

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001941-ME

C.C.

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE DENNIS R. FOUST, SPECIAL JUDGE
ACTION NO. 15-AD-00035

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
S.A.L.C., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

J. LAMBERT, JUDGE: C.C. (the Mother) has appealed from the order of the McCracken Family Court terminating her parental rights to her biological daughter, S.A.L.C. (the Child). Finding no error or abuse of discretion, we affirm.

The Child was born on April 5, 2010, in McCracken County, Kentucky. Her father's identity is unknown. Patricia Leach of the Cabinet for Health and Family Services' (the Cabinet) Department for Community Based Services (DCBS) office filed a Juvenile Dependency, Neglect and Abuse (DNA) Petition with the juvenile court on April 7, 2014 (Case No. 10-J-00124-004). The grounds for the petition were as follows:

There is an extensive history with the Cabinet regarding [the Mother], including a prior TPR.^[1] [The Mother] has three prior-born children of whom she does not have custody. A case was opened for ongoing services in February, 2012. Since that time [the Mother] has been non-compliant/cooperative with the Cabinet toward efforts to ensure the safety and well-being of the child[.] The mother has a history of leaving the child with inappropriate caregivers. The mother's whereabouts are currently unknown. She failed to appear in court and has an active bench warrant. The present caretaking arrangements made by [the Mother] are considered inappropriate as well. Given [the Mother's] extensive history inclusive of transiency, instability, substance abuse, child abandonment, domestic violence, and non-compliance with court orders/DCBS, [the Child] is considered to be at risk of harm.

The juvenile court held a temporary removal hearing on April 14, 2014, and heard testimony from Cabinet worker Patty McCoy. She was the ongoing caseworker for the Child. Ms. McCoy recounted the family's history with the

¹ The record contains documentation of one prior termination case, which provides that the Mother had a son on November 24, 2008, who was placed into foster care at five weeks old and committed to the Cabinet as a neglected child in March 2009. The Mother's parental rights to him were terminated by the McCracken Family Court on December 15, 2010, after the Cabinet filed a petition for involuntary termination of parental rights. The order also terminated the parental rights of the father. The court noted that the Mother had engaged in domestic violence relationships and was so engaged at the time of her son's removal.

Cabinet, that the Child had been with inappropriate caretakers for the last two weeks, and that the Mother was on the run due to outstanding bench warrants. The Cabinet had removed four children from the Mother's care, including the Child in this case. Ms. McCoy believed that the Child was at risk of severe neglect if she were to be returned to the Mother's custody. She stated that there were no suitable relatives to take the Child at that time. By order entered April 15, 2014, the court made the following findings:

Mother's whereabouts are unknown. Mother left child with inappropriate caregivers who have history w/CHFS. Mother also has long history w/CHFS including TPR cases. Mother has outstanding bench warrants for criminal charges. Child is at risk of harm.

The court also found that reasonable efforts had been made to prevent the Child's removal from the home, that there were no less restrictive alternatives available other than removal, and that by a preponderance of the evidence, the Cabinet had proven that it would be contrary to the Child's welfare if she were to be returned to the custody of the Mother. The court placed the Child in the temporary custody of the Cabinet and appointed counsel for the Child (Cathi Harrison) and a warning order attorney for the Mother (Gini Grace).

The juvenile court held an adjudication hearing on May 15, 2014, and entered two orders the following day. The Mother was not present at the hearing, but her warning order attorney was present. While the court declined to appoint the Mother's warning order attorney as her guardian ad litem because the Mother had chosen to make herself unavailable, it did permit the attorney to provide

placement information at the hearing. Ms. McCoy testified again, noting her concerns about placement due to domestic violence between the Child's caretaker, with whom the Mother placed the Child, and her boyfriend. Her concerns with the Mother included domestic violence, sexual abuse of the Child, and transience. Ms. McCoy had not had any contact with the Mother, but another Cabinet worker who was investigating the sexual abuse allegation had communicated with her. The Cabinet had substantiated medical neglect as to the Child in 2012. Ms. McCoy stated that the Child was not removed at that time, but all of the Mother's children had been removed and her rights to one child had been terminated involuntarily. The Child had been left with numerous people, including inappropriate ones due to the presence of domestic violence and drug use. The Mother's substance abuse issues were related to her use of meth, marijuana, and alcohol. The warning order attorney was able to cross-examine Ms. McCoy, who stated that the Mother had not given her the names of any appropriate caregivers, despite asking her multiple times.

At the conclusion of the testimony, the court made a finding of neglect and asked whether anyone wanted a separate disposition hearing. At that point, the warning order attorney provided the names of two potential caretakers for the Child, including Shashaw Aman and Violet Duncan. Ms. Duncan already had one of the Mother's other children. The court ordered the Cabinet to investigate those individuals and directed the Cabinet to let them know of the next court date if

either expressed interest in taking placement of the Child. The court wanted to speak with any individuals interested in taking the Child.

The court went on to decide the disposition and entered a separate order. In its ruling, the court found the Child to be neglected and ordered that she remain committed to the Cabinet. The court also ordered home evaluations for the individuals mentioned during the hearing. It went on to find that the best interests of the Child required her to be taken from the home, that reasonable efforts were made to prevent her removal, and that there were no less restrictive alternatives to removal based upon its finding that the Child was neglected.

The juvenile court held a review on June 26, 2014. One of the potential fathers appeared at the hearing, but he had not sought paternity testing. The court ordered the child support office to perform a paternity test. The Mother was still on the run, and the Cabinet requested that reasonable efforts be waived because of the prior termination of rights. The court granted the Cabinet's request as to the Mother, but held off on the father until paternity tests were returned. The Cabinet reported that a home evaluation had been completed on Ms. Duncan, but she was not present in court that day. Ms. Duncan's relative home evaluation dated June 20, 2014, was filed, and it stated that the Child would be sleeping on a couch in the living room, while another child slept on a different couch in the same room. Otherwise, the home was clean and organized, and the family could provide for the Child's basic needs. Concerns from the social worker included Ms. Duncan's ability to provide financially for the Child based upon her seasonal work and the

need for the Child to sleep on a couch. The placement was ultimately approved by the social worker and the family services office supervisor (FSOS). However, upon review, the court indicated that it was not inclined to place the Child in a home where she would be required to sleep in the living room with another child, and it also noted the limited financial support Ms. Duncan could provide.

Therefore, the court denied home placement. The Cabinet also requested that a Court Appointed Special Advocate (CASA) volunteer be appointed, which the court granted. The court indicated that the potential father could begin visitation with the Child. The court entered an order in conformity with its oral rulings, and a review was scheduled for September 4, 2014.

The Mother finally appeared before the court at the September 4, 2014, review. She was in a wheelchair, having lost her leg in a motorcycle accident in July of that year when she was riding with another person. At the start of the review, the court appointed her warning order attorney as her attorney and agreed to reschedule the matter for a few weeks. Paternity testing had not been completed. The Mother requested visitation with the Child in the meantime, which the court granted on a supervised basis. Ms. McCoy stated that the Cabinet had offered her visitation in June, but the Mother did not accept this because she was on the run from outstanding warrants and was afraid the Cabinet would turn her in.

The court held a subsequent review on September 25, 2014, and noted at the outset that the potential father who had appeared earlier was not the Child's father pursuant to the paternity test results. Another potential father still needed to be

tested. The Mother's attorney stated that the Mother had been visiting with the child and asked that reasonable efforts be reinstated. The Mother had not been in court when reasonable efforts were waived, and she deserved a chance to reunite with her Child. The court allowed the Mother to meet with a social worker and set up a case plan. The court gave the Mother six months to work on her plan and set a review for that time.

At the March 19, 2015, review date, the Mother did not appear, but her attorney did appear. She indicated that her last conversation with the Mother was in February. The court noted that she had not shown up for a parenting assessment. Her attorney had not been able to reach her to find out why she had not appeared at her assessments. The court ordered the Child to remain in the current foster home. The Cabinet reported that the Child had been biting her nails until they bled and that the Mother had told her numerous times that she would be going home with her. Ms. McCoy stated that this was harmful to the Child and that she would be starting counseling. Therefore, the Cabinet requested a goal change hearing, which the court scheduled. Ms. McCoy also stated that the Child was not currently in an adoptable home, but the Cabinet was looking into one for the Child. The Mother was still permitted to work towards reunification.

The court scheduled a goal change hearing on April 16, 2015. The Mother did not appear, but her attorney asked for a continuance. Her attorney stated the Mother had contacted the CASA worker to tell her she had car problems and was unable to get to the hearing. The court opted to go forward with the hearing since

the matter had already been continued once. Ms. McCoy testified that the Child just turned five years old. The Cabinet had established a case plan with the Mother, but she refused to sign it. She did not do anything the Cabinet asked, even though her medical card covered the substance abuse and mental health care that the case plan required. The Mother scheduled multiple parenting and domestic violence assessments but failed to show up or cancel those assessments. She noted that the Mother had three outstanding bench warrants in Livingston County for trafficking in methamphetamine. The Mother had missed one visitation, which CASA had been supervising. The Child was adapting in her placement, stating that she was happy and loved to play with other children. The only thing the Mother had done was keep her visitations with the Child, although she could not set boundaries during those visits, according to the CASA worker. There were no expectations, and the Child ignored her. The Child was transitioning into an adoptive home.

On cross-examination by the Mother's attorney, Ms. McCoy agreed that the Mother had become disabled during the process and began receiving disability benefits in December. She had asked the Mother to complete four assessments in the areas of mental health, substance abuse, parenting, and domestic violence. The mental health and substance abuse assessments were together. Only the parenting and domestic violence assessments required a payment from the Mother. She agreed that the Child and the Mother were bonded, but the Child never mentioned her after visits. She said the Mother could not parent the Child and had not taken

any parenting classes. Upon questioning by the Child's guardian ad litem, Ms. McCoy confirmed that parenting classes were part of her case plan, and she had provided the Mother with guidance about where she could take these classes. She had signed the Mother up for free Necco classes, but the Mother failed to appear at her parenting assessment. The Mother had transportation and was able to drive.

Jamie Vieitez was the CASA worker appointed to this case in June 2014. She supervised visitation between the Mother and the Child, which took place at the Mother's home once per month and two other times per month at Burger King. She saw a bond between them and knew the Mother loved the Child, but she saw a lack of redirection. Parenting classes would help, but the Mother was on the run from the law and had drug charges pending against her. She did not know how the Mother would be able to parent the Child or take parenting classes if she remained on drugs. The Mother told her that she did not want to do anything Ms. McCoy wanted her to do. The Mother also continued to bring her boyfriend to the visits, even though she was told he could not be there. She would let the children run around the parking lot of the restaurant and around cars. She had received a text from the Mother that morning telling her about car problems. Ms. Vieitez told her that it was very important for her to be there that day and to find a ride. The Mother said that the court was not going to take her child over not having a ride. On cross-examination by the Mother's attorney, Ms. Vieitez stated she was aware that the Mother had taken some parenting classes in Benton and asked for the paperwork. The Mother said Ms. McCoy told her the classes would not work in

this court. She asked her to bring the copies anyway and talk to the judge about it. She took three classes, the last being for children up to five years olds. The Mother did not have any witnesses to call, as the Mother was not present.

The court entered an oral ruling at the conclusion of the hearing, finding sufficient evidence to change the goal because the Mother had not been working the plan and had not made any progress. Another review was scheduled for May to address terminating the Mother's visitation. The court entered a written order on April 24, 2015, providing that the Child was to remain committed to the Cabinet and that the goal be changed to adoption. The court found that the Cabinet recommended that the Child be placed for adoption, that reasonable efforts had been made to finalize the permanency plan, and that the Cabinet's recommendation of the permanency goal was in the Child's best interests.

The juvenile court held a review as scheduled on May 7, 2015. The Mother did not appear, and her attorney did not know where she was. Ms. McCoy moved the court to terminate visitation because the Mother had not shown up at the last visit, which upset the Child. Because the mother did not show up, the court terminated visitation, but said that the mother would need to show up and deal with her warrants if she wanted to have visitation reinstated.

About five minutes into the review, the Mother showed up late and using a walker. The court corrected itself to clarify that the Mother had missed a summons, but did not have any outstanding warrants. The court asked the Mother to address visitation. She said she had purchased a new vehicle the day before the

review, and she had missed her last visit due to car problems. Ms. McCoy found out thirty minutes before the visit that the Mother was not going to be there. The court opted to not suspend visitation, but it informed the Mother that visitation would be suspended if she missed another visit without at least five hours' notice. The Mother provided her current address to the court and the Cabinet. The court set a review for August. The Cabinet raised the issue of child support, which had never been set. The Mother was receiving \$721.00 per month in disability benefits. Her expenses included \$400.00 in rent, but she did not have much left at the end of the month. She also needed to pay for evaluations. The court found that the Mother did not have the ability to pay child support.

On June 22, 2015, the Cabinet filed a petition for involuntary termination of parental rights. The Child was continuing to live in foster care at that time. The Cabinet stated that a case had been opened for ongoing services for the Child in February 2012 and that she had entered the Cabinet's care on April 10, 2014. The Mother had been non-compliant and uncooperative with the Cabinet and DCBS to ensure the Child's safety and well-being, she had a history of leaving the Child with inappropriate caretakers, her whereabouts were unknown, she failed to appear in court, and she had two active bench warrants. The Mother also had a history of transiency, instability, substance abuse, child abandonment, domestic violence, and serial relationships. The Child had been found to be neglected following the adjudication hearing in May 2014, and an allegation of sexual abuse was pending. The Cabinet alleged that the Child was a neglected/abused child as defined by

Kentucky Revised Statutes (KRS) 600.020; that termination of parental rights was in her best interests; that the Mother failed to provide essential care and protection for the Child for six months, noting that the Mother had a history of leaving the Child with different people without regard to her safety; and that the Mother was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary for reasons other than poverty alone, noting that the Mother was not exhibiting parenting skills, had no boundaries for her children and did not discipline them; had lost custody to three of her children and had had her parental rights terminated to one of them; and continued to live a transient lifestyle. The Cabinet went on to allege that it had made reasonable efforts to reunite the Child with the Mother but that the assigned worker did not believe that additional services would be likely to bring about a reunification. Cathi Harrison was again appointed as the Child's guardian ad litem, and Gini Grace was again appointed to represent the Mother. While attempting to have the Mother served with the petition, the Cabinet discovered that she had been arrested and was in the McCracken County Jail.

On August 3, 2015, the Cabinet, through DCBS, sent an update to the family court. The Child had moved from a foster home to a potential adoptive home, but after two months, the foster parents gave their 14-day notice that they no longer wanted to adopt her. The foster parents cited the Child's behavior as the reason for their decision and stated that she would not listen to adults, would lie and manipulate, had attacked her teacher, and lacked social skills and empathy. The

Child was placed back into her original foster home, and the Cabinet indicated that it would continue to search for an adoptive home. The Cabinet stated that the Child was continuing to attend counseling sessions at Child Watch with Cecelia Reside and that Ms. Reside recommended that the Child not have any contact with the Mother due to the trauma she had experienced with her. This included sexual abuse, severe neglect, and mental and emotional abuse. Regarding the Mother, the Cabinet reported that she and her husband had been involved in a physical altercation, culminating in the Mother driving her car into a tree at her home. One of the husband's relatives reporting seeing drugs and drug paraphernalia in the trailer that day, and a sheriff's deputy conducted a search pursuant to a search warrant. The Mother denied ownership of the paraphernalia, but admitted that she had snorted meth the day prior to the incident. The Mother had not taken out a protection order against her husband, and her probation had been revoked for failing to follow its terms and because she was charged with three counts of trafficking in methamphetamine in another county. Furthermore, the Mother had not completed any of her assessments, including mental health, substance abuse, domestic violence, and parenting assessments, even though she had a medical card and assistance from the Cabinet. As a result, the Cabinet recommended that the Mother's visitation with the Child be terminated. The Cabinet included the incident reports along with the letter from the Child's therapist detailing the Child's issues and history, in which the Child's behaviors were blamed on the "complex trauma history" she experienced while in the Mother's custody.

The CASA volunteer filed a report with the family court dated August 6, 2015. In September 2014, the court, at the Mother's request, had reinstated the Cabinet's obligation to use reasonable efforts to reunite the family for the next six months, and it ordered supervised visitation in December of the same year. Paternity testing of two possible fathers failed to identify the Child's biological father, and the Mother refused to name the father. Concerns were expressed over the Mother's temper and anger issues, her inability to complete the Cabinet's case plan, the Child's behavior after visits with the Mother, the Mother's return to jail, the Child's attachment to her foster family coupled with the need to move her from that home because the family did not attend to adopt her, and the Child's disclosures of sexual abuse. The recommendations were for the Child to remain committed to the Cabinet and placed for adoption, for visitation with the Mother to be discontinued, for a careful transition to permanent placement for the Child, and for the Child to continue her trauma-focused therapy.

The court held a review on August 6, 2015, to discuss the two filings. The Mother was present, and her attorney objected to the DCBS report, which the court overruled. The Mother claimed that she had completed the substance abuse assessment through Probation and Parole, had scheduled an assessment at Four Rivers, and was waiting to start parenting classes at Necco. She also pointed out the Mother's legal and health-related issues that had slowed her down. The court responded that her legal issues were keeping her from working on and in contravention to her case plan. Regarding visitation, the Mother missed some of

the visits because she was in jail, but Ms. McCoy had been notified of this. The Mother also recounted that she had been involved in a car accident. The court indicated it had serious concerns about the Mother's progress and that the Child was being negatively affected by visitation. It therefore temporarily suspended visitation until her probation revocation issue was resolved. The court also addressed the termination petition filed against the Mother and held a pre-trial conference. The Cabinet stated that no father was ever named and that the Mother had a criminal trial scheduled for February 2016. The court scheduled a termination hearing for October, but the judge noted that she was leaving the bench in September.

On September 3, 2015, the Mother filed a motion in the juvenile court action for amended disposition and for reconsideration of relative placement, arguing that the relative home evaluation for Ms. Duncan had been approved by the social worker and the FSOS in Lyon County. However, Ms. Duncan was never notified by the Paducah DCBS office or given notice of the court date. Neither the Mother nor Ms. Duncan appeared at the June 26, 2014, hearing, when the court waived reasonable efforts and denied home placement. The Mother appeared at the September review and reasonable efforts were reinstated, but the court did not revisit the relative home placement ruling. The Mother contended that this would have altered the course of the case and allowed her to maintain her bond with the Child. The Mother requested that relative placement with Ms. Duncan be approved, that the permanency goal be changed to reflect placement with Ms.

Duncan as custodian, and that visitation be restored. The court held a hearing on September 10, 2015, on the Mother's motion. Ms. Duncan attended the hearing, and the Mother expressed that it had always been her wish that the Child be placed with Ms. Duncan. The court stated that it was the Mother's fault that she did not appear or respond or that the case had moved in the direction that it did. The court also noted that the home evaluation was out of date and therefore invalid. The court declined to revisit the issue of relative placement. Following the hearing, the court denied the Mother's motion as reflected in the calendar order entered the following day.

The court held a termination hearing on October 16 and October 22, 2015, before a special judge. Over the two days, the court heard testimony from Cabinet workers, the CASA volunteer, the Child's therapist, two law enforcement officers, Ms. Duncan, and the Mother.

The law enforcement officers testified about responding to calls at the Mother's residence. Deputy Christopher Glenn with the McCracken County Sheriff's Office responded to a domestic dispute call on June 18, 2013, after the Mother's husband choked the Mother and her mother (the Child's grandmother) while the Child was on the bed next to her. Deputy Glenn explained to the Mother how she could seek a protection order against her husband. Deputy William Strader of the Marshall County Sheriff's Office responded to a May 23, 2015, incident regarding an automobile accident when the Mother ran into a tree in her

yard after arguing with her husband. Deputy Strader also provided information to the Mother about how she could seek protection from her husband.

Amanda Hendrix, a social services worker for the Cabinet, testified about the 2013 incident. She performed an investigation pursuant to a referral regarding an assault between the Mother and her husband. The Mother told her she called her husband because he had been gone for a long time. He came home, and she woke up with his hands around her neck, choking her. The husband then began choking the Mother's mother with the Child next to her on the bed. The Mother did not seek a restraining order against the father, but she had been advised that she could do so and she was planning to divorce him while he was in jail. She did not do either.

Cecilia Reside is the Child's therapist and had been seeing her since March 26, 2015, when she was four years old. Ms. McCoy made the referral to her office, and the Child's foster mother set up the intake appointment. The presenting issues were lack of empathy, aggression to peers and adults, and oppositional and defiant behavior. Ms. Reside used play therapy due to the Child's young age, and she saw her twice per month. The Child had experienced multiple complex trauma. She told Ms. Reside that she had experienced multiple incidents of sexual abuse. The Child did not mention the Mother in the sessions, but she did mention her foster mother. She would express that she had fun with the Mother when asked. The Child was making some progress, and she needed consistency in her home environment. Ms. Reside diagnosed the Child with sexual abuse of a child, victim.

The Child's needs were being met in her foster home. She would need to continue therapy with the Child because she had a lot of issues. Ms. Reside had done some social skills training with her and had been teaching her manners, sharing, and to not be manipulative.

Susan Carneal, a social services clinician, is an investigator with the Cabinet, and she conducted three investigations of this family. The first was in July 2012 regarding the Child and a younger sibling, with the Mother as the perpetrator. She learned that the family was residing in an unstable environment, noting that the Mother thought the home they were living in had been used to manufacture methamphetamine. The Mother had also been relying on others to meet the children's basic needs. The Child was the third of the Mother's four children. The youngest child went to live with the paternal grandmother during the investigation. The Child went to stay with a maternal family member. One of the Mother's older children lived with his father, and her parental rights were terminated to the other older child. The next incident she investigated was in April 2013. She expressed concern regarding the maternal grandmother being a caretaker for the Child, but she was unable to substantiate anything against the Mother. The next report was in November 2013, and this was her most recent report regarding the Mother. Ms. Carneal noted that the Mother had been in and out of many homes, and the Mother had tested positive for methamphetamine. The Mother would not let Ms. Carneal see the Child until early 2014, when the Mother brought her to her office. The Child had been with the maternal grandmother, and

she noted that the Mother had been experiencing some health issues. There had been an open case with the Cabinet throughout this time, and the case was transferred from county to county depending upon where the Mother lived. She determined that the Mother needed services, and the case was transferred to Ms. McCoy.

Kathleen Verbeck is a support service aide, and she supervised visits between the Mother and the Child beginning in January 2015. She said they were very affectionate, but she noticed a lack of boundaries. The Child set the tone for the visit and was in charge. The Mother did not have the ability to redirect the Child, and the Child would ignore any attempts to do so. She noted that the Child separated easily from the visits. Ms. Verbeck last supervised a visit in June of that year. She believed that the Mother's issues with redirection could be addressed in parenting classes, and she was not aware that the Mother had been taking parenting classes at Necco.

CASA volunteer Jamie Vieitez testified that she was appointed to the case through McCracken Family Court in approximately August of 2014 and that she acted as the advocate for the Child. She attended the home visits with Ms. McCoy and the supervised visits. Her concerns about the Mother were an upcoming surgery scheduled for the Mother, her temper, and her multiple changes in residence. She was aware that the Mother had been taking parenting classes at Necco and had completed assessments for substance abuse and mental health. She

was also aware that the Mother had a new home that her family had furnished for her and that was accessible by wheelchair.

Cabinet case worker Patty McCoy testified that the Child had been in foster care since the emergency custody order was entered in April 2014, and she had been with one family for a significant period of time. The Mother had cases in Trigg, Lyon, Livingston, and McCracken Counties due to her transient lifestyle. She said she had a poor working relationship with the Mother and described the Mother as very hostile to her. Ms. McCoy testified about the Mother's inability to control the Child during visitations as well as her personal issues, including transiency, mental health problems, and domestic violence. She visited the Mother in jail in February 2014. She had fifteen felony charges pending for credit card fraud, and she was later convicted of these charges. She was on felony probation at the time of the hearing. She had returned to jail after that time, once in June and July when she served thirty days. The Mother only had sporadic visits in 2014 until they set up a schedule in early 2015. However, she missed all of her visits in May 2015. She provided a variety of reasons for missing the visits, although she sometimes just did not show up. Ms. McCoy first met with the Mother for case planning on February 7, 2014. The Mother was very aggressive and demanding at the meeting. She wanted to give guardianship to Misty Henderson if she went to jail for the credit card charges. Ms. McCoy noted that Ms. Henderson was involved in an ongoing domestic violence situation between her husband and another man.

The Mother was married to but estranged from her husband. She had also been in a relationship with another man, who had lost his parental rights to his children, had no job, and was transient. These two men were not made a part of the Child's case. Ms. McCoy had not been able to determine the identity of the Child's father. She described the difficulties Cabinet workers had in contacting the Mother beginning in 2012. She also described contact the workers were able to make and reports of home visits in the Mother's various residences. Based on her history, Ms. McCoy testified that the Mother was trying to avoid Cabinet workers by moving to different residences. The Mother had refused to complete assessments for anger management and parenting, saying that she did not need these. She had completed mental health and substance abuse assessments just prior to the hearing, but Ms. McCoy did not know the results of these assessments. These assessments had been on her case plan since 2014. Regarding the termination of parental rights to the Mother's older child, the report noted that the Mother was transient and was involved in criminal activity. These problems continued through the proceedings involving the Child in this case. None of her issues had been resolved. Barriers for the Mother to provide for the Child's daily needs and protection included her mental health, lack of stability, substance abuse, and transient lifestyle. She noted that the Mother came into a large amount of money due to her lawsuit against a person involved in the accident in which she injured her leg.

Ms. McCoy testified that the Mother had not demonstrated that she was ready to make significant changes, and there were no additional services she could offer that would bring about lasting, permanent changes. The Child had been improving in foster care and was on target for her education. In July, Ms. Reside made a recommendation to not restart visitation because the Child's behavior regressed after visits, and the Mother's visitation was not restarted based upon this recommendation. She also related that the Mother had been in a motorcycle accident while she was a passenger. Following the accident, the Mother came to the Cabinet's office in August 2014 and was very demanding about wanting to see the Child. She stated that the Child was bonded with her foster parents and had a routine. Ms. McCoy believed that termination of parental rights and adoption would be best for the Child.

On cross-examination, Ms. McCoy was asked about appropriate placement and about Ms. Duncan in particular. She had not contacted Ms. Duncan about the home evaluation after receiving the report because it was not her responsibility to tell her about the upcoming court dates. At the court date when this was discussed, while neither Ms. Duncan nor the Mother was present, the home study evaluation was considered. Ms. McCoy was not aware that the Mother had scheduled assessments for November, but she had been informed by the CASA volunteer that the Mother had obtained a house that her family had refurbished for her. She was aware that the Mother had completed all but three parenting classes at Necco. Ms. McCoy had set up these classes during the spring, but the Mother had delayed

taking the classes. On cross-examination by the Child's guardian ad litem, Ms. McCoy confirmed that she had not seen the results of the mental health assessment the Mother had recently completed, but expected there would be recommendations for her to follow up on.

The first witness the Mother called was Violet Duncan, who lives in Lyon County. She is the Mother's cousin, but Ms. Duncan said she raised her as a niece. Ms. Duncan had past experience in social work, and she performed assessments and home evaluations, and worked with children in an after-school program. She did this for four or five months. She was currently working as a waitress. Ms. Duncan was the subject of a home evaluation of the Lyon County DCBS the prior spring. She said it was a thorough evaluation, more so than the one performed when her home was evaluated for another older child, who had been with her for two years. She confirmed that Lyon County DCBS had approved the placement, but McCracken County did not. She was never notified about a court date for the home evaluation decision. It had been the Mother's wish for the Child to be placed with her as a relative placement. She visited frequently with the Child prior to her removal from the Mother's care. She lived with her fiancé, his ten-year old daughter, and an eight-year old girl placed by DCBS. She explained a normal day with the children after she got home from work at approximately 2:30 p.m. She lived in a two bedroom mobile home, but she indicated that she was financially able to obtain a larger home if the Child were to be placed in her home. On cross-examination by the Child's guardian ad litem, she stated that three children were

living with her, and two of the girls slept on one of the couches. Her 18-year old son had the bedroom, but he no longer lived in the house.

The Mother was the final witness to testify. In February 2015, she began collecting \$733.00 per month in disability due to her leg injury, which she incurred on July 17, 2014, in a motorcycle accident. She lived rent-free in her residence, thanks to her family. No home evaluation had been performed at that point. She wanted the Child to be returned to her or placed in the custody of Ms. Duncan, and she said she had always requested relative placement in this case. She believed the loss of her leg slowed her down in completing her case plan requirements. She said she had completed two assessments in her case plan, and these were mental health and drug assessments at Four Rivers. She had another appointment on November 3, 2015, to take additional assessments. She was participating in a twelve-week parenting course through Necco, and she had three classes remaining. Prior to this, in March or April, she had tried to take some parenting classes in Benton, but Ms. McCoy told her those would not qualify because they were not qualified through Necco. She had learned skills through her parenting classes that would help her with her issues in directing the Child. Her last visit with the Child was in July, prior to going to jail on July 7th. She was still married to her husband, but they were no longer together. She planned to divorce him, and she had filled out the paperwork, but her husband burned the documents.

The Mother listed the various residences in which she lived over the last few years. She believed her current residence would be a safe place for the Child to

live. She also described her visits with the Child, and said the Child would ask her when she would be coming home. The Mother told her she was doing everything she could. She was not sure how many visits she missed, but said some were for medical appointments in Nashville. She and the Child were bonded, and she said the Child was her “whole world.” Regarding her older child, she said she voluntarily terminated her parental rights because she was told this could not be used against her regarding any of her other children.² Her other children were ten years old (she had joint custody with his father) and almost four years old (he lived with his paternal grandmother). She would see them both on a regular basis. She said she had maintained her sobriety. She agreed that she did not communicate with Ms. McCoy, but she did communicate well with the CASA volunteer. She was also working to control her temper. She had a hotline number she could call.

On cross-examination by the Child’s guardian ad litem, the Mother testified that she had stayed away from court proceedings so that she could avoid jail. She did not know the results of her mental health assessment and had not received any recommendations at that time. Regarding her relationship with her husband and the 2013 choking incident for which he went to jail, she did not seek protection from him when he got out of jail because their son lived with his paternal grandmother and that was the only way she could see him. She did not believe a

² During the course of the hearing, the Cabinet asked the court to take judicial notice of a separate action involving the termination of the Mother’s parental rights to another child. The Mother, through her attorney, indicated that the termination of parental rights was voluntary, not involuntary. However, the Mother had not attended that hearing, but rather had been represented through counsel.

“piece of paper” would prevent her husband from hurting her. She said her family would provide adequate protection for the Child from her husband, along with the surveillance equipment around her house. She agreed that several people had advised her to obtain an EPO. She did not attend any of the Millstone counseling sessions because she did not have the money to pay for those.

On cross-examination by the Cabinet, the Mother admitted that she was not present at the adjudication hearing because she had pending warrants due to missing a court date in McCracken County on a felony bail jumping case. She also said she had not known the date. The first time she attended court in the Child’s case was in July or August, after her wreck. She asked for an attorney to be appointed for her at that time, and the court did so. She denied that Ms. McCoy told her that Misty Henderson was an inappropriate person to care for the Child. She was present in court when the court changed the permanency goal to adoption, and she was represented by an attorney at that hearing. She also testified about her criminal history, which included charges for complicity to burglary in Marshall District Court, theft, and a citation for not having a booster seat for the Child.

Regarding her family relationships, the Mother testified that she did not know her mother had filed a petition against her related to the Child in 2012. She said she and her mother had had a falling out and that she had grown up in foster care. Her father had not been involved in her life, but she had gotten to know him when she was seventeen years old. She had not been allowed to meet her father because he was an alcoholic. The Mother married her husband in July 2013.

Although she testified that she had tried to divorce him, she did not spend any of the \$17,000.00 she received from her expected settlement in early 2015 to hire a divorce attorney. She later testified that she was willing to get an additional loan from her settlement to seek a divorce. She had been involved in multiple domestic violence incidents, both as the victim and as the perpetrator. She had a personal safety plan in place with her next door neighbors. She had used the \$17,000.00 to purchase furnishings for her trailer and a car, all of which had been stolen when she had been in the hospital after driving her car into a tree.

The court permitted the parties to argue their respective positions at the conclusion of the testimony. The Mother argued that the court should order relative placement, noting that the decision in the juvenile action to deny placement with Ms. Duncan had been made when neither the Mother nor Ms. Duncan was present and that the court did not permit her to testify until that day. In the alternative, the Mother requested the court to order immediate placement with the Mother and to dismiss the TPR action, and she requested additional time to work on her case plan based upon her disability. The Mother contended that this case never should have reached the termination proceedings, but should have proceeded as a relative placement case.

On the other hand, the Child's guardian ad litem recommended termination of the Mother's parental rights because the statutory requirements had been met and it was in the Child's best interest. She expressed concerns about the safety of the Child if she were to be placed with the Mother and noted that there may be

recommendations arising from the assessments. She did not see enough progress. The Cabinet pointed to the Mother's poor choices and her inability to rely on her family. She had not made the Child a priority throughout her life.

On November 18, 2015, the family court entered its findings of fact, conclusions of law, and order terminating the Mother's parental rights. In the findings of the fact, the court stated, in relevant part, as follows:

Reasonable efforts, along with the issue raised by [the Mother] of the denial of relative placement by the court throughout these proceedings, have been a point of contention. The record is clear that the court considered but found inappropriate the proposed relatives of [the Mother.] The court did in fact hear testimony from Violet Duncan, a relative, which suggested that she might be a suitable relative for placement. But that was testimony which this court heard at the October 2015 hearings. The testimony in the Juvenile file was such that the Juvenile Court refused to allow a relative placement which would, in essence, place a small child in a situation in which she could be living in a crowded home and sleeping on a couch. This court finds that no suitable relative placements were ever found, and that the Juvenile Court made proper findings in its rulings.

The court went on to find that the Child was neglected, that it was in her best interest to terminate parental rights, that the Mother had failed to provide essential care and protection for the Child or provide for her for reasons other than poverty, and that there was no reasonable expectation of improvement by the Mother. The court specifically found that the Mother "has a history of leaving [the Child] with different individuals with no regard for her safety." Additionally, the court found:

[The Mother] is not exhibiting parenting skills at this time, as has been exhibited by her inability to set

boundaries for the child to follow, as well as an inability to appropriately discipline her child, as testified to by witnesses who have supervised her visitations. She also has lost custody of three other children and her parental rights were terminated on a fourth child. She remains committed to a transient lifestyle, having lived in six different places since April of 2015.

Finally, the court found that the Cabinet had made reasonable efforts to reunite the Mother and the Child, that the proposed relative placements were inappropriate, and that the Mother had “failed to make reasonable efforts or adjustments in [her] circumstances, conduct, or conditions to make it in the child’s best interest to return home within a reasonable period of time[.]” Therefore, the court terminated the Mother’s parental rights and transferred the Child’s custody to the Cabinet with the authority to place her for adoption. This appeal now follows.

On appeal, the Mother argues that she was denied due process at critical stages of the underlying juvenile action, that the Cabinet did not make reasonable efforts toward reunification or relative placement, that the Cabinet did not make reasonable modifications in her case plan or other areas under the Americans with Disabilities Act, and that the Cabinet failed to establish the required elements to involuntarily terminate her parental rights. The Cabinet disputes the Mother’s arguments and asserts that the family court’s ruling should be affirmed.

This Court’s standard of review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998):

The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky. App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, Ky.App., 706 S.W.2d 420, 424 (1986).

“Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

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

At the outset, we recognize, and the United States Supreme Court has emphasized, the fundamental nature of the liberty interest natural parents have for the raising of their child:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the

irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982) (footnote omitted). *See also M.E.C. v. Com., Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008) (“While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution.”).

Pursuant to CR 52.01, findings of fact “shall not be set aside unless clearly erroneous,” and a reviewing court must afford “due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.” It has long been held that “when the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *R.C.R. v. Com., Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998), citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

For her first argument, the Mother contends that she was denied her due process rights as well as a right to an attorney at critical stages of the juvenile proceedings. As a part of this argument, she asserts that the court in the juvenile action failed to hear the testimony of Ms. Duncan to support the Mother’s request for relative placement.

In support of his argument, the Mother cites to KRS 620.100, which provides for the appointment of counsel in DNA cases:

(1) If the court determines, as a result of a temporary removal hearing, that further proceedings are required, the court shall advise the child and his parent or other person exercising custodial control or supervision of their right to appointment of separate counsel:

...

(b) The court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31. . .

In addition, she cites to *R.V. v. Com., Dep't for Health & Family Servs.*, 242 S.W.3d 669, 672-73 (Ky. App. 2007), in which this Court reversed an order terminating parental rights based upon lack of counsel at all critical stages of the underlying proceeding. The parents had been appointed attorneys in the DNA action, but the attorneys were relieved of their duties despite the fact that there were crucial decisions left to be made in the case, including permanency. In reversing, this court held:

We therefore hold, pursuant to both the due process clause of the Fourteenth Amendment to the United States Constitution and KRS 625.080(3) and 620.100(1), that the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

Id. at 672-73.

In the present matter, we must agree with the Cabinet that the Mother purposely absented herself from the early portions of the juvenile action because there were active warrants for her arrest and she wanted to elude authorities. Furthermore, a warning order attorney had been appointed to represent her and appeared at the hearings that the Mother missed. Ms. Grace was also able to voice the Mother's desire for relative placement, which the court considered and rejected after reviewing the home evaluation. We find no due process violations in this matter and therefore reject the Mother's argument that she was not afforded her due process rights in the juvenile action.

Next, the Mother argues that the Cabinet failed to make reasonable efforts toward reunification or by placing the child with a relative; specifically, with Ms. Duncan. She contends that the family court's order violated KRS 620.090, which provides for temporary custody:

(1) If, after completion of the temporary removal hearing, the court finds there are reasonable grounds to believe the child is dependent, neglected or abused, the court shall issue an order for temporary removal and shall grant temporary custody to the cabinet or other appropriate person or agency. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known. The order shall state the specific reasons for removal and show that alternative less restrictive placements and services have been considered. The court may recommend a placement for the child.

(2) In placing a child under an order of temporary custody, the cabinet or its designee shall use the least restrictive appropriate placement available. Preference

shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known. The child may also be placed in a facility or program operated or approved by the cabinet, including a foster home, or any other appropriate available placement. . . .

The Mother also relies upon 922 Kentucky Administrative Regulations (KAR) 1:140, which addresses foster care and adoption permanency services. Section 7 provides for permanent relative placement:

The permanency goal for a child in the custody of the cabinet shall be permanent relative placement if:

- (1) Return to the parent is not in the child's best interest; and
- (2) The cabinet determines that a relative who does not pursue adoption or legal guardianship is able to provide a permanent home for the child.

The family court considered relative placement both in the juvenile action and again in the termination proceedings. Both times, the court concluded that placement with Ms. Duncan would not be appropriate, noting that the Child would have been sleeping on a couch in the living room with another child sleeping on an adjacent couch. We find no due process violation in that the court in both proceedings considered Ms. Duncan as a relative placement option, but did not find her home to be an appropriate placement for the Child based upon a consideration of the Child's best interests.

Next, the Mother argues that the Cabinet did not make reasonable modifications in this case based upon her disability under the Americans with

Disability Act. She contends that she should have been permitted additional time to complete her case plan and to obtain appropriate and safe housing for her and the Child. She also points to the costs she was required to expend to obtain the ordered assessments. Ms. McCoy first met with the Mother in February 2014 regarding her case plan, and we note that the Mother lost her leg as a result of a motorcycle accident in July 2014. She began receiving disability payments in early 2015, and she also received a sizeable loan from an anticipated settlement during the same time frame. The termination petition was filed in June 2015, almost one year after the Mother's injury, and the hearing was not held until October 2015. The Mother had ample time, even considering her disability, to work on and complete her case plan prior to that time. She also had the funds from the settlement loan to pay for the necessary assessments. It appears that the Mother waited until the termination hearing date grew close before she sought to comply with the case plan. We cannot hold that the provisions of the Americans with Disability Act were violated in this case or that the Cabinet withheld or failed to modify any of its services due to her disability.

Finally, the Mother contends that the Cabinet failed to establish the required elements to terminate her parental rights by clear and convincing evidence.

KRS 625.090 mandates that the Cabinet must meet a three-prong test in order to involuntarily terminate parental rights and establish by clear and convincing evidence that 1) the child is abused or neglected; 2) termination would

be in the child's best interest; and 3) one or more of several listed grounds exists.

These grounds are enumerated in KRS 625.090(2) and include:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (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;
- (f) That the parent has caused or allowed the child to be sexually abused or exploited;
- (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;
- (h) That:

1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

In making these findings and determining the best interest of the child, the family court must also consider the factors listed in KRS 625.090(3), which include:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not

requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

Finally, KRS 625.090(4) provides that “[i]f the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.”

In the present case, the court found that the Child was a neglected child pursuant to KRS 600.020, that the Mother failed to provide essential parental care and protection for the Child for at least six months, and that the Mother failed to provide for the child for reasons other than poverty alone. The court pointed to the Mother’s unstable and transient lifestyle and her past history of leaving the Child with various individuals with no regard for the Child’s safety. The court also noted that the Mother did not exhibit parenting skills at her visitations with the Child, as those supervising those visits testified. In addition, the court noted the Mother’s failure to cooperate with the Cabinet or comply with its directives, her failures to

appear in court due to outstanding warrants, substance abuse, domestic violence, and her relationships with convicted felons. The court went on to find that the Cabinet had made reasonable efforts and that relative placement with Ms. Duncan was inappropriate. The court also found that of her four children, the Mother had lost custody to three and had her parental rights terminated to a fourth. The Mother points out an error in this finding, as she testified that she shared joint custody of one of her children. However, the fact still remains that the Mother had lost custody of two of her children, including the Child in this case, and had her parental rights terminated to another one. Finally, the court found that termination would be in the Child's best interests. We agree.

The family court's findings, other than the finding related to the custody of one of her children, were supported by clear and convincing evidence in the record established through the testimony and the documentary evidence introduced at the hearing. These findings established the statutory requirements of KRS 625.090, and we find no abuse of discretion in the family court's decision to terminate the Mother's parental rights.

For the foregoing reasons, the order of the McCracken Circuit Court terminating the Mother's parental rights is affirmed.

ALL CONCUR.

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