Emergency Custody Order Affidavit on or around December 23, 2006, and a Juvenile Dependency, Neglect, and Abuse (DNA) Petition on or around December 28. The factual allegations in the two documents are very similar. The affidavit stated that the child frequently spent the night at Young's house; the DNA petition stated that Jerry and the child had recently been living with Young.

Shortly after obtaining emergency custody in the district court, Young then filed a petition for permanent custody in the circuit court, alleging that Marie was an unfit parent and that it would be in the child's best interest for Young to have custody of the child. Meanwhile, after learning of Jerry's death, Marie had obtained an order, purporting to award her physical custody of the child, issued by the Indiana trial court that had granted her divorce from Jerry. The basis of the Indiana order was Marie's status as the child's sole surviving parent and the lack of evidence against Marie's having physical custody.

Young then filed a motion in the Kentucky circuit court asserting that Kentucky had jurisdiction as the child's home state under the Uniform Child Custody Jurisdiction and Enforcement Act, Kentucky Revised Statutes (KRS) 403.800, *et seq.* Apparently, the motion was resolved in Young's favor; and Marie does not contest the Kentucky circuit court's exercise of child custody jurisdiction in this appeal. The circuit court ordered that Young have temporary custody of the child while the case was pending.

As discovery proceeded, Young filed with the court a report prepared by licensed clinical social worker (LCSW) Mary Fran Davis, indicating that Young intended to submit the report as evidence. The report stated that "[t]his evaluator was requested to evaluate the relationship between [H.L.K.] and her grandmother Linda Young and the extent of emotional injury [H.L.K.] may have suffered by contacts with her mother Marie Knight." The report indicated that

LCSW Davis had interviewed H.L.K. on several occasions, sometimes alone with H.L.K. and sometimes with Young present.

Shortly after filing the report, Young filed a notice to take the deposition of LCSW Davis for use at trial. The deposition took place at the day and time noticed, which was approximately one week after the notice was filed in the record. Marie, who was not represented by counsel of record at the time the deposition was noticed, alleges that she did not receive the notice until the day of the deposition. She secured representation around the same time or slightly after the deposition took place.[5] She never attempted to re-depose LCSW Davis during the two months between the taking of her deposition and the trial court's evidentiary hearing on custody. However, Marie did file a motion in limine to exclude as inadmissible hearsay LCSW Davis's testimony concerning statements H.L.K. allegedly made to LCSW Davis. Young argued that the statements should be admitted under hearsay exceptions for either state of mind, statements made for medical diagnosis and treatment, or as business records.

The trial court denied the motion in limine at the evidentiary hearing, finding the deposition testimony relevant and admissible. The trial court noted that LCSW Davis's deposition testimony really did not have much to offer in terms of Marie's fitness since LCSW Davis had readily admitted that she had not met Marie and could not offer an opinion on her relationship with H.L.K.

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[5] The notice of deposition is stamped filed with the circuit clerk on April 26, 2007. The deposition took place as noticed on May 2, 2007. Marie's new counsel filed a notice of his representation of her on May 4, 2007.

Both parties presented evidence at the evidentiary hearing. H.L.K. did not testify, but others testified to statements she had purportedly made. Young testified and called several other witnesses, including several friends and family members and the child's schoolteachers, to testify to Young's relationship with the child.[6] She also called Marie and several of Marie's family members, including Marie's father, Marie's children from an earlier marriage, and her ex-husband, to testify concerning Marie's shortcomings. This evidence tended to show Marie's troubled relationship with her other children, as well as other matters. Marie testified on her own behalf and offered the testimony of a friend, who testified to her observations of Marie enjoying a loving relationship with H.L.K.

The trial court found that (1) Young had met her burden of proving by clear and convincing evidence that Marie was not "suited to the trust" of having custody of H.L.K, (2) improvement in Marie's circumstances militating against her having custody of the child would not change in the foreseeable future, and (3) awarding sole custody to Young was in the child's best interest. The trial court granted sole custody to Young and supervised visitation to Marie. The trial court issued no child support order.

Marie appealed the trial court's judgment to the Court of Appeals, which affirmed. We granted discretionary review.

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[6] Marie argued at the custody hearing that evidence of Young's relationship with the child should be excluded as irrelevant to determining whether she (Marie) was suited to the trust. However, the trial court overruled her objection, allowing testimony to Young's relationship with the child so that if it determined Marie was not suited to the trust, it could then resolve whether it would be in the child's best interest for Young to have custody without requiring another hearing.

II. ANALYSIS.

A. Trial Court Issued Factual Findings Supported by Substantial Evidence and Did Not Misapply Controlling Precedent in Determining Marie was Not Suited to the Trust of Having Custody of H.L.K.

Marie's contentions on appeal have three main themes. First, she contends that the trial court's judgment awarding sole custody to Young and limiting Marie to supervised visitation is an abuse of discretion and is based on improper testimony from LCSW Davis and from "several witnesses that had no knowledge as to the relationship between [Marie] and the minor child." Second, Marie argues that the trial court misapplied KRS 405.020 and controlling caselaw because it failed to find a number of elements "that must be present before a finding of unfitness, which were not present in the instant action"; and it improperly "based much of [its] Findings upon [Marie's] past actions and her relationship with other children from different relationships." Third, Marie argues that controlling caselaw limits proof of parental unfitness to proof about the "relationship between the parent and the child which is the subject of the action . . . ." We discuss each argument, but we reject Marie's challenge to the propriety of the trial court's judgment.

As the lower courts and parties have recognized, child custody disputes between a surviving parent and a non-parent are governed by KRS 405.020(1), which provides that "[if] either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are

under the age of eighteen . . . ." So the surviving parent has a superior right to custody over the non-parent so long as the surviving parent is "suited to the trust." The concept of *suited to the trust* essentially means a parent (1) who is fit to assume care and custody of the child[7] and (2) who has not waived the superior right to custody. Waiver has not been raised as an issue in this case.

Because the law recognizes the parents' constitutionally protected liberty interests in raising their own children, a non-parent — other than a *de facto* custodian[8] — seeking custody of a child has a burden of proving the parent's unfitness by clear and convincing evidence.[9] As stated in *Davis v. Collinsworth*, evidence of unfitness includes "(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral

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[7] *See Berry v. Berry*, 386 S.W.2d 951, 952 (Ky. 1965) ("By KRS 405.020(1) the surviving parent, if suited to the trust, shall have the custody, nurture, and education of a minor child. The rule is that in a contest between a foster parent and a natural parent who has not surrendered custody, the natural parent has the superior right of custody which must prevail unless the natural parent is not suitable, fit, or capable of making reasonably adequate provisions for the child's well-being."). *See also Davis v. Collinsworth*, 771 S.W.3d 329, 330 (Ky. 1989) (reversing child custody award to grandmother due to lack of substantial evidence of mother's unfitness).

[8] KRS 405.020(3) provides that:

> Notwithstanding the provisions of subsections (1) and (2) of this section, a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian.

Young never alleged that she was the child's de facto custodian.

[9] *Davis*, 771 S.W.2d at 330 ("The United States Supreme Court has recognized that *parents* have fundamental, basic and constitutionally protected rights to raise their own children and that any attack by third persons (and we would include grandparents in that category) seeking to abrogate that right must show unfitness by 'clear and convincing evidence.'").

delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children."[10] Even assuming that clear and convincing evidence of current unfitness on the basis of failure to provide parental care and protection is presented, the trial court must further find that there is no reasonable expectation for the parent to improve the parent's ability to provide such care and protection before granting permanent custody to a non-parent.[11] The trial court here found no reasonable expectation of future improvement in Marie's ability to provide parental care and protection.

1. No Requirement that Every Factor Listed in *Davis* be Found to Find Parent Not "Suited to the Trust."

Marie argues that all of the factors listed in *Davis* must be proven to find unfitness; and, thus, because the trial court failed to find the abandonment of the child factor, the judgment must be reversed. We disagree.

Marie cites no authority indicating that every factor listed in *Davis* must be proven to find a parent not "suited to the trust," and *Davis* does not explicitly require finding each listed factor. *Davis* simply indicates the types of evidence that can show unfitness.

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10 *Id.*

11 *See Forester v. Forester*, 979 S.W.2d 928, 930 (Ky.App. 1998) (Recognizing the long-standing effects of a grant of permanent custody to non-parents, including the possibility that a prior finding of unfitness would help facilitate proceedings for involuntary termination of parents rights, "[w]e hold that the trial court must find, by clear and convincing evidence, that there is no reasonable expectation that [parent] will improve in her ability to provide parental care and protection, before it can permanently award custody to [grandparents]."). *Forester* (a Kentucky Court of Appeals opinion) has not been previously formally cited or adopted by this Court but was binding precedent on the trial court, and we find no reason to disturb its holding here.

In *Davis*, we held that clear and convincing evidence of the parent's unfitness would be required for the parent to lose the parent's superior right to custody. We then stated that "[t]he type of evidence that is necessary to show unfitness on the part of the mother in this custody battle with a third party is" before us, listing the five previously mentioned factors. Noting "[t]here was simply no evidence of *any* of these factors present in the instant case[,]"[12] we affirmed the decision of the Court of Appeals reversing the trial court's grant of custody to the paternal grandmother. We now state clearly that proof of all five factors listed in *Davis* is not required for a finding of parental unsuitability; rather, *Davis* identifies several appropriate types of evidence relevant to a determination of whether a parent is "suited to the trust" to the extent that the parent should enjoy a superior right of custody.

As stated by the Court of Appeals in its opinion in the case before us today,

> The statutory provisions involving a court's **involuntary termination** of all parental rights do not require proof of each and every element that might indicate a parent's unfitness. Therefore, in a case involving a court's determination of fitness for physical **custody**, we cannot conclude that a court's scrutiny or analysis of the statutory factors must exceed that which is required for involuntary termination of parental rights.[13]

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[12] *Davis*, 771 S.W.2d at 330 (emphasis added).

[13] The Court of Appeals opinion refers to KRS 625.090 (involuntary termination of parental rights), which requires findings of one or more, but not all, of a list of grounds very similar to the grounds listed in *Davis*.

Although the trial court did not find abandonment, it found each of the four other factors listed in *Davis*: evidence of (1) inflicting emotional harm, (2) moral delinquency, (3) emotional or mental illness, and (4) failure to provide essential care for the child. And substantial evidence supported the trial court's findings on each of these factors. So we find no reversible error in the trial court's determination that Marie was not suited to the trust.

2. Trial Court's Findings of Four *Davis* Factors Indicating Unfitness are Supported by Substantial Evidence.

a) Substantial Evidence of Inflicting Emotional Harm.

Although it noted no evidence of physical harm or sexual abuse, the trial court found that "emotional harm, despite [Marie's] love for and current interest in [H.L.K.], is evident." The trial court indicated that its finding of emotional harm stemmed, in part, from evidence that the child had been upset over comments Marie made on the phone, such as statements that the child should be with her mother, that Young would not let the child visit her, and that Young "took her step-daughter away . . . ." The trial court also cited Marie's broken promises in failing to visit the child over fall break and her delay in visiting the child over Thanksgiving break.[14] The trial court also pointed to evidence that H.L.K. told others she did not want to visit Marie in Iowa and that she feared she would not be allowed to return to Kentucky. Finally, the trial court cited testimony that H.L.K. had to be "reprogrammed" after visits with Marie even before Jerry's death and Marie's statements that

[14] According to Marie, her planned Thanksgiving break visitation was delayed a few days because of car trouble.

she "did not feel the same" about H.L.K. as her other children following H.L.K.'s birth.

From our review of the record, we find that Young's testimony provided much of the evidence of upsetting phone calls, cancelled or delayed visits, the child's expressions of fear of visits in Iowa, and having to be "reprogrammed" after visits. The trial court apparently found Young's testimony persuasive. Some expressions attributed to the child were also stated in LCSW Davis's deposition testimony and report (such as H.L.K. being upset by Marie's statements in phone calls and missed or delayed visits), with many of the expressions actually reflecting Young's statements recounting to LCSW Davis what H.L.K. had said to her.

In finding emotional harm, the trial court also pointed to H.L.K.'s "expressed worry to Ms. Farley about having to go live with her mother." This information obviously came from testimony of family friend Mollie Farley about the child's statements to her. The trial court also noted that "[s]ince [Marie] has become estranged from her father, who testified and made an excellent witness, [H.L.K.] would suffer from a lack of that grandparent relationship." Obviously, the trial court refers here to the testimony of Marie's father, who testified against her.

Lastly, the trial court discussed evidence of a troubled relationship between Marie and her two other children, including a hurtful email message

allegedly sent by Marie to the other children and one child's testimony indicating significant animosity toward and a lack of real relationship with Marie. It appears that the trial court viewed this evidence more as indicating potential future harm to H.L.K. than present emotional harm to H.L.K.: "Other hurtful comments while not directed to [H.L.K.], show that, as Ms. Davis indicated, the potential for emotional harm is present, even if not currently meeting the clinical definition of 'emotional injury.'"[15] The trial court also noted that one child's testimony indicated emotional harm and stated "the Court believes the likelihood of similar problems with [H.L.K.] [would occur] if custody were awarded to" Marie.

Having thoroughly reviewed the record, we find the trial court's finding of emotional harm to be supported by substantial evidence. In doing so, we look primarily to the evidence cited of present emotional harm to H.L.K., which, by itself — even if the evidence of potential future harm relating to relationship with other children is disregarded — is substantial evidence supporting the finding of emotional harm. Although we are aware that Marie offered differing interpretations of events and statements in her testimony, we must defer to the trial court as the finder of fact in determining which witnesses were the most

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[15] LCSW Davis explained in her report that: "In order to have a finding of emotional injury, it must be shown that the child's functioning is impaired." She further found that although H.L.K. appeared to find some contacts with Marie upsetting, "there is no overall impairment in her [H.L.K.'s] functioning . . . . However, although it cannot be said at this time that [H.L.K.] has impairment in her functioning, this evaluator believes she is at risk of emotional injury if she continues to have upsetting encounters with her mother."

credible.[16] Unfortunately for Marie, the trial court found her testimony less credible as will be discussed below. Clearly, there was evidence of substance supporting its factual finding of emotional harm, particularly in the testimony of Young and of Mollie Farley.

Marie argues that the "emotional harm" found by the trial court does not rise to the level of *emotional injury* as defined by KRS 600.020(24):

> an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to his age, development, culture, and environment as testified to by a qualified mental health professional . . . .[17]

But we are unaware of any authority that demands that a finding of *emotional harm* in this type of child custody case must reach the level of *emotional injury* defined in KRS 600.020(24) (part of the Juvenile Code and, thus, not necessarily applicable to the instant case, which is not a juvenile court proceeding). Whether or not the evidence of emotional harm here would have been enough in and of itself to sustain a finding of parental unfitness, we do not believe the trial court erred in considering the evidence in light of the effect

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16 *See Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007) ("A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.").

17 Marie also argues that LCSW Davis was not a qualified mental health professional; however, we note that KRS 600.020(48)(e) includes a "licensed clinical social worker licensed under the provisions of KRS 335.100" within the definition of *qualified mental health professional*. In any event, regardless of her qualifications, LCSW Davis did not find an *emotional injury*, as defined by KRS 600.020(24), due to the child's ability to function.

of Marie's actions on the child's emotions and/or emotional well-being (even if the harm did not rise to the level of *emotional injury* under KRS 600.020(24)) as one factor bearing on whether Marie was suited to the trust of having custody of her daughter.

b) Substantial Evidence of Moral Delinquency.

The trial court found moral delinquency based upon a number of factors, including Marie having smoked marijuana in her home while H.L.K. was present in the home, Marie admittedly having had affairs while married, Marie's relationship with a man with a history of drug and alcohol abuse, and physical altercations with him (including her statement to Farley that he had knocked her teeth out), allegations of her engaging in "black marketing" and writing cold checks in Okinawa when her first husband was stationed there, and her arrest for bad checks and telephone credit card theft. It also pointed to her father's testimony of an incident in which Marie left her other children (then eight and ten years old) with an eighteen-year old when Marie had been living with her father and her father was away on vacation, and her son's testimony that he (as a child) was the one who primarily changed and fed H.L.K. when he was living with Marie following H.L.K.'s birth.

The trial court also noted that Marie lived in an apartment over a bar and indicated that it did not find believable her testimony that she would change her residence if awarded custody. It stated that it found her credibility

lacking based on numerous conflicts between her testimony and other evidence, including (1) her denial of ever being arrested, contrary to her first ex-husband's testimony (which the trial court found credible); (2) her denial of any problems in Okinawa, despite her first ex-husband's testimony and written Army records[18] to the contrary; and (3) conflicts in her own statements concerning whether Mark Griffith was her "legal husband" (despite admitting "there was never a ceremony")[19] and whether he lived with her currently. The trial court also found that "[Marie] hesitated before answering many questions, evidently to formulate a 'best answer' and was impeached several times by the transcript of her testimony in the Indiana divorce proceedings."

Again, although Marie offered a different interpretation of many events in her testimony, the trial court found her testimony less credible than that of other witnesses. Because the trial court had the opportunity to observe the demeanor of witnesses, we defer to its findings of which witnesses were credible.[20] Its finding of moral delinquency was supported by evidence of substance, including:

1) Marie's ex-husband's testimony concerning her prior arrests and problems in Okinawa;

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[18] Marie claims in her brief that the Army records were "uncertified" but does not indicate whether she objected to their admission on authentication grounds. In any event, her ex-husband's testimony also provided evidence of her arrests.

[19] There was some testimony that Marie indicated the man was her common law husband, presumably meaning that perhaps he might legally be regarded as her husband in jurisdictions recognizing common law marriages. We express no opinion on whether she had a valid common law marriage recognizable under another state's laws.

[20] *See Bailey*, 231 S.W.3d at 796.

2) Marie's other daughter's testimony concerning Marie smoking marijuana in her home while H.L.K. was present there;

3) Marie's father's and her son's testimony about her leaving small children in the care of other children or teenagers;

4) Marie's own admissions of extra-marital affairs; and

5) Marie's own and others' testimony concerning her current relationship with a man who has a history of substance abuse and domestic violence.

Although Marie complains that much of this evidence concerns events long ago and before H.L.K.'s birth, at least some of it also relates to more recent events during the lifetime of H.L.K., who was about six years old at the time of the custody hearing. For instance, Marie's physical altercations with her boyfriend and her having smoked marijuana in H.L.K.'s presence appear to be relatively recent occurrences. While we need not resolve how far back in one's life a trial court could look in determining moral delinquency, we believe there was evidence of substance to support the trial court's implicit finding of current, continuing moral delinquency.

c) Substantial Evidence of Emotional or Mental Illness.

The trial court found that Marie's "actions do demonstrate emotional or mental illness which affects her life, even though there was no medical proof as such of these conditions, the facts speak for themselves." In making this

finding of emotional or mental illness, the trial court relied on a therapist's notes that Marie had experienced hallucinations concerning killing her five-month-old baby and suicidal ideations. The trial court specifically noted that these suicidal ideations were noted by a therapist in February 1989, and we believe that the reference to hallucinations of killing an infant also date back to approximately the same period and relate to a child other than H.L.K.

In finding emotional or mental illness, the trial court also relied on Young's report of Marie's stating she (Marie) was bipolar, testimony regarding "irrational behavior" when Marie was visiting her father and his wife preceding Marie's mother's death, and the "Okinawa issues." The trial court also generally found that although Marie was "trying to get better" through therapy, she gave the impression of being unstable during the custody hearing. Although not discussed in its analysis of mental or emotional illness, the trial court had also noted in its Findings of Fact that the Indiana "custody award [to Jerry] was because the [Indiana divorce court] found there was 'some question as to the mental health of the mother.'"

We recognize that much of the evidence of emotional or mental illness relied upon by the trial court relates back many years. But the trial court also generally found Marie to be currently unstable and noted Marie's telling Young that she was bipolar. It also cited the relatively recent (2003) Indiana divorce

court's finding of "some question" as to Marie's mental health in its general findings.

We also take note of the trial court's clear recognition that there was no medical proof of mental or emotional illness and Marie's argument that its finding of mental or emotional illness without such medical proof is suspect. However, Marie does not cite any authority to indicate that medical proof must be presented to support a finding of mental or emotional illness in this context. Although we express no opinion on whether the proof of mental or emotional illness in this particular case was strong enough, standing alone, for a finding of parental unsuitability to the trust, we do not believe the trial court erred in considering the evidence presented indicating mental or emotional illness as one factor in arriving at its general conclusion that Marie was not "suited to the trust." Moreover, even exclusion of the mental or emotional illness-related evidence would not affect our decision because the trial court's decision is supported by substantial evidence on alternate grounds.

d) Substantial Evidence of Failure, For Reasons Other than Poverty Alone, to Provide Essential Care and No Reasonable Expectation of Improvement in Foreseeable Future.

The trial court found that Marie had failed, for reasons other than poverty alone, to provide essential care for H.L.K., specifically noting (1) her having paid a total of only $240.00 in child support payments despite having been ordered by the Indiana trial court to pay $30.00 per week; (2) "[h]er

visitation, even before Jerry's death, as well as her contact with [H.L.K.], was sporadic"; and (3) "her financial difficulties, credit card problems, and substantial debts have been ongoing since at least the mid-[1990s]." There was evidence of substance to support this finding, including Marie's own admissions concerning the amount of child support actually paid and the infrequency of her visits.

We also note that the trial court, as finder of fact, was free to accept or reject Marie's allegation that Jerry agreed to the cessation of child support in exchange for claiming the child for tax exemption.[21] Furthermore, Marie's child support obligation was for the benefit of H.L.K., not Jerry, so even if Jerry did make such an agreement, that would not excuse her not making a contribution to the child's support.[22]

The trial court further found no reasonable expectation of improvement, based on Marie's troubled relationships with her other children and "the fact that she did not change her lifestyle or her truthfulness after the Okinawa problems." Although not expressly noted by the trial court, we believe that more recent delayed or missed visitations and lack of recent child support payments in the months preceding Jerry's death also are evidence of substance indicating no reasonable expectation of improvement in Marie's willingness or ability to provide essential care to the child.

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[21] *See Bailey*, 231 S.W.3d at 796.

[22] *See* 2 THOMAS JACOBS, CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 6.12 (2008), *available at* Westlaw, CALRO § 6.12 ("Child support is for the benefit of the child, even though it is payable to the custodial parent.").

3. Overall, Finding of Unsuitability to Trust Neither Clearly Erroneous nor Abuse of Discretion.

In sum, we believe that the trial court's findings on these four factors were supported by substantial evidence and that given its findings on these factors, the trial court did not err in determining that Marie was not suited to the trust of having custody of her daughter. Furthermore, while some of the witnesses may not have directly observed Marie's interactions with the child,[23] Marie cites to nothing indicating that only direct observations of parent-child interactions are admissible; and, unfortunately for her, some of the testimony concerning her interactions with the child was not positive. For example, there was her older daughter's testimony that Marie smoked marijuana in the home while H.L.K. was there and her son's testimony that Marie left much of H.L.K.'s care to him following H.L.K.'s birth. Also, despite Marie's arguments that the trial court improperly considered evidence of her relationship with her other children, we find no reason why the trial court could not consider such evidence among other factors even if it might not be proper to base a finding of unsuitability to the trust solely on evidence of relationships with other

[23] Marie alleges in her brief that many witnesses that testified had no knowledge of her relationship with the child. We believe it might be more accurate to say of some witnesses that they had not directly observed her interactions with the child. There was also testimony presented from the child's schoolteachers, who admitted to never observing Marie with the child or speaking with Marie; but the trial court did not appear to rely upon their testimony in determining whether Marie was not suited to the trust. The teachers did not say anything remotely negative concerning Marie, other than stating that Marie never contacted the teachers, although she presumably could have (an assertion that the trial court did not mention in its findings, conclusions, or judgment). Rather, the teachers generally testified to the child appearing to be well cared for and doing well at school.

children. Here, we discern no abuse of discretion in the trial court's consideration of Marie's relationships with other children among other factors.

B. Any Error in Admission of LCSW Testimony and Report was Harmless.

Next, we address Marie's arguments concerning the admission of LCSW Davis's deposition testimony and records, particularly statements made by H.L.K. to LCSW Davis. While Marie raises some potentially meritorious issues about the propriety of admitting this evidence, as discussed below, we find that any error in admitting this evidence was harmless, especially because much of this evidence concerning the child's statements in LCSW Davis's report and testimony was cumulative of Young's testimony.

1. Allegation of Lack of Proper Notice of LCSW Deposition Not Properly Preserved for Review.

Marie contends that LCSW Davis's deposition testimony should have been excluded, among other grounds, on the basis of lack of reasonable notice.[24] However, she fails to show how she preserved this issue for our review by raising it to the trial court. Although Marie did file a motion in limine to exclude parts of LCSW Davis's deposition testimony on other grounds, she did not raise lack of proper notice in her written motion or, to our knowledge,

[24] As cited by Marie in her brief, Kentucky Rules of Civil Procedure (CR) 30.02(1) requires that: "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action."

orally to the trial court. Issues not raised to the trial court are not preserved for our review.[25]

In any event, we do not believe that the alleged lack of notice merits relief. The certificate of service on the Notice of Deposition indicated that it was mailed directly to Marie on April 25, 2007, approximately one week before the deposition was to take place on May 2, 2007. At the time the notice was mailed to her, Marie had apparently been without counsel of record for approximately three weeks because her former counsel had obtained the trial court's permission to withdraw on or around April 4, 2007. She secured representation shortly after the deposition took place because her new counsel filed notice of his representation on May 4, 2007. Even assuming that Marie did not actually receive notice until the day of the deposition and was not represented on that day, she was represented by counsel just days later and had the opportunity to re-depose LCSW Davis or subpoena her for cross-examination at the evidentiary hearing, which took place more than two months after LCSW Davis's deposition.[26]

So given the apparent lack of preservation of this notice issue and the fact that Marie and her counsel had time to re-depose or subpoena LCSW Davis, we cannot fault the trial court for not excluding LCSW Davis's deposition testimony on notice grounds.

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[25] *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

[26] LCSW Davis's deposition took place on May 2, 2007. The custody hearing was held on July 17, 2007.

2. Any Error in Not Excluding Child's Statements to LCSW as Hearsay was Harmless.

Marie argues that the trial court erred by not excluding LCSW Davis's records and deposition testimony "because the opinions and statements therein were comprised primarily from hearsay testimony from an incompetent source." Technically, her motion in limine only asked for exclusion of the child's statements to LCSW Davis and not necessarily for exclusion of *all* of LCSW Davis's records and testimony. Nonetheless, the issues of the hearsay nature of the child's statements underlying the records and testimony, as well as the child's alleged incompetence to make such statements, were preserved for review by Marie's motion in limine,[27] which argued that the child's statements were hearsay not made admissible by any valid hearsay exception and that the statements of a then six-year old child could not be considered competent.

According to long-standing Kentucky precedent, "[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations."[28] Furthermore, there is no reason to disturb this precedent in the instant case because despite Young's argument that the statements are admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment, the record clearly shows that the child's

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[27] Kentucky Rules of Evidence (KRE) 103(d) provides, in pertinent part, that: "A motion in limine resolved by order of record is sufficient to preserve error for appellate review." We note that the trial court orally denied the motion in limine on the record during the custody hearing.

[28] *Sharp v. Commonwealth*, 849 S.W.2d 542, 546 (Ky. 1993).

contact with LCSW Davis was initiated for the purpose of gathering evidence, rather than for the sole or primary purpose of seeking medical diagnosis or treatment of the child.[29] Nonetheless, any error in admitting LCSW Davis's testimony or records was harmless considering the lack of indication that LCSW Davis's report or testimony had a substantial effect on the trial court's judgment given the cumulative nature of much of this evidence and the other overwhelming evidence of unfitness.

We note that Marie does not specifically identify any statements prejudicing her or point to any indication that the trial court actually relied to Marie's prejudice on any statements made by the child to LCSW Davis. We do recognize that although the trial court orally stated that LCSW Davis's testimony and reports did not necessarily offer much proof of Marie's unfitness, the trial court specifically stated in its written judgment that it considered LCSW Davis's deposition along with other testimony and exhibits of record. It also made reference to LCSW Davis's finding of a "potential" for future emotional injury if Marie kept making upsetting comments to the child. And having reviewed LCSW Davis's written report and deposition testimony, we

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[29] LCSW Davis specifically stated in her report and testimony that she was initially consulted for an evaluation at the request of Young's attorney; although, eventually, she also started providing counseling to the child. According to LCSW Davis's report, the purpose of the evaluation was to "evaluate the relationship between [H.L.K.] and her grandmother Linda Young and the extent of emotional injury [H.L.K.] may have suffered by contacts with her mother Marie Knight." LCSW Davis's contact with the child was initiated with the aim of gathering evidence for this custody dispute, rather than purely for medical diagnosis and treatment, so we will not reach the issue of whether the child's statements fit the hearsay exception for medical treatment or diagnosis in this case.

recognize that LCSW Davis did recount many statements by H.L.K concerning Marie. But we find no indication that the child's statements in LCSW Davis's report or testimony had a significant effect on the trial court's decision concerning custody.[30]

Although the trial court did consider LCSW Davis's testimony and her testimony did recount statements by H.L.K concerning Marie, many similar statements made by H.L.K. concerning Marie were made to others and recounted in their testimony.[31] Furthermore, considering the overwhelming evidence of unfitness previously discussed, any error in admitting LCSW Davis's testimony and records was harmless.[32]

III. CONCLUSION.

Because we find that any error in the admission of LCSW Davis's testimony concerning the child's statements was harmless error and because

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[30] We do recognize that the trial court indicated that modifications to *visitation* might be made if LCSW Davis determined such modifications would be in the child's best interest. We express no opinion on the propriety of the trial court's visitation order but simply address its custody decision here.

[31] We need not determine whether these statements made to others by H.L.K. should have been excluded as hearsay because Marie does not attack their testimony on hearsay grounds in her brief to this Court. Marie did make contemporaneous objections to Young's and Farley's testimony concerning the child's statements; however, the trial court admitted the testimony based on the "state of mind" hearsay exception.

[32] *See Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009), *citing Kotteakos v. United States*, 328 U.S. 750 (1946). ("A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error."). Marie does not explicitly claim any type of constitutional error in her brief; rather, she simply contends that the trial court abused its discretion in admitting the evidence. Furthermore, the Sixth Amendment Confrontation Clause does not apply in civil cases. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006).

we find that the trial court otherwise properly applied controlling precedent and issued factual findings supported by substantial evidence in determining that Marie was not suited to the trust of having custody of H.L.K., we will not disturb its decision not to award custody to Marie or the opinion of the Court of Appeals affirming its judgment.[33] To the extent that Marie is also challenging the trial court's visitation order providing for limited and supervised visitation,[34] we decline to address this issue as it is not substantively discussed in the parties' briefs.

So, for the foregoing reasons, we affirm the decision of the Court of Appeals affirming the judgment of the trial court.

Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., sitting. All concur. Cunningham, J., not sitting.

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33 *See Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008), *quoting B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky.App. 2005) ("Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.").

34 A heading in Marie's brief claims that "AN AWARD OF SOLE CUSTODY AND SUPERVISED VISITATION WAS BASED UPON IMPROPER TESTIMONY AND THEREFORE CONSTITUTES AN ABUSE OF DISCRETION." However, the propriety of the visitation order is not specifically discussed in the parties' briefs.

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