

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001944-ME

T. W., FATHER AND  
C. W., MOTHER

APPELLANTS

v. APPEAL FROM GALLATIN CIRCUIT COURT  
HONORABLE LINDA R. BRAMLAGE, JUDGE  
ACTION NO. 09-J-00059

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF  
KENTUCKY AND J. W., A CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

LAMBERT, JUDGE: T.W. and C.W. appeal from the Gallatin Family Court's  
order finding neglect of their infant child, J.W. After careful review, we affirm.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On July 28, 2009, Andrea Sullivan, a case worker from the Kentucky Cabinet for Health and Family Services, filed a petition for neglect in the Gallatin Family Court against T.W. and C.W., alleging neglect of their infant child, J.W. On August 6, 2009, the court conducted an arraignment hearing, and on September 17, 2009, the court held a bench trial. At the August 6, 2009, hearing the evidence presented was as follows:

- On July 23, 2009, T.W. was arrested for cultivation of marijuana over five plants, first offense. Marijuana was found inside and outside the home.
- The Cabinet received a referral that J.W., a minor, was in the house at the time of the arrest and that C.W. was believed to be under the influence at the time of the arrest.
- The arresting officers asked C.W. to turn over the child to a relative and C.W. complied with this request.
- On July 24, 2009, C.W. admitted to smoking marijuana at least once a week and then caring for the child. She also admitted to taking a valium not prescribed to her and reported that her husband also smokes marijuana and then cares for the child.

T.W. and C.W. denied the allegations and a trial was set for September 17, 2009.

At trial, the Cabinet called two witnesses, Trooper Bradley Arterburn and Ms. Andrea Sullivan. Trooper Arterburn went to visit T.W. and C.W. at home on the night of July 23, 2009. The police were responding to a complaint filed by

Gary Hutcherson, who claimed he had a fight with T.W. the previous evening and observed marijuana growing in T.W.'s home.

The officers questioned T.W. about Hutcherson's complaint, and T.W. admitted that a fight had occurred when Hutcherson attempted to take some of T.W.'s medicine, which he stored in the basement. The officers asked T.W. if they could see the basement, and T.W. showed them the basement. There the officers found one marijuana plant and subsequently found more marijuana plants growing in the back yard. The officers found drug paraphernalia, including a bong and grinder in another part of the house. T.W. admitted to owning the plants, the bong, and the grinder.

The officers questioned T.W. and C.W. about smoking marijuana. They admitted smoking marijuana, but claimed that they had not smoked it on that particular night, July 23, 2009. Trooper Arterburn observed that C.W. had glassy, bloodshot eyes and responded slowly to his questions, which he believed to be signs of marijuana impairment. Trooper Arterburn did not observe any signs of marijuana impairment from T.W., other than nervousness.

The officers arrested T.W. for cultivation of marijuana, but did not arrest C.W. because she did not have any drug-related items on her person, and because T.W. had indicated that he owned the plants and paraphernalia. Trooper Arterburn indicated that he did not observe any other problems with the condition of the home.

The officers called the Cabinet to get a recommendation for the disposition of the child for the night. According to Arterburn, the agency recommended that the child should be removed for the night, and arrangements were made for C.W.'s sister to take the child for the night. Trooper Arterburn testified that he had concerns about the parents caring for the child, given that they were both smoking marijuana regularly and were growing it in their home. However, Trooper Arterburn also testified that the parents gave no indication to the officers as to when or how often they smoked marijuana, only that they had done so in the days prior to the night in question.

Andrea Sullivan testified that on the day after T.W.'s arrest, July 24, 2009, she received a referral about allegations of marijuana being grown in T.W.'s home and about T.W. and C.W. being under the influence. Ms. Sullivan interviewed C.W., who admitted to smoking marijuana once a week with her husband and admitted smoking marijuana the day before her husband's arrest. She also admitted to having taken valium medication that was not prescribed to her on the evening of T.W.'s arrest.

As part of the interview, C.W. agreed to a "prevention plan," in which she agreed that J.W. would not be unsupervised until further notice, that she would not use illegal drugs or un-prescribed medications, and that T.W. would speak to Ms. Sullivan before being around J.W., due to his current incarceration. Following the interview, C.W. remained in possession of J.W.

On July 29, 2009, Ms. Sullivan also interviewed T.W. According to her, T.W. admitted to raising marijuana in the home for his personal use, smoking it once a day, and testified that he had probably smoked marijuana while taking care of J.W. He estimated that C.W. probably smoked marijuana four to five times a week. He agreed to a prevention plan, which consisted of him agreeing not to smoke marijuana and only taking medications prescribed to him.

Ms. Sullivan testified that there were no other concerns about the safety and care of the child, other than the marijuana use by both parents. She had no other concerns about the home itself or the child remaining in the home, other than the drug use.

At the conclusion of the trial, the family court found that T.W. and C.W. were knowingly growing and smoking marijuana in the presence of their child and that such conduct amounted to neglect. The court found that T.W. and C.W. were able to care for their child, but the marijuana use put the child at risk and was a threat and harm. This appeal now follows.

Family Courts have broad discretion in determining whether a child is being abused or neglected. *See R.C.R. v. Commonwealth*, 988 S.W.2d 36, 38 (Ky. App. 1998) (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). Kentucky's juvenile code provides at Kentucky Revised Statutes (KRS) 600.100(3) that the Commonwealth bears the burden of proving dependency, neglect, or abuse of a child by a preponderance of the evidence. *See* KRS 620.100(3).

A careful review of the record indicates that the Commonwealth met its burden in this case. KRS 600.020 defines an abused or neglected child as:

(1) [A] child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child . . .

(b) 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.

In the instant case, the direct testimony of both the investigating officers and the parents was that both parents admitted to growing and using marijuana and un-prescribed medications in J.W.'s presence. Furthermore, after the fact, both parents admitted their conduct to child services in their interviews with Ms. Sullivan. Because there was direct evidence of criminal activity in J.W.'s presence, it was not unreasonable for the family court to conclude that the child was at risk for physical and emotional injury, and the parent's actions were not in J.W.'s best interests. Thus, the family court's finding of neglect was supported by the evidence in the record, and the Cabinet met its burden.

Therefore, we affirm the September 17, 2009, order of the Gallatin Family Court finding neglect.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Alec J. Ott  
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BRIEF FOR APPELLEE:

John G. Wright  
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