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# Commonwealth of Kentucky

# Court of Appeals

NO. 2021-CA-1465-ME

A.H. APPELLANT

APPEAL FROM WARREN FAMILY COURT
v. HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 20-AD-00111

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES AND Z.K.E.H., A
MINOR APPELLEES

AND

NO. 2021-CA-1466-ME

A.H. APPELLANT

APPEAL FROM WARREN FAMILY COURT
v. HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 20-AD-00112

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES AND Z.R.L.R.H.,
A MINOR APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND MCNEILL, JUDGES.

LAMBERT, JUDGE: A.H. (the Mother) has appealed from the Warren Family Court's findings of fact and conclusions of law and from the orders terminating her parental rights to her two minor children, which were all entered November 9, 2021. Because we hold that it was not appropriate to terminate the Mother's parental rights at this time, we vacate and remand.

The Mother is the biological mother of two daughters, Z.K.E.H. (Child 1) and Z.R.L.R.H. (Child 2), who were born in January 2018 and August 2019, respectively. The Mother was not married when the children were conceived or born, and no putative fathers have been identified. Shortly after Child 2's birth, Emily Long, a social worker with the Cabinet for Health and Family Services (the Cabinet), filed juvenile dependency/neglect or abuse (DNA) petitions with the Warren Family Court. Ms. Long stated:

> [The Mother] . . . tested positive for methamphetamines and marijuana upon admission to the Medical Center in

> Bowling Green, KY. [The Mother] was admitted to the hospital on [date omitted] to deliver her child, [Child 2]. [Child 2] was born four weeks early, but was nine pounds due to gestational diabetes. [Child 2] began showing signs of withdrawal [the next day] which included: poor feeding, loose/watery stool, mild tremors with disturbance, hypothermia, respiratory rate higher than 60, and neonatal abstinence scale ranging from 3-6. [The Mother] has tested positive for cocaine, methamphetamines, and marijuana during the course of her pregnancy. [The Mother] admits to using cocaine during pregnancy up until May 2019 and using marijuana up until a month ago, but denies any use of methamphetamines. Due to her ongoing drug use and abuse [the Mother] is incapable of caring for immediate and ongoing needs of [the children]. Worker and [Bowling Green Police Department] have been unable to make contact with [Child 1] who is currently in the home with maternal grandmother, [Grandmother]. [The Cabinet] is requesting permission to seek medical, education needs, developmental services, and appropriate supervision for child.

The family court granted the Cabinet's motions for emergency custody on August 22, 2019, and scheduled a temporary removal hearing for later that month. Following that hearing, the family court entered an order granting temporary custody of the children to the Cabinet, relying upon Ms. Long's testimony that Child 2 had been born dependent on drugs and that the Mother had admitted to her that she had continued to use marijuana after she knew she was pregnant.

By order entered October 4, 2019, the family court appointed counsel for the Mother and ordered that the children would remain with the Cabinet, that the Mother would work on her case plan and comply with random drug screenings,

and that she would have supervised visitation at the Cabinet's discretion. The adjudication hearing was rescheduled so that the Mother's appointed attorney could review the medical records. And on October 24, 2019, the court entered an order as to child support and insurance, ordering the Mother to pay $30.00 per month in child support and to provide health insurance if it was reasonably available. The Cabinet also continued to provide reports to the court throughout the proceedings.

At the adjudication hearing, the Mother stipulated to neglect as to both children, and the court found that they were neglected or abused pursuant to Kentucky Revised Statute (KRS) 600.020(1), noting that the Mother had "[c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means[.]" The court ordered that the children would remain with the Cabinet pending disposition, that the parties were to comply with the Cabinet, that the Mother was to work her case plan and comply with random drug screenings, that the Mother could exercise supervised visitation at the Cabinet's discretion, and that the children would have a First Steps assessment and follow the recommendations.

Following the disposition hearing, the court entered an order on November 7, 2019, finding that the children were neglected or abused and ordering that they were to remain committed to the Cabinet.

The objective of the Mother's September 2019 case plan with the Cabinet was to overcome her issues of substance misuse so that she could effectively parent her children. Her tasks included completing a substance misuse assessment, following the recommendations of the therapist, completing parenting classes with the Family Enrichment Center, agreeing not to use illegal substances and submitting to random drug testing, showing that she could provide for her own basic needs through community resources and/or employment, and maintaining a safe and stable home. The social worker was tasked with making referrals for the Mother as needed to support the completion of her tasks and with conducting home visits to assess her progress.

On October 14, 2020, the Cabinet filed petitions with the family court in both cases to involuntarily terminate the Mother's parental rights. The children had been committed to the Cabinet since August 22, 2019, pursuant to the above juvenile actions. In support of the petitions, the Cabinet alleged that the Mother failed to protect the children's fundamental right to a safe and nurturing home, that they were abused and neglected children pursuant to KRS 600.020, and that it was in their best interests that parental rights be terminated. The Cabinet went on to allege that the Mother had failed to provide essential parental care and protection for the children for at least six months and there was no reasonable expectation of improvement considering their ages; and that she had failed to provide essential

food, clothing, shelter, medical care, or education reasonably necessary for the children's well-being, and there was no reasonable expectation of significant improvement in the immediately foreseeable future, considering the ages of the children.

The Cabinet alleged that it had offered or provided all reasonable services to the family, but the Mother failed or refused to make any changes in her circumstances, conduct, or conditions that would allow the children to be safely returned to her care. It explained:

> Child was removed when child [or child's sibling] tested positive for methamphetamines, cocaine, and marijuana at birth. Mother is compliant with substance abuse counseling. Mother has tested dirty on random drug screens every other month. Mother does not have housing. Mother has never lived alone and is low-functioning. Mother currently lives with her mother, but that person is not appropriate due to drug-related charges.

The Cabinet sought a judgment terminating the Mother's parental rights and granting it custody of the children. The court appointed guardians *ad litem* (GAL) to represent the children's and the Mother's interests. The Mother later retained her own counsel.

The family court held a termination hearing exactly one year later on October 14, 2021, and heard testimony from several witnesses. The first witness the Cabinet called was Megan Skaggs, who works as a targeted case manager for Wilson Counseling. The Mother had been her client since March 2020. Ms.

Skaggs assisted the Mother in obtaining housing, employment, her credit, maintaining healthcare, and she advocated for the Mother in the community. The Mother had been compliant and overall had done well. She believed that ongoing support would be beneficial for the Mother. She believed she could function as she was currently without ongoing case management. The Mother had met the goals Ms. Skaggs had set out for her.

Michelle Yoebstl testified next. She works for Wilson Counseling as a certified alcohol and drug counselor, and she did a substance abuse assessment on the Mother in January 2020. The Mother was diagnosed with a cannabis disorder, and she had used methamphetamine on occasion. She recommended that the Mother enroll in targeted case management and do twelve individual counseling sessions with her. The Mother finished the sessions in May of 2020. Ms. Yoebstl then saw the Mother monthly for a few months, then every three months. The Mother was also doing mental health counseling. After failing a couple of drug screens in August and September 2020 for marijuana and methamphetamine use, the Mother entered a 28-day inpatient treatment program in January and finished in February 2021. The Mother returned for after-care counseling, and Ms. Yoebstl last saw her on September 24th, when she seemed to be doing well. The Mother had stable housing, a job, and negative drug screens.

Amy Carter, an LCSW mental health therapist at Wilson Counseling, testified next. She began seeing the Mother in September 2020 for mental health services, including concerns for depression. She saw her every two weeks. Ms. Carter diagnosed the Mother with major depressive disorder, cannabis disorder, and other stimulant use disorder. The Mother was compliant with her treatment. Ms. Carter identified extreme stress as a trigger for the Mother's substance abuse, and they discussed coping skills as well as ways to reduce anxiety. The Mother did not need medication for her depression. They were working on decreasing the symptoms of her depression, increasing her self-worth, and improving her emotional regulation through the use of effective coping skills. Ms. Carter noted improvement in her communication skills, as the Mother was being more open about her feelings and emotions, and she was asking for help. The Mother was honest and was actively participating in her treatment plan.

Ms. Carter and the Mother also discussed her desire to get her children back. Ms. Carter stated that the Mother was employed at Wendy's and had an apartment, where she lived by herself. The Mother had supervised visits with the children, although it had been less frequent due to COVID-19 exposures. The Mother and the children had been meeting every two weeks at the Cabinet's office, and home visits supervised by the Cabinet had just started. The Mother had expressed frustration that she had only seen the children one time from August to

September, which Ms. Carter attributed to COVID-19 exposure. The Cabinet had never discussed what support the Mother would need if the children were to be returned to her; Ms. Carter knew the plan was termination.

Heather Brod testified next. She is a social worker with the Cabinet, and she is the worker for the case involving the Mother and the children. The Mother identified potential fathers for the children in March 2021. One potential father she identified for Child 1 was ruled out by DNA, and the other signed a disclaimer of paternity and stated there was no way he could be the father of either child. The children were placed in the Cabinet's custody after the Mother tested positive for methamphetamine, marijuana, and amphetamine upon admission for Child 2's birth. Child 2's umbilical cord tested positive for methamphetamine, marijuana, and amphetamines, and her meconium tested positive for canniboids and amphetamines.

Ms. Brod set up case plans for the Mother, the first on September 3, 2019. The Mother was to comply with random screens, seek out substance abuse and mental health counseling, be able to meet her own daily needs, and obtain her own stable housing. The Mother was compliant, but there were times during the first year that she failed the drug screens. She tested positive on September 30, 2019, for marijuana and methamphetamine, the screen was clean in October, and she again tested positive in November for marijuana and methamphetamine. Ms.

Brod referred the Mother to Wilson Counseling. She missed a few counseling sessions due to oversleeping or because she forgot. The case plan had changed over time to include maintaining housing and employment, and to add the psychological and parental capacity assessments. Attending AA/NA and obtaining a sponsor had been added after the Mother got out of inpatient treatment. As of July 2021, the Mother had not gotten a sponsor or gone to AA/NA, which was on the outpatient orders from Park Place, where she went for inpatient treatment. But the Mother reported to Ms. Brod that she had been going weekly on Wednesdays since July of 2021. And she was still attending as of September 2021 when Ms. Brod asked her at the home visit that month.

Ms. Brod referred the Mother for a psychological evaluation, which was completed in October 2020. Ms. Brod used the results of the evaluation during home visits and visitations to implement other strategies to give the Mother suggestions to optimize her ability to interact or control the children when it was just the Mother, rather than her and her mother, during visits. Visits were scheduled two times per week at the beginning of the case, and the Mother generally showed up for these visits. Ms. Brod described the visits as chaotic. Child 1 would run around the visitation room or Child 2 would cry while the Mother continued to sit in one part of the room. The Mother would hold Child 2 while she cried, which would frustrate the Mother. Sometimes she would try to

feed her with a bottle or snacks, or change her diaper. Ms. Brod would recommend that the Mother stand up and bounce Child 2 and move around with her when she cried.

Ms. Brod stated that the Mother's visits changed from two times per week in March 2020 due to the COVID-19 pandemic. Visits were suspended for about a month, but the Mother had virtual visits through Zoom or Facetime twice weekly. The Mother showed up to all of those visits. Visitation resumed in May, then were suspended for a few weeks. When visits started again, Cabinet workers were told to do the minimum visits (one time per week for an hour) due to the threat of exposure to COVID-19. Those visits were still hectic. The Mother tended to sit in one part of the visitation room while the children ran or crawled around. The Mother would interact with Child 2 if she could get Child 1 to watch a show on her phone. Sometimes the Mother would lie down on the floor with Child 1 and watch a show on the phone while Child 2 played independently with a toy.

In August and September 2021, the Mother did not get to visit as much as she normally would. Child 1 tested positive for COVID-19 at the end of August, and while Child 2 did not test positive, the virus went through the whole foster home, causing them to be continuously quarantined. Child 2 had the longest quarantine period and was not released until mid-September. After Child 2 was

released from quarantine, Ms. Brod was exposed and had to quarantine until October 1st. The Mother was able to continue Facetime visits with the children while they were in quarantine. And even when in-person visits resumed, visitation was supplemented with Facetime visits as well.

Ms. Brod testified that the first visit in the Mother's home was October 1, 2021, and the last one was October 8th. The first visit was hectic. During both visits, the Mother catered more to Child 1 than to Child 2. There was not a lot of redirection or equalizing between the children. And at the end of the visit on October 8th, Child 2 went to the unlocked front door, and she could have opened the door and gone outside. During the October 1st visit, Child 2 had been jumping on the bed and grabbed the bookshelf. The Mother did not redirect her, but allowed her to do this. And she put Child 2 on a bed that she could have fallen off of, and then walked away while Child 2 was standing and jumping on it. The Mother allowed Child 2 to continue jumping on the bed. Ms. Brod described these incidents as concerning.

The Mother was currently living in a two-bedroom apartment with two bathrooms. The residence was sufficient for the children to be returned. She was employed at Wendy's, where she started working in September 2021. The Mother had had several other jobs prior to that, after she left her inpatient program. Ms. Brod did not know how much money the Mother earned. The Mother was

paying child support. Ms. Brod stated that Child 1 had been diagnosed with ADHD and had some learning delays. Child 2 was receiving First Steps services for core speech.

Mr. Brod testified that, in her professional opinion, the Mother's parental rights should be terminated. She thought the Mother could handle one child, but not two children. She struggled to handle them equally at the same time. She had not used the suggestions Ms. Brod had given her to demonstrate that she could adequately handle both children during visitations and during Facetime visits. The Mother was unable, in her opinion, to provide the children with essential parental care or supervision, or to provide them with essential protection or necessities of life. And there was no reasonable expectation of improvement in the Mother's conduct to provide such care for the children. The Cabinet had rendered all reasonable services to the Mother and there were no other services that would bring about a reunion of the family. In her opinion, it was in the children's best interests that parental rights be terminated because the Mother struggled to adequately supervise the two children at the same time without the support of her mother. The Mother had a hard time identifying situational risks for the children, such as leaning over and hanging from an unsecured bookshelf and not ensuring the front door was locked. When the Mother's mother had been present at some of the in-person visitations, they would each occupy a child.

Ms. Brod testified that there were some visits at the office where the Mother could handle both children, but for the most part she sat in one place and the children came to her. In the home, where it was not a structured environment, she had a hard time controlling both children.

On cross-examination, Ms. Brod was asked what services she had recommended or provided to the Mother since the petitions were filed to help reunite the family. She said the Mother had been referred to parenting services, she had recommended that the Mother do different things during visitations so that she would be able to handle both children, and she had discussed concerns with her providers. Her apartment was appropriate. When asked why it took so long to begin supervised visits at her house, Ms. Brod stated that she wanted to see how the mother progressed in a structured environment and to be sure that the Mother could take care of the children predominantly on her own, without her mother being present constantly. Her mother was not approved for placement or the children would have been placed with her. Ms. Brod said that she (Ms. Brod) was there to observe, not to intervene. She said the Mother hadn't "gotten it." She noted that there was more of a bond between the Mother and Child 1, and less between her and Child 2.

The children's foster mother testified next. The children had been in her home since August 2019. At that time, Child 2 had withdrawal symptoms

from methamphetamine and was premature. Child 1 had anger issues, would tear out her hair and hit and scratch at herself. The children were currently doing well. She supervised weekly Facetime visits between the Mother and the children.

The Mother called the Mother's aunt to testify. She and her sister (the Mother's mother) would be available to help the Mother with the children. The Mother did not call any other witnesses, and she did not choose to testify.

In her closing argument, the Mother, through counsel, asked the court to not find that it was in the best interest of the children to terminate her rights. She argued that there was no evidence she had abandoned the children or caused them to be injured. She paid her child support. There was no evidence that she had not provided parental care and protection for the children, and the Cabinet had not established that there was no reasonable expectation for improvement. She argued that the Cabinet had made up its mind. She had been sober for 10 months and had just recently gotten home visits with the children. The Mother had been making progress, but she was not permitted to make progress with the children. She had had four in-person visits in the last four months. Since January, the Mother had clean drug screens, maintained employment, and had a residence. Counsel noted an inference that the Mother was "too slow" to raise her children, but she was not "too slow" to go to work or maintain her apartment, which she had obtained on her own. The Cabinet had not made reasonable efforts for

reunification. And she disputed Ms. Brod's example of leaving the door unlocked as being her fault and said Ms. Brod should have locked the door when she went inside.

The Cabinet conceded that the Mother had done almost everything on her case plan. However, the issue was whether she was able to protect the children. At the visits, the Mother would sit and let the children come to her, or she ignored them while they were there. And she favored Child 1. The Mother had not followed suggestions since August 2019 for actions she could take during visits, including comforting the crying baby and ways to engage the children during Facetime visits. When the petition was filed in October, the Mother had had a number of positive drug screens, and positive screens after the petition was filed were what prompted her to go into inpatient treatment. While she was currently doing well, the question remained as to whether she could take care of herself and the children. The Cabinet argued that she could not. She had not provided essential care and protection, or necessities for the children. She could not take care of the children during the visits. Therefore, the Cabinet requested that parental rights be terminated.

The children's GAL questioned whether the Mother had the innate ability to nurture and care for the children. He did not know if she could do this with two children. He recommended terminating her rights not due to lack of

effort but because of lack of ability. This was not her fault or malicious on her part; she lacked the ability to do what was needed to be done for the two young children.

Following the hearing, the Mother moved the court to consider additional evidence, stating that after the hearing but before a ruling was entered, the Cabinet stopped in-home visits. This, she asserted, further illustrated the Cabinet's refusal to work with the Mother towards a goal of reunification.

At the hearing on the motion, the Mother said that visits were moved back to the Cabinet's office. The Cabinet agreed that the visits were moved back to the office and offered an explanation as to the safety issues that came out during the hearing, including one of the children falling off a stool and jumping on the bed. The Cabinet was not sure what additional evidence would be required, other than what the Mother stated in the motion. The GAL objected to the motion, noting that the Mother had had years to get everything done. What happened after the hearing did not affect whether the Mother failed to do the things she needed to do and whether her lack of efforts supported termination. The GAL noted it was normal policy for the Cabinet to stop visits because termination was pending, stating that the emotional well-being of the children was at issue. This information, the GAL argued, was not relevant to the court's decision. The court denied any further hearing as to the additional evidence, noting that it would not be

something it would consider for the final decision. The Cabinet was permitted to have visitation at its discretion, and that had not changed. The court would not have considered the Cabinet's reasons for changing visitation as part of its consideration but would assume it had a good reason to do so. It did not need the later evidence to make a decision. The court orally denied the motion and entered a written order memorializing its oral ruling on November 9, 2021.

Also on November 9, 2021, the court entered its findings of fact and conclusions of law and, separately, orders terminating the Mother's parental rights. The court found that the Mother had failed to provide the children with essential parental care and protection, and there was no reasonable expectation of improvement, considering the age of the children. The court also found that the Mother, for reasons other than poverty alone, had failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being, and that there was no reasonable expectation of significant improvement in her conduct in the immediately foreseeable future, considering the children's ages. The court granted custody to the Cabinet with the authority to place them for adoption. These consolidated appeals now follow.

On appeal, the Mother asserts that the Court's finding that the Cabinet had rendered or attempted to render all reasonable services to reunite the family

was clearly erroneous. The Cabinet disputes this argument and contends that the family court's decisions should be affirmed.

In *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204 (Ky. 2014), the Supreme Court of Kentucky addressed the involuntary termination of parental rights, recognizing the concern such cases raise and setting forth the statutory elements the Cabinet must establish:

> The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). The U.S. Supreme Court has unequivocally held that a parent has a "fundamental liberty interest" in the care and custody of his or her child. *See*, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). This fundamental interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . ." *Id*. at 754-55, 102 S. Ct. 1388. Therefore, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id*.
>
> The Commonwealth's TPR [involuntary termination of parental rights] statute, found in KRS 625.090, attempts to ensure that parents receive the appropriate amount of due process protections. KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3)

> at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

*K.H.*, 423 S.W.3d at 209.

In *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998), this Court discussed the applicable standard of review and recognized:

> 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 [Kentucky Rules of Civil Procedure (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).

More recently, the Supreme Court of Kentucky stated:

> "Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." [*Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).] Due to the

> fact that "termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome." [*D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012).]

*K.H.*, 423 S.W.3d at 211.

Turning to the statutory requirements, the first prong of the three-part test requires that the child is or has been adjudged to be an abused or neglected child pursuant to KRS 625.090(1)(a). KRS 600.020(1) defines an "[a]bused or neglected child" as "a child whose health or welfare is harmed or threatened with harm when":

> (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:
>
> > 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
> >
> > 2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
> >
> > 3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including but not limited to parental incapacity due to a substance use disorder as defined in KRS 222.005;

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

7. Abandons or exploits the child;

8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being.[1] A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the

[1] The latest version of this subsection, effective April 1, 2022, includes an expanded first sentence, indicated here by italics: "Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being *when financially able to do so or offered financial or other means to do so*."

> cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months; or
>
> 10. Commits or allows female genital mutilation as defined in KRS 508.125 to be committed[.]

In the present case, the Mother stipulated to neglect in the juvenile cases, and the family court made independent findings that both children were abused and neglected based upon the Mother's drug use while pregnant with Child 2. She has not sought review of this finding, and we shall not disturb these findings.

Next, the court must find the existence of one or more grounds listed in KRS 625.090(2) related to parental unfitness. These grounds 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;

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights; or

> (k) That the child has been removed from the biological or legal parents more than two (2) times in a twenty-four (24) month period by the cabinet or a court.

The court found that the Mother was incapable of providing essential parental care and protection for the children and there was no reasonable expectation of improvement (KRS 625.090(2)(e)), and that she was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being, and there was no reasonable expectation of significant improvement in the immediately foreseeable future (KRS 625.090(2)(g)). The court detailed the reasoning for these findings at length in its findings of fact. These reasons included the Mother's history of drug use both during and after Child 2's birth, the Mother's need for support in her day-to-day activities, and her inability to control and protect the children during visitations. While we question whether substantial evidence supports these findings, the Mother does not appear to contest these findings in her brief.

Finally, in considering the best interest of the child, as well as the existence of a ground for termination as set forth above, the family court must consider the factors set forth in KRS 625.090(3), which include:

> (a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability 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.

Crucial to our decision is whether the Cabinet made reasonable efforts to reunite the Mother with the children pursuant to KRS 625.090(3)(c). "Reasonable efforts" is defined in KRS 620.020(13) as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home[.]"

"Preventive services" is defined in subsection (12) of that statute as "those services which are designed to help maintain and strengthen the family unit by preventing or eliminating the need for removal of children from the family[.]" And "[r]eunification services" is defined in subsection (14) of that statute as "remedial and preventive services which are designed to strengthen the family unit, to secure reunification of the family and child where appropriate, as quickly as practicable, and to prevent the future removal of the child from the family[.]"

The Mother, as she did below, argues that the Cabinet had not rendered or attempted to render all reasonable services to reunite the family prior to filing the petitions to terminate her parental rights pursuant to KRS 625.090(3)(c). Instead, she argues that the Cabinet had "made up their minds" once the petitions were filed that the Mother would not be reunited with the children, regardless of what she did. She argues that the Cabinet had "offered her two 'token' visits prior to the Termination of Parental Rights trial merely to come up with some reasons to nitpick her parenting[.]"

The Cabinet, in turn, argues that the statute requires that the Cabinet make reasonable efforts prior to filing the petition, not after. And the evidence establishes that prior to the filing of the petitions in October 2020, the Cabinet had offered many services, including parenting education, drug screenings, substance abuse treatment, case management, counseling, a psychological evaluation, and

supervised visitation. In addition, Ms. Brod testified about her attempts to offer coaching and advice to the Mother in order to strengthen her parenting skills, but the Mother failed to implement these recommendations.

As we consider this factor, we are mindful of the fundamental liberty interest at stake in a parent's care and custody of his or her child:

> The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). The U.S. Supreme Court has unequivocally held that a parent has a "fundamental liberty interest" in the care and custody of his or her child. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). This fundamental interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . ." *Id*. at 754-55, 102 S. Ct. 1388. Therefore, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id*.

*K.H.*, 423 S.W.3d at 209.

Here, we cannot hold under the circumstances of this case that the Cabinet had rendered or attempted to render all reasonable services to reunite the family prior to filing the petitions to terminate the Mother's parental rights. The record establishes that the Mother has made great efforts to follow the recommendations of the counselors and other supportive agencies by successfully completing drug treatment, completing parenting classes, and securing housing and

employment. Ms. Skaggs and Ms. Yoebstl both testified that the Mother was doing well and would benefit by receiving ongoing support. Certainly the COVID-19 pandemic hindered the Mother's ability to visit with the children in person and practice the skills she had learned in parenting classes prior to the filing of the petitions. And we note that the basis for the children's removal and the finding of abuse and neglect – the Mother's drug use – no longer appears to exist as she has completed the appropriate treatment programs.

In our view, termination of the Mother's parental rights was premature. Once the Mother has been provided all available reasonable services, the family court may revisit the termination issue, if appropriate. But at this time, there is not sufficient evidence to establish that the Cabinet had made the necessary reasonable efforts to reunite the family. Therefore, we hold that the family court's decision to terminate the Mother's parental rights is not supported by clear and convincing evidence.

For the foregoing reasons, the orders terminating the Mother's parental rights to the children are vacated, and these matters are remanded for further proceedings in accordance with this Opinion.

MCNEILL, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

DIXON, JUDGE, CONCURRING IN RESULT: I write separately merely to address a few additional points. This case presents an unusual set of circumstances, due in large part to a pandemic disrupting the entire court system. And, given the gravity of termination of a parent's constitutional right to raise one's own child, breaking the bond of the parent-child relationship "is a scrupulous undertaking that is of the utmost constitutional concern." *Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

It cannot be understated that parental rights are sacrosanct in the United States. Herein, what proof was presented sufficient to break this constitutionally protected right? The Cabinet filed its petition for TPR in October 2020, alleging as its basis that the children had been removed because: Mother's newborn tested positive for drugs at birth; Mother tested positive on random drug screens on two occasions; Mother had no housing; and Mother is "low-functioning." Had a pandemic not intervened, I doubt I would disagree with the family court that sufficient evidence supported termination at that time. However, during the necessarily protracted court proceedings, Mother used that time to, in every way, comply with the Cabinet's mandates. Remarkably, the Cabinet's own witnesses established Mother had completed in-patient treatment and all necessary counseling, received negative drug screens since treatment, and done everything asked of her. Moreover, Mother obtained and maintained employment and suitable

housing – even without the assistance of the Cabinet or other provider. The only witness supporting termination was the Cabinet's employee, Heather Brod. What were Brod's concerns? First, during two Facetime visits, Brod testified that Mother was unable to keep the attention of a one-year-old and a three-year-old, certainly no easy task. Mother was only permitted two in-home supervised visits, during which Brod expressed concern that Mother allowed the children to jump on a bed and sit on bar stools unaccompanied and that Mother had not locked the door after Brod brought the children into Mother's apartment. I sincerely doubt this is uncommon for even the best of parents. To further bolster her position, Brod criticized Mother for asking Brod to watch the children while Mother went to the bathroom. Brod's position was that she was only there to observe. However, as the children were apparently required to remain under observation at all times, what other choice did Mother have? Surely, the greater danger would have been in not asking for Brod's help. I would note that both of these visits occurred within two weeks of the TPR hearing and well after the Cabinet sought termination and, therefore, could not have factored into the Cabinet's decision to seek TPR. It is rare that these facts would even be mentioned in a TPR action. Most cases involve clear abuse and/or neglect. This is not to say Brod's concerns are not genuine and noble; however, her insistence that Mother was incapable of caring for her children based upon these facts seems specious. Could Mother be a better mother?

Probably. However, contending that Mother's parenting classes, attended a year-and-a-half before the termination hearing, had not helped her parenting appears rather unfair in light of Mother's later significant improvement. Unquestionably, the allegations made in the Cabinet's petition no longer existed at the time of the termination hearing. Nor did the basis for the finding of abuse and neglect – drug use – exist by the time of the termination hearing. Additionally, both Yoebstl and Skaggs testified there were additional services which would assist Mother's parental skills. Consequently, any determination that all Cabinet and provider services had been offered to Mother is clearly incorrect.

Moreover, even Brod acknowledged Mother was capable of caring for one child. While I understand the desire to keep both sisters together, I question that such trumps Mother's constitutional protection to parent at least one of her children. This case also leads me to question the sincerity of our system. If a parent does all that is asked of them, why is that not enough? I also question the judicial system's right to determine that termination is appropriate when none of the allegations in the original petition requesting removal of the children currently exist. Essentially, the family court has determined that even though Mother has complied with every demand made of her, she nevertheless is incapable of caring for her children on a basis that is merely speculative. I believe this basis for termination is clear error.

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