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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000666-ME

D. F. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA MCDONALD, JUDGE
ACTION NO. 15-AD-500486

CABINET FOR HEALTH & FAMILY SERVICES, COMMONWEALTH OF KENTUCKY AND S.L.D., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: D. F. (the Mother) has appealed from an order of the Jefferson Circuit Court terminating parental rights to her biological daughter, S.L.D. (the Child). We find neither error nor abuse of discretion, and we affirm.

S.L.D., born in 2010, is the Mother's ninth child. Of the other eight, two have reached majority, five are in the custody of their natural fathers, and the

remaining two are in the custody of the Cabinet for Health and Family Services (Cabinet). The Mother voluntarily terminated her parental rights to her eighth child in a proceeding that immediately preceded the within case.

S.L.D. was temporarily removed from the Mother in March 2014, after the Mother was found to have smoked marijuana with two of the older children during visitation with them at the Center for Women and Families. The Mother stipulated to the Cabinet's allegations at that particular time. The Mother completed some programs, which included random testing for illicit substances, and S.L.D. was returned to her Mother's care in October 2014. Within six months the Mother had lost custody of S.L.D. after the Mother tested positive for cocaine and benzodiazepines. In the temporary removal hearing of March 2015 the Mother stipulated in writing that her substance abuse placed the Child at risk. In its emergency custody order the circuit court determined S.L.D. to be an abused or neglected child within the meaning of Kentucky Revised Statutes (KRS) 600.020(1).

Again remedial programs were offered to the Mother as was monthly supervised visitation with the Child (which, with the Mother's cooperation, would have been increased in frequency and eventually become unsupervised). The Mother ceased all visits with the Child in September 2015. In December 2015 the Mother canceled a scheduled visit, stating that it was "too difficult" and that she worried it would be too upsetting for both her and the Child. No attempt or request to visit was made after that date. The Mother also repeatedly failed to appear for

or tested positive on almost half of the forty random drug screens given offered from March 15 through November 10, 2015; the Mother tested negative twenty-one times, failed to appear ten times, and tested positive nine times. However, she did remain in contact with the Cabinet throughout the times in question.

Termination of parental rights proceedings were undertaken versus the Mother. Counsel was appointed for her, and a guardian ad litem was appointed for the Child. A warning order attorney was appointed for the putative Father who has never been found. The Father's rights to the Child were terminated at the same hearing as the one concerning the Mother. No appeal was taken by the putative Father from the Order terminating his parental rights.

At the TPR hearing, held on March 18, 2016, the sole witness was Margaret Fort McKinley, the assigned caseworker for the Cabinet. Ms. McKinley testified about the family history. She read into the record the extensive efforts made by the Cabinet to reunite this Child with the Mother. Ms. McKinley also testified that the Mother tested positive for illegal substances (cocaine and marijuana) as recently as the day prior to the hearing. Neither the Mother nor the guardian ad litem offered any proof other than testimony elicited on cross-examination of the Cabinet's witness. The Jefferson Circuit Court entered its order terminating the Mother's parental rights on April 11, 2016, and the Mother appeals.

We note at the outset two deficiencies in the Appellant's brief, *viz.*: (1) that it fails to include, in the Statement of the Case, "ample references to the

specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary;"[1] and (2) the brief is lacking, at the beginning of the Argument, "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."[2] Appellant's reliance upon *V.S. v. Commonwealth*, 194 S.W.3d 331 (Ky. App. 2006), does not relieve her of either burden. *V.S.* instead speaks to the standard of review (clearly erroneous versus palpable error) on appeal. However, because of the seriousness of the issues, we shall examine the issues raised in Appellant's brief rather than strike it. CR 76.12(8)(i).

We shall first address the Appellant's second argument in which she urges this Court to declare Kentucky Revised Statute (KRS) 625.090(1)(a)(1) "unconstitutional as a matter of law," stating that "the statute effectively lowers the burden of proof from 'clear and convincing' to the lesser standard used in dependency cases." We decline to rule on the merits of this issue for two reasons.

KRS 418.075(2) states, in no uncertain terms:

> In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the

[1] Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv); *Oakley v. Oakley*, 391S.W.3d 377, 380 (Ky. 2012).

[2] CR 76.12(4)(c)(v).

> pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

The record before us does not indicate that the Attorney General has received the specified notification. "Therefore, we will not review the question of whether the revised statute is constitutional." *Skaggs v. Commonwealth*, 488 S.W.3d 10, 16 (Ky. App. 2016). *See also Cabinet for Health and Family Resources v. T.G.*, 2007-SC-000436-DGE and 2007-SC-000821-DGE, 2008 WL 3890033 (Ky., Aug. 21, 2008) (an unpublished decision cited pursuant to CR 76.28(4)(c)).

Furthermore, the trial court made independent findings of neglect and abuse after it considered the testimonial and documentary evidence taken during the TPR hearing. It did not rely solely on the evidence taken at the emergency removal hearing the year prior. *T.G.* at *5, *citing J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services,* 239 S.W.3d 116, 120 (Ky. App. 2007).

This leads us to Appellant's first argument, namely, that the findings upon which the trial court based its decision to terminate the Mother's parental rights were clearly erroneous. CR 52.01. The Mother concedes that S.L.D. has been previously adjudicated as abused or neglected as required under KRS 625.090(1). But she disagrees that termination is in the child's best interest (KRS 625.090(1)(b)) and argues that the circuit court's findings do not support the remaining statutory requirements set forth in KRS 625.090(2).

The Cabinet based its petition for TPR on KRS 625.090(2)(a), (e), and (g). The pertinent parts of that statute read:

> (2) 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:
>
> > (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
> >
> > . . .
> >
> > (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;
> >
> > . . .
> >
> > (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.

The Mother insists that she "made every effort to enjoy visits with her child, supervised by her assigned social worker, through September of 2015" and that subsequent to that date she was precluded from effecting her visitation rights because she was indigent and thus unable to maintain "telephonic capabilities." The inability to communicate with the Cabinet, the Mother continues, was caused by her poverty, not by her lack of parental concern. The Mother also takes issue

with the trial court's findings that she failed to provide essential parental care, or food, clothing and shelter. The Mother urges that the Child's custody with the Cabinet as well as the Mother's poverty prevented her from performing those duties.

We disagree. The trial court need only find that one of the Cabinet's alleged grounds be supported by clear and convincing evidence. KRS 625.090(2). At the TPR hearing, the Cabinet's proof of the Mother's continued substance abuse was unrefuted as was her failure to avail herself of the reunification services offered to her. She did not complete or even make significant progress with the court-approved treatment plan. It was the trial court's specific finding that the Mother's continued and persistent substance abuse, not her poverty, was responsible for her abandonment of the child and failure to provide essential parental care. The trial court did not foresee any "reasonable expectation of improvement."

The trial court went on to consider, in painstaking detail, all the factors laid out in KRS 625.090(3), as well as the Mother's lack of proof to contradict any of the Cabinet's evidence (KRS 625.090(4) and (5)) before concluding that it would be in the Child's best interest that the Mother's rights be permanently terminated.

Therefore there was substantial compliance with the "clear and convincing" evidence standard enunciated in *Santosky v.Kramer*, 455 U.S. 745, 769 (1982); *accord J.E.H. v. Department for Human Resources*, 642 S.W.2d 600, 603 (Ky. App. 1982).

The order of the Jefferson Circuit Court terminating the Mother's parental rights is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, D.F.:

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BRIEF FOR APPELLEE CABINET FOR HEALTH & FAMILY SERVICES:

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