COMMWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-000404-D
(2007-CA-001850-MR)

DELORES MARIE KNIGHT — APPELLANT

v.

LINDA YOUNG — APPELLEE

** ** ** **

APPEAL FROM LYON CIRCUIT COURT
CIVIL ACTION NO. 07-CI-000003

BRIEF OF APPELLEE

** ** ** **

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CERTIFICATE OF SERVICE

I hereby certify that ten (10) copies of the Brief of Appellee have been mailed to the Clerk of the Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601, and true and exact copies of the Brief of Appellee have been mailed to Hon. C.A. Woodall, III, Lyon Circuit Judge, Lyon County Courthouse, 300 West Dale Avenue, Eddyville, Kentucky 42038, and Hon. Brad Goheen, 629 U.S. 68 E, Benton, Kentucky 42025 on this 12 day of May, 2009.

BARCLAY W. BANISTER

COUNTERSTATEMENT OF ORAL ARGUMENT

Appellee, Linda Young, does not believe that oral argument is necessary in this matter and would not assist the Court in deciding the issues presented.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF CASE

This is, as Appellant states, a child custody case involving young Hannah Louise Knight (d/o/b August 4, 2000) and the tragic, untimely death of her father and sole custodian, Gerald Van Knight, Jr. (hereafter "Jerry") in a motorcycle accident on December 22, 2006.

More particularly, this case involves a custody dispute between the child's biological mother, Appellant, Delores Marie Knight, and Hannah's paternal grandmother, and current custodian, Linda Young, who is the Appellee. Appellee alleged in her "Verified Petition for Custody" that Appellant is an "unfit parent" and therefore, "unsuited to the trust of having the custody, nurture and education of the child." KRS 405.020. A final hearing was held in the Lyon Circuit Court on July 17, 2007. By virtue of its well-written and detailed "Findings, Conclusions and Judgment" entered July 25, 2007, the Lyon Circuit Court found by "clear and convincing evidence that [Appellant] is an unfit parent... and that there is no reasonable expectation...[of] change in the foreseeable future" and thus awarded custody of Hannah to the Appellee, Linda Young. As this Court will no doubt see, the record is replete with proof of Appellant's "unfitness" and lack of "suitability to the trust" of being a custodial parent to young Hannah. Appellant conveniently glosses over, and even outright ignores, the multitude of evidence presented at the hearing which, again, more than proved her "unfitness."

Instead, Appellant chooses to focus her attention on many of the procedural aspects of the case and claims that she was not given proper notice of the action "taking place in Kentucky." This is patently false as Appellant knew

of every proceeding that took place in this case including those preliminary proceedings that also took place in the Lyon District Court.

Appellant takes issue primarily with the admission of the deposition testimony of Mary Fran Davis, a Licensed Clinical Social Worker, in Hopkinsville, Kentucky. In particular, Appellant accuses Appellee's counsel of scheduling Ms. Davis's deposition "to deliberately exclude her [Appellant] from the deposition." (Appellant's Brief, p. 3) This is absolutely untrue and both counsel and Appellee strongly object to this spurious allegation.

Appellant's previous lawyer, Hon. Delbert K. Pruitt, withdrew from the case on April 4, 2007. Appellant then had twenty-one (21) days in which to retain a new lawyer before Ms. Davis's deposition was finally noticed on April 25, 2007 which was seven (7) days prior to the deposition taking place on May 2, 2007. Appellant certainly had "adequate time to either appear personally for the deposition or [better yet] retain counsel to do so on her behalf." (Appellant Brief ,p. 3) As it were, her current counsel did not enter his appearance in the case until May 3, 2007, after the deposition.

Therefore, it is not as if Appellee waited until the previous lawyer withdrew and then immediately scheduled Ms. Davis's deposition so as to keep Appellant in the dark as to the proceedings. Rather, Appellee waited approximately three (3) weeks but never once heard from substitute counsel or Appellant herself for that matter. Then Appellee went forward with the case not knowing when (or even if) Appellant would hire a new lawyer. Was Appellee required to wait in perpetuity to see if Appellant might indeed hire a new lawyer? It would hardly be

fair to require Appellee to wait until Appellant decided whether or not she would retain a new lawyer, when at that time there was no indication she would even do so. The bottom line is that Appellant had three (3) weeks from the time her first lawyer withdrew until the "noticing" of the deposition of Ms. Davis in which to retain substitute counsel. She did not do so for another month. This is certainly no fault of the Appellee who decided to proceed with her case. Thus, Appellee proceeded by providing "notice" to the then unrepresented Appellant at her home address seven (7) days prior to the deposition.

Shifting gears, Appellee certainly agrees with Appellant that a parent has a "superior right" to custody of his/her child pursuant to KRS 405.020. However, this right is not absolute as the parent must be "suited to the trust." KRS 405.020(1). Appellee, Ms. Young, thereby, as was her right, and believing Appellant to be unfit, filed the appropriate actions in both the Lyon District Court and then ultimately the Lyon Circuit Court. Procedurally, there were no errors and it is absurd for Appellant to claim "lack of notice" of the proceedings that took place. At any rate, Appellant never objected to any proceeding based upon "lack of notice." Appellant either appeared personally or with counsel at almost every stage of the proceedings.

As alluded to by Appellant, Hannah's parents, Jerry Knight and Appellant were divorced by an Indiana Superior Court "Decree" dated August 12, 2003. At that time, Jerry was awarded custody of Hannah and Appellant was granted visitation rights. Appellant was also ordered to pay the sum of $30.00 per week in child support payments for Hannah. (See "Dissolution of Marriage Decree" of

the Vigo Co. (Ind.) Superior Court, previously tendered by Appellant, as well as Video Record hereafter "VR" 1:25:58-1:27:44).

Unfortunately, Appellant did not take her support obligation seriously at all. In fact, from August 12, 2003, until Jerry's death on December 22, 2006, and encompassing a total of 175 weeks (and a total support obligation of $5,250.00), Appellant paid a grand total of $240.00 toward support of this child. (See "Certified Child Support Payment Records" and VR 1:26:34).

Conveniently, Appellant attempted to convince the trial court that she and the now deceased Jerry had orally agreed that Jerry would waive his right to receive child support payments for "income tax purposes" (VR 1:27:15 to 1:27:44). Of course, Jerry is no longer here to dispute this but suffice it to say this "Agreement" was never put in writing. (VR 1:35:49). Appellant had even written a letter to the Judge in Indiana on April 5, 2004, telling him that she intended to be current on her child support by April 16, 2004. (VR 1:33:14 to 1:33:50). But, of course, she never followed through. (VR 1:34:05). So, all told, Appellant has paid a total of eight (8) weeks of child support over a period of approximately four (4) years. (VR 1:35:17 to 1:35:39).

Appellant would have this Court ignore the ample evidence of "unfitness" in this matter by characterizing her past as "ancient history." But, as the trial court aptly pointed out, "what is past is prologue." Appellant further makes much to do about the fact that numerous witnesses, including Appellant's own children and own father, testified **for** Appellee. Appellant states that these witnesses should have been excluded because they could "offer nothing relating to

Appellant and her daughter." But again, certainly, her past gives us a glimpse as to her present and future. Of course, Appellant attempted to minimize each issue by stating that she had simply suffered from Postpartum Depression. However, her problems run much deeper than that.

For example, although she denied sending it, it was shown at the final hearing that Appellant had previously sent an email to her other two children wherein she stated that she wanted the children's father to "send me papers relinquishing me as your mother" and that she wanted to "sign my maternal rights away and want nothing else to do with either one of you for the rest of my life." Of course, she denied ever sending this email but it was proven to have come from her email address. (VR 1:42:46 to 1:43:29).

While again denying it all at the hearing, Appellant was impeached with evidence from past mental health treatment providers showing that she had been suicidal (VR 1:48:14) and, more alarmingly, had also suffered on at least two (2) occasions from hallucinations wherein voices told her to take the life of her then five (5) month old child. (VR 1:48:29 to 1:49:14). Of course, Appellant states that she merely suffered from Postpartum Depression and otherwise outright denied what was plainly mentioned in her psychological counseling records.

Appellant has also been hospitalized twice in the past for psychological treatment (VR 1:51:40 to 1:51:46); she had an extramarital affair while in Japan with her Army sergeant husband, John Shields, III, which even may have involved prostitution (VR 1:56:08; 3:20:40 to 3:21:03). During this time she was even ordered by the Army to leave Okinawa due to being accused of "black

marketing", prostitution and writing bad checks in excess of $10,000.00. (VR 3:20:40 to 3:21:03).

More evidence of Appellant's moral turpitude presented at the hearing included that fact that she: (1) smoked marijuana in the presence of Hannah (VR 2:58:41); (2) she and her other daughter regularly smoked marijuana together (VR 3:01:32); (3) fought with her boyfriend while Hannah was present (VR 2:58:59 and 3:04:48 to 3:05:20); (4) lives in an apartment over a bar (VR 3:06:23); (5) ran up credit card charges in excess of $46,000.00 while applying for the cards using her husband Jerry's name and identity (VR 2:05:20 to 2:05:40); (6) falsely assumed Jerry's online identity to contact an ex-girlfriend of Jerry's (VR 2:05:49); (7) allowed third parties whose full names were unknown to her to transport Hannah to and from visits (VR 2:06:15 to 2:06:40); (8) has made numerous upsetting statements to Hannah over the phone which Linda has overheard (VR 3:54:00 to 3:54:45); (9) had to withdraw from dental hygienist school because she forged a prescription for controlled substances (VR 2:09:08 to 2:09:25); (10) has lived with, and even claimed to be married to, one Mark Griffith, who she admitted was an alcoholic and smoker of marijuana and who had previously knocked her teeth out (VR 3:34:49 to 3:34:58); (11) has been arrested on two (2) occasions as testified to by her ex-husband, John Shields, III, for cold checks and telephone credit card theft (VR 3:23:15).

Appellee could go on ad nauseum as to Appellant's "unfitness" but it need only be said that the evidence is **OVERWHELMING** that Appellant is "unfit" and lacks "suitability to the trust" pursuant to the criteria established in Davis v.

Collinsworth, Ky., 771 S.W.2d 329 (1989). Nevertheless, all issues relating to Appellant's "suitability to the trust" are not properly before the Court and should not be considered. Instead, this Court should limit its review to the issues involving Ms. Davis's deposition as those were the only issues properly preserved for review.

Finally, Appellee would certainly be remiss if she did not comment upon Appellant's allegation of "mayhem" and "chaos" at the final hearing on July 17, 2007. As this Court can no doubt see in the video record, the hearing contained no such "mayhem" and there was nothing "chaotic" about these proceeding.

ARGUMENT

I. STANDARD OF REVIEW ON APPEAL

The "standard of review" applicable for appellate courts in custody cases was established by this Court in Moore v. Asente, Ky., 110 S.W.3d 336 (2003). According to said standard, an appellate court may only overturn a trial court's findings in a custody case if those findings are "clearly erroneous" and not supported by "substantial evidence." "Substantial evidence" was defined by this Court as:

> "...evidence that a reasonable mind would accept as adequate to support a conclusion... and has sufficient probative value to induce conviction in the minds of reasonable men." (Moore at 354)

Further the Moore court continued, stating that:

> "regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached contrary finding due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses... Thus, mere doubt as to the correctness of the

findings will not justify reversal and appellate courts should not disrupt trial court findings that are supported by substantial evidence." (Id.)

In other words, an appellate court cannot substitute its own judgment for that of the "finder of fact." The trial court had ample opportunity to weigh the credibility of witnesses including the Appellant both by actual testimony and demeanor. The appellate court is not in that position and should not substitute its judgment for that of the trial court unless the trial court's judgment is "clearly erroneous."

As mentioned previously, the evidence supporting the trial court's "Findings, Conclusions and Judgment" was more than substantial and thus must not be disturbed.

II. THE DEPOSITION TESTIMONY OF MARY FRAN DAVIS, LCSW, WAS PROPERLY ADMITTED

Appellant advances two arguments in support of excluding the testimony of Mary Fran Davis, LCSW, whose deposition was taken May 2, 2007. First, Appellant argues that the deposition took place without proper notice to Appellant, and second that the testimony constitutes inadmissible hearsay.

A. Appellant Had Proper Notice Of The Deposition Of Mary Fran Davis

At the outset, Appellee takes issue with Appellant's accusation that the deposition was scheduled deliberately so as to exclude Appellant's participation. To the contrary, Appellant's previous attorney, Hon. Delbert K. Pruitt, withdrew from this matter on April 4, 2007. Appellant then had twenty-one (21) days in which to retain counsel before the deposition was finally noticed on April 25,

2007. She did not retain substitute counsel until after the deposition on May 2, 2007. It is not as if Appellee waited until previous counsel withdrew and then immediately filed a "Notice" to depose Mary Fran Davis. Rather, Appellee waited approximately three (3) weeks and never heard from substitute counsel and, thus, went forward with the deposition. Appellant had ample time within which to hire counsel who would have then been served with said "Notice" and could have appeared at the deposition. It would not be fair to require Appellee to wait in perpetuity until Appellant hired another attorney, when at the time there was no indication that she would even do so. Bottom line is that Appellant had three (3) weeks prior to the noticing of the subject deposition in which to get substitute counsel to represent her at the deposition.

Appellee contends that "reasonable notice" as required by CR 30.02(1) was given in that "Notice" was sent to the then unrepresented Appellant at her address seven (7) days prior to the deposition. Furthermore, although Appellant filed a "Motion in Limine" to exclude the deposition testimony of Mary Fran Davis, and again objected to same at trial, no "lack of notice" objection was ever made either in the "Motion in Limine" or at trial and thus the issue was not properly preserved for appeal. It has long been the law of Kentucky that an issue not raised at trial may not be presented for the first time on appeal. Gabow v. Comm., Ky., 34 S.W.3d 63, 75 (2003).

Nevertheless, proper notice was given under CR 30.02(1) and 30.02(2)(b) in that there was no showing at trial by Appellant that she was "unable through the exercise of diligence to obtain counsel to represent her" at the deposition.

The fact of the matter is that Appellant exercised **no** diligence in seeking to obtain counsel to represent her at the deposition. She had been without counsel for three (3) weeks which is ample time to "obtain counsel to represent her at the deposition." Again, Appellant's objection on the "Notice" issue was not properly preserved for appeal at trial.

Furthermore, once Appellant's current lawyer was retained he certainly could have, with even a cursory review of the case file, seen and read Davis's deposition and then issued a subpoena for her to appear at the hearing for purposes of cross-examination. Or counsel could have himself deposed Mrs. Davis in order to cross-examine her previous testimony. Thus, the "lack of proper notice" argument advanced by Appellant must fail.

B. Mary Fran Davis' Deposition Was Properly Admitted As The Statements Therein Fell Under Several Hearsay "Exceptions"

All statements gleaned from Hannah by Mary Fran Davis fall under several recognized exceptions to the rule against hearsay. In particular, as Hannah's treating therapist, the statements which Hannah made fall under KRE 803(4) as "statements for purposes of medical treatment or diagnosis." Again, Ms. Davis was Hannah's **TREATING** therapist and thus the statements Hannah made were for purposes of treatment or diagnosis.

The case of J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, et al., Ky. App., 239 S.W.3d 116 (2007) is directly on point. There, the Kentucky Court of Appeals held that:

> "As permitted by KRE 803(4) a trial court may admit statements into evidence which would otherwise constitute inadmissible hearsay, if the statements were made for purposes of medical treatment or diagnosis. More specifically, this exception applies when a witness, whose purpose for seeing an individual is to determine what happened to him and what therapy or treatment is needed, testifies to statements made by the individual for the purpose of receiving treatment."

The Court in J.M.R. was citing this Court's opinion in Cabinet for Health and Family Services v. A.G.G., Ky., 190 S.W.3d 338 (2006). In that case, statements made by a minor child to a licensed family therapist was admissible under KRE 803(4) as being statements made for purposes of medical treatment or diagnosis even though said therapist was not a physician.

Also, such statements are properly admitted under KRE 803(3) as they included statements of the declarant's (Hannah) "then existing state of mind... ."

KRE 803(3) states as follows:

> "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)..."

is not excluded by the hearsay rules. Thus, Hannah's relation to Mrs. Davis of her mental feelings, etc. are admissible under the "state of mind exception" to the hearsay rule. See this Court's opinion in Prater v. Cabinet for Human Resources, Comm. of KY, 954 S.W.2d 954 (1997) which stands for the proposition that out of court expressions of fear by a child falls within the "state of mind" exception to the hearsay rule same being KRE 803(3).

Additionally, the certified records of Mary Fran Davis, LCSW, are "records of regularly conducted business activity" under KRE 803(6) and were self-

authenticated pursuant to KRE 902(11). (See "Notice of Intent to Use and Rely Upon Certified Medical Counseling Records of Mary Fran Davis, LCSW, at the Trial/Hearing"). Thus, the records were properly admitted at trial.

C. Mary Fran Davis, LCSW, Is A "Qualified Mental Health Professional" As Defined By Kentucky Law

Appellant indicates that the testimony provided by the aforementioned Mary Fran Davis is to be excluded because she is not a "qualified mental health professional" as required by law. However, Ms. Davis definitely is a "qualified mental health professional" under KRS 600.020(47)(e). The statute provides in pertinent part that:

> "(47) qualified mental health professional means: (e) a licensed clinical social worker licensed under the provisions of KRS 335.100... ."

In her deposition testimony, Ms. Davis testified that: (1) she is a licensed clinical social worker (Davis Deposition, at p. 3); and (2) she is licensed by the Board of Social Work (Id., at p. 4). Therefore, Ms. Davis qualifies as a "qualified mental health professional." The Souder case (719 S.W.2d 730) cited by Appellant in her Brief is inapposite in that the "social worker" in that particular case was not an actual "licensed clinical social worker" and thus did not qualify as a "qualified mental health professional" unlike Mary Fran Davis here.

Mary Fran Davis, therefore, was competent and qualified to express the opinions that she did pursuant to KRE 702.

Moreover, in R.C. v. Comm., Ky. App., 101 S.W.3d 897 (2002), the Kentucky Court of Appeals indicated that a LCSW is not considered "qualified as an expert for **ALL** purposes." (emphasis added). Thus, the court seemed to

indicate that a LCSW could be qualified as an expert for **SOME** purposes. Therefore, Mary Fran Davis, should be deemed qualified to testify as to any "emotional harm" or the potential for emotional harm to Hannah.

D. Any Error In Allowing At Trial The Deposition Testimony And/Or Records Of Mary Fran Davis, LCSW, Was "Harmless"

Assuming arguendo that the deposition testimony and the records of Mary Fran Davis, LSCW, were improperly admitted in evidence at trial, the other evidence of Appellant's "unfitness" and "lack of suitability to the trust" was so overwhelming so as to render the error that may have occurred in its admission "harmless."

In other words, if this Court decides that the trial court erred in allowing the testimony in question, it then must decide whether such error was harmless or prejudicial to Appellant's case. Due to the other overwhelming evidence of parental "unfitness", any error was, indeed, harmless.

The case of Thacker v. Comm., Ky., 194 S.W.3d 287 (2006), articulates the test for whether or not an error is "harmless." That test is as follows:

> "the test for harmless error is whether there is any substantial possibility that the outcome of the case would have been different without the presence of that error."

Had Ms. Davis' testimony never been admitted, it is clear that there is still no possibility that the trial court's judgment would have been different.

III. APPELLEE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT IS "UNFIT" AND THEREFORE "UNSUITED TO THE TRUST"

The law establishing the proper standard for a non-parent (here, a grandparent) to prevail in a custody case against a parent's superior right to custody has been well established. The first circumstance, and the only one relevant to the instant case, is where a parent is shown to be "unfit" by "clear and convincing evidence." (Moore, at 359)[1] (See also, Vinson v. Sorrell, Ky., 136 S.W.3d 465 (2004))

The law defining just what constitutes "unfitness" and, therefore, a lack of "suitability to the trust" was set forth for the first time in Davis v. Collinsworth, Ky., 771 S.W.2d 329 (1989). The court in Davis found that in a custody dispute between a parent and non-parent, the parent, if not having waived the superior right to custody, must be found to be "unfit." Evidence of "unfitness" was found by the Davis court to include evidence of the following: (1) inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care and support for the child. (Id., at 330).

Further, as stated by Forrester v. Forrester, Ky. App., 979 S.W.2d 928, 930 (1998) the trial court must find that there is no "reasonable expectation for improvement" with regards to the factors enumerated in Davis v. Collinsworth.

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[1] A second exception arises if a parent is found to have waived his/her superior right to custody. This second exception is inapplicable in the instant case.

The trial court, after hearing testimony, was not convinced that Appellant could reasonably be expected to improve and, thus, its holding should not be disturbed.

Turning to the factors enumerated in Davis concerning "unfitness", the trial court found that four (4) of them were present in this case, thereby finding Appellant to be "unfit." First, the trial court found "emotional harm" due to upsetting statements made to the child by Appellant, as testified to by Appellee who stated that she overheard conversations between Hannah and Appellant that were quite upsetting to Hannah. (VR 3:54:00 to 3:54:45). Emotional harm was also found due to Appellant breaking several promises to visit with the child namely over fall break 2006 and being ten (10) days late for a visit at Thanksgiving of that same year.

Appellant mistakenly looks to KRS 600.020(24) which defines emotional **injury** as opposed to emotional **harm** as mentioned in Davis v. Collinsworth. It is, therefore, not necessary to meet the statutory definition of emotional **injury**, and a trial court need only find emotional **harm** as it did in the instant case. In other words, Davis says that one of the factors of "unfitness" is "physical injury, sexual abuse or **emotional harm**" (emphasis added). It does not require that a finding of emotional **harm** meet the definition of emotional **injury**. If it had so intended, the Kentucky Supreme Court would have referenced said statute in its definition; it did not. It is, therefore, safe to say that to find emotional **harm** does not necessarily require that the proof rise to the level of emotional **injury**. The bottom line is that only emotional **harm** must be found; not emotional **injury.** Again, the trial court went through a litany of instances evidencing emotional

harm and found, accordingly, that Appellant had indeed inflicted emotional **harm** upon Hannah.

Next, the trial court found "moral delinquency" based upon a laundry list of instances showing Appellant's moral depravity which need not be rehashed here other than to say that the evidence of Appellant's lack of moral fiber was overwhelming. It bears mentioning, however, that of particular concern to the trial court was testimony that Appellant had: (1) been arrested for bad checks and telephone credit card theft (VR 3:23:15 to 3:23:26); (2) smoked marijuana in Hannah's presence (VR 2:58:44); (3) forged a prescription for a controlled substance (VR 2:09:08 to 2:09:25); and (4) engaged in "black marketing" and prostitution while in Okinawa, Japan (VR 3:20:40 to 3:21:03).

The third factor is "abandonment" which the trial court did not find and, thus, need not be discussed in any more detail here.

Fourth, a parent may be deemed "unfit" based upon "emotional or mental illness." As mentioned previously, Appellant's mental illness was apparent and includes past hallucinations telling her to murder her then five (5) month old child as well as suicidal ideations all of which she denied or simply attributed to a temporary postpartum depression. (VR 1:48:29 to 1:49:14).

However, Appellant was impeached with her treatment notes from mental health therapy that she had undergone previously. Of course, it is well settled that a witness may be interrogated and contradictory evidence introduced concerning a material matter even though the evidence may be otherwise

inadmissible. Therefore, her therapist's notes indicating her homicidal ideations were introduced and rightly relied upon by the trial court.

Even Appellant's own father testified that Appellant had made threats of suicide in the past (VR 2:29:45 to 2:30:52) as did her own son, Josh Shields, from whom she is now estranged. (See VR 3:07:35 to 3:17:17 for Josh Shields' compelling testimony in regards to his mother, the Appellant, including her threats of suicide made directly to young Josh).

Finally, the fifth factor to be considered in determining parental "unfitness" is "failure, for reasons other than poverty alone, to provide essential care for the child." (Davis v. Collinsworth, at 330). This was found by the trial court, which found that Appellant had paid only $240.00 (or eight (8) weeks) of child support pursuant to the Indiana divorce decree which ordered her to pay $30.00 per week from August 12, 2003, forward. Again, as mentioned previously, her total support obligation from August 12, 2003, until Jerry's death on December 22, 2006, would have been $5,250.00 (or 175 weeks) and she therefore has paid approximately 4.5% of her total support obligation. (See VR 1:25:58 to 1:26:34 and "Certified Child Support Payment Records" from Indiana)[2] Appellant, at the time of Jerry's death, was more than $5,000.00 in arrears, enough to be charged with "Flagrant Nonsupport" in Kentucky, which is a felony.

There was no testimony offered by Appellant that she was impoverished or otherwise had an inability to pay child support. Instead, she simply was unwilling to do so and, thus, "failed to provide essential care" for her child.

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[2] Appellee contends that this is also evidence of "abandonment" which the trial court did not find. (See also B.T.R. v. J.W., Ky. App., 148 S.W.3d 294 (2004))

Forrester, cited previously herein, added the requirement that there be no "reasonable expectation of improvement" before a parent could be found "unfit." Appellant offered no evidence that there is **any** expectation of improvement and, instead, the trial court noted that her actions led to one conclusion and that is that there is no "reasonable expectation of improvement." In so finding, the trial court rightfully questioned Appellant's credibility in finding that "her history shows that there is no reasonable expectation of improvement" due to "her lack of a relationship with her fifteen (15) year old son, Josh; her dysfunctional relationship with her eighteen (18) year old daughter; the fact that she did not change her lifestyle or her truthfulness after the Okinawa problems." Thus, coupled with her current "unfitness", her past "pattern of unfitness" clearly is relevant to, and dispositive of, whether or not there is a "reasonable expectation of improvement."

Appellant contends that both Davis and Forrester "limits any proof of unfitness to the relationship between the parent and the child" who is the subject of the action. Upon even a cursory reading of both Davis and Forrester one can glean no such limitation. Thus, the trial court rightfully based its findings of "unfitness" on matters which involved both Appellant's past history and her present conduct including: (1) moral delinquency; (2) criminal history; and (3) her relationship (or lack thereof) with her other children that did not necessarily involve Hannah.

Furthermore, and however, the trial court's "Findings" is also replete with evidence of "unfitness" even toward the subject child, Hannah. In particular, it was noted that Appellant has refused to provide child support payments toward

Hannah's care in direct violation of an Indiana Court Order and also that Appellant has smoked marijuana in the child's presence.

Finally, this Court may look to the unpublished case of Kline v. McClain, 2006-CA-001096-ME (May 18, 2007) for a very similar case to the instant one. Kline also involved the death of a parent and the other non-custodial parent's attempt to gain custody. Citing a "mass of evidence proving unfitness" the court infused to find that the trial court committed reversible error. The same "mass of evidence proving unfitness" also exists here. Thus, the trial court's findings must not be disturbed.

CONCLUSION

In closing, Appellee wishes to address the fact that Appellant indicates that Appellee "effectuated a fraud upon the court on the advise [sic] of counsel." Both Appellee and the undersigned counsel certainly take issue with this slanderous characterization.

On the contrary, while Appellee did seek the advice of counsel concerning Hannah shortly after Jerry's death, she perpetrated no such "fraud" upon any court. She merely went through the proper and legal steps in order to seek custody of her granddaughter due to the Appellant's "unfitness" which is quite evident. Appellee simply did what she was entitled to do under the law. Appellant had proper notice of every critical stage of these proceedings including the initial proceeding in the Lyon District Court as well as all Circuit Court proceedings.

Appellant makes much to do about nothing with regard to the deposition testimony of Mary Fran Davis, LCSW. Appellant takes issue with the fact that Mrs. Davis "was not called as a witness at the final hearing to defend her claims or subject herself to cross-examination." Appellee was certainly not obligated, after having deposed Mrs. Davis, to call her as a witness at trial. For the reasons discussed heretofore, Appellant certainly had every opportunity to either depose Mrs. Davis herself or to issue a subpoena for her to appear at trial. This was certainly not the responsibility of the Appellee.

Finally, Appellee simply would reiterate that she presented "clear and convincing evidence" of Appellant's "unfitness" and lack of "suitability to the trust" of being a custodial parent to Hannah. Of course, "clear and convincing" does not necessarily mean uncontradicted proof; rather, it is deemed sufficient "if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people." Rowland v. Holt, Ky., S.W. 2d 5, 9 (1934).

Quite obviously, Appellee presented ample "clear and convincing" proof of Appellant's "unfitness." And the bottom line is that this case is a relatively simple one, not withstanding Appellant's attempts to "muddy the water." Appellee, in order to have custody of her granddaughter, was required to prove by "clear and convincing" evidence that Appellant is "unfit." She did just that to the trial court's satisfaction and the trial court's decision should not be overturned or otherwise disturbed.

Respectfully submitted,

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