

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

NO. 2010-CA-002004-ME

T.K.

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE  
ACTION NO. 09-AD-00028

CABINET FOR HEALTH AND  
FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY;  
D.S.K., AN INFANT; AND M.D.K.,  
AN INFANT

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

KELLER, JUDGE: The Boyle Family Court terminated the parental rights of T.K. (the mother) and J.K. (the father) to their children, D.K. (the son) and M.K. (the daughter). The mother's termination rights are the only ones at issue because the

father has not appealed the decision terminating his parental rights. For the following reasons, we affirm.

### FACTUAL BACKGROUND

On November 7, 2008, the Cabinet for Health and Family Services (the Cabinet) received a call from the Boyle County Police Department stating that drugs, marijuana, and drug paraphernalia were present in the parents' home within easy reach of the children, and that there was minimal food in the home. At the time, the son was five years old, and the daughter was almost two years old. Because the mother and father agreed for the children to be placed with their paternal grandmother and step-grandfather, a nonremoval petition of neglect was filed in the Boyle Family Court. Pursuant to an agreed upon prevention plan, the mother and father were only allowed to have supervised visits with the children. On or about January 16, 2009, the children were placed in foster care after it was discovered that the mother was having unsupervised visits with the children in violation of the prevention plan.

At a hearing held on August 17, 2009, the family court concluded that, based on the parents' lack of progress in completing their case plans, the Cabinet was no longer required to make reasonable efforts to reunify the children with them. On December 4, 2009, the Cabinet filed a petition for involuntary termination of parental rights in the Boyle Family Court against the mother and father. On December 23, 2009, the mother filed a motion to reinstate reasonable efforts to reunify the family, and the family court denied her motion. On July 9, 2010, the

mother again filed a motion to reinstate reasonable efforts to reunify the family, and the family court denied her motion.

A bench trial was subsequently held on August 27, 2010, and on October 27, 2010, the family court issued its findings of fact, conclusions of law, and orders terminating the parental rights of the mother and father to their children. The following is a summary of the testimony and evidence presented at trial that is relevant to this appeal.

### 1. Gayle Learned

Gayle Learned (Learned), a social service clinician for the Cabinet, testified by deposition as follows. On November 7, 2008, Learned was “on call” for the Cabinet when she received a call from the police that drugs and drug paraphernalia were present in the parents’ home within the reach of the children, and that there was not adequate food in the home. After receiving the call, Learned went to the home and found the father there with the police and his two children. The mother was not present. The father told Learned that the mother had left their home, and that she had not returned when he thought she would. The father also explained that he became agitated because the children were asking for food, and the mother had the food stamps. The father told Learned that, after he found some prescription drugs and drug paraphernalia within the reach of the children, he contacted the police.

Learned testified that she went upstairs and looked in the master bedroom. The police had already retrieved the marijuana and drug paraphernalia. However,

Learned observed a couple of pill bottles on the window sill within easy reach of the children, and one of the bottles was tipped over with pills coming out of it.

Learned also testified that the daughter followed her upstairs, grabbed a pill from the window sill, and that she had to retrieve the pill from the daughter.

Learned further testified that approximately thirty minutes after she arrived, the mother returned to the home with an unidentified adult male. Learned testified that the police searched the vehicle the mother arrived in and found approximately eight Lortabs in an unmarked prescription bottle between the front seats of the vehicle. The mother denied that the pills were hers; however, she was criminally charged with their possession. Finally, Learned testified that as a result of the November 7, 2008, incident, she filed a nonremoval petition of neglect in the family court.

## 2. Virginia Jones

Virginia Jones (Jones) testified by deposition to the following. From December 2008 to approximately late May or early June of 2009, she was the ongoing case worker assigned by the Cabinet to work with the mother and father. Jones testified that under the initial prevention plan, the children were placed with their paternal grandmother and step-grandfather, and that the mother and father were allowed to have supervised visitation with the children. However, the prevention plan was violated when the grandmother permitted the mother to have unsupervised visits with the children. Thus, in January 2009, the Cabinet placed the children in foster care.

Jones further testified that the Cabinet developed case plans with the mother and father to work toward reunification. The case plans required the mother and father to maintain stable housing; cooperate with the Cabinet; complete a substance abuse assessment; complete a mental health assessment; comply with random drug screens; attend visitations with the children; and participate in an assessment with the University of Kentucky's Comprehensive Assessment and Training Services (CATS) clinic.

Jones testified that the mother and father did not complete the tasks in their case plans. Both parents often missed scheduled visitations with no warning or explanation. Jones testified that it became necessary to have one or both of the parents arrive at scheduled visits at least one hour early to confirm that the visit would take place because the son would get very upset when they did not attend scheduled visitations. Jones also testified that the parents' supervised visits with the children were often chaotic, and that the mother often wanted to clean the visitation room as opposed to sitting and talking with the children.

Jones further testified that the mother only sporadically submitted to her random drug screens, several of which were positive. Furthermore, the mother did not complete a substance abuse assessment or a mental health assessment. Additionally, the CATS clinic refused to assess the mother and father because of their failure to consistently attend scheduled visitations and submit to drug screens. Finally, Jones testified that while she was the ongoing caseworker, the mother lived with her boyfriend. She testified that because the boyfriend had a prior

history with the Cabinet, and had an extensive history of drug use, the Cabinet asked the boyfriend to submit to drug screens, which he refused. Jones testified that the boyfriend had to comply with drug screenings before the children could reside with the mother in the boyfriend's home.

### 3. Jeanne McQuerry

Jeanne McQuerry (McQuerry), a social services clinician for the Cabinet, testified at trial that she assumed responsibility of the mother's and father's case plans from Jones in June 2009. McQuerry testified that there had been twenty-three referrals to the Cabinet regarding this family, with the first referral beginning in April 2001. McQuerry testified that not all the referrals were substantiated. However, McQuerry cited a previous substantiation for neglect in November 2001 based upon a serious car accident in which the mother and her other daughter from a previous relationship<sup>1</sup> were involved. The mother and her other daughter were passengers in the vehicle, and the other daughter was not in a child restraint seat. The driver's child, who was also not in a child restraint seat, was killed. The driver was apparently under the influence of drugs and alcohol.

In March 2004, the mother stipulated to dependency because she was unable to take care of her children due to ongoing pain she was experiencing from injuries she received from previous car accidents. In April 2004, there were substantiated spouse abuse charges against both the mother and father and both were reportedly intoxicated and on drugs. Additionally, there was a substantiation of neglect in

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<sup>1</sup> The other daughter is in the custody and care of her paternal grandmother.

August 2006 against the mother and father after police found drugs in their bedroom; the mother admitted to smoking marijuana while pregnant with the daughter; and the son described in detail the mother's use of cocaine.

McQuerry also testified that in June 2009, she and Kurt Fogle (Fogle), who also works for the Cabinet, conducted a routine home visit of the mother's and father's home. Fogle found a marijuana roach on the floor of the living room and a pill on the floor of the bedroom, which the father identified as Xanax.

McQuerry further testified regarding the mother's and father's case plans. She stated that there were problems with visitations and that the mother talked with the people supervising the visits more than she did with her children. In addition to problems with visitations, the mother and father did not complete a substance abuse assessment and refused to sign the case plans because they did not want to participate in the CATS assessment. Furthermore, McQuerry confirmed Jones's testimony that the CATS clinic refused to assess the mother and father until they were clean from drugs for at least one month.

Additionally, Steve Hutt, Certified Alcohol and Drug Counselor for Comprehensive Care Center, wrote a letter to McQuerry on December 29, 2009. The letter stated that, out of twenty-one appointments, the mother only kept five of them. Specifically, the mother failed to attend or notify him that she was not attending on twelve occasions, and she cancelled the other four. Hutt stated that he was considering not giving the mother future appointments if she did not start keeping them.

As to her random drug screens, McQuerry testified that the mother did not begin calling in consistently and testing negative for drugs until July 9, 2010. Prior to that time, the mother was sporadically compliant with her drug screens, and she frequently tested positive for benzodiazepines, amphetamines, opiates, and THC. She also tested positive on a few occasions for cocaine and once for methadone. McQuerry testified that if the mother produced valid prescriptions to the drug testing facility, positive drug tests for prescription medications were not counted as positive results.

Finally, McQuerry testified that she did not think it was in the children's best interests to continue the reunification plan. Specifically, she testified that she believed the mother and father would not meet the children's needs for safety and supervision.

#### 4. Heather Prather

Heather Prather (Prather), a therapist for Comprehensive Care Center, testified at trial that she began providing weekly therapy to the son in January 2010. In Prather's opinion, the son was doing well in school and at his foster home. Additionally, Prather testified that the son told her that the mother was mean to him and made him clean and take care of the house. The son also told her that he felt safer with his foster family and hoped they would adopt him. Prather further testified that the son sometimes suffers from anxiety related to permanency issues in his life, and that he had experienced nightmares and worries related to fears that his parents would kidnap him.



## 5. Foster Mother

The children's foster mother testified at trial that the children were placed in her home on January 16, 2009. She testified that, when the son first arrived at her home, he did not "know how to be a kid." Specifically, the son always wanted to work or sweep instead of play. However, both children are doing well and have made great progress since they began living in her home.

The foster mother further testified that the children are well-bonded with her and her husband, as well as the other children in their home. Additionally, she and her husband adopted another sibling group and are interested in adopting the children if they become available for adoption. Finally, the foster mother testified that, of their own volition, the children call their biological parents by their first names.

## 6. Grandparents

The children's paternal step-grandfather testified that the children were always well-fed, had good clothes, and that the mother kept a clean house. Similarly, the children's paternal grandmother testified that the mother kept the house clean, made sure the children were fed and clean, and took better care of the children than the foster parents. Finally, the children's paternal grandfather testified that the mother took good care of the children, the children were always clean, and the mother kept a clean house.

## 7. Harold Tokle

Harold Tokle (Tokle), the mother's therapist, testified that he began seeing the mother weekly or bi-weekly in April 2010, regarding her parenting and substance abuse issues. Tokle believes that the mother has made progress and is suited to parent her children.

#### 8. The Mother

The mother testified at trial that she is in therapy with Tokle and has tested negative for drugs since July 2010. She testified that she had difficulty making it to the scheduled visitations with her children because of the pain she suffered from injuries she received in car accidents. Additionally, the mother testified that she did not have a driver's license and often did not have access to transportation. The mother explained that the father could not drive her because he went to Louisiana to work for a period of time after the children were removed from their home. Additionally, her father-in-law, who was her usual source of transportation, had a transmission problem with his vehicle and had severe back pain which made it difficult for him to drive her to visitations.

The mother further testified that she is living with her father-in-law and that she and the father are in the process of reconciling. However, the mother did acknowledge that she filed a domestic violence petition against the father in March 2010.

We set forth additional facts as necessary below.

## STANDARD OF REVIEW

The standard of review in a termination of parental rights case is set forth in *M.E.C. v. Commonwealth, Cabinet for Health & Family Services*, 254 S.W.3d 846, 850-51 (Ky. App. 2008), as follows:

[T]his Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record.

Furthermore, although termination of parental rights is not a criminal matter, it encroaches on the parent's constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met. 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. It is a very serious matter.

(Citations omitted).

## ANALYSIS

On appeal, the mother argues that the family court erred in terminating her parental rights. As set forth below, we disagree.

Kentucky Revised Statute(s) (KRS) 625.090 governs involuntary termination of parental rights proceedings. This statute permits a family court to terminate parental rights only under limited circumstances. First, the family court

must find by clear and convincing evidence that a child is or has been previously adjudged abused or neglected. KRS 625.090(1)(a). The court must also find by clear and convincing evidence that termination would be in the child's best interest. KRS 625.090(1)(b). Finally, the family court must find by clear and convincing evidence the existence of one or more of the grounds for termination that are enumerated in KRS 625.090(2)(a)-(j).

In its orders terminating the mother's parental rights, the family court concluded that the children were abused or neglected children as defined in KRS 600.020(1). The family court also found that the mother had failed to provide essential parental care and protection for the children for a period of not less than six months, and that there was no reasonable expectation of improvement in her parental care and protection considering the age of the children. KRS 625.090(2)(e). Additionally, the family court found that the mother had continuously or repeatedly failed, for reasons other than poverty alone, to provide food, clothing, shelter, medical care, or education reasonably necessary for the child's well-being, also finding no reasonable expectation of significant improvement in her conduct in the immediately foreseeable future. KRS 625.090(2)(g). Finally, the family court concluded that termination of the mother's parental rights was in the best interests of the children.

The mother contends that there was not substantial evidence to support the family court's finding that grounds for termination existed and that termination of her parental rights was in the best interests of the children. KRS 625.090(3)

provides that in determining the best interest of the child and the existence of a ground for termination, the family court shall consider the following factors:

(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. . . .

With these factors in mind, we address the mother's arguments.

We believe that the record supports the family court's finding that termination of parental rights was in the best interests of the children. As noted by the family court, McQuerry and Jones testified that the mother did not complete her case plan. After the children's removal, the mother continued to abuse drugs and was only sporadically compliant with drug screens. Additionally, the mother did not complete a substance abuse assessment or a mental health assessment, and she refused to sign her case plan because she did not want to participate in the CATS assessment. Furthermore, the mother's failure to have negative drug

screens resulted in a rejection of her referral to the CATS clinic. The mother also missed sixteen out of twenty-one appointments with the certified alcohol and drug counselor from Comprehensive Care Center.

Furthermore, the mother only sporadically attended scheduled visits with the children. The mother argues that she missed scheduled visitations because she lacked access to transportation. However, this does not explain the mother's frequent failure to call to say she was going to miss a visit. Furthermore, there was testimony that even when the mother did attend a visit, she was not engaged with the children and talked with the workers supervising the visits more than she did with her children.

As noted above, the son's mental health therapist, Prather, testified that the son did not wish to return to the care of his parents; he wanted to be adopted by his foster parents; and he experienced nightmares and worries related to fears that his parents would kidnap him. Additionally, the children's foster mother testified that the children had made great progress since coming to live with her, and that she and her husband are interested in adopting the children.

We note that the mother did finally begin mental health and substance abuse treatment with Tokle in April 2010, and that she has tested negative on her drug screens since July 2010. However, there was substantial evidence to support the family court's finding that termination of the mother's parental rights was in the best interests of the children.

We also believe that, based on the mother's failure to complete her case plan and her history of substance abuse, there was substantial evidence to support the family court's finding that the mother failed to provide essential care and protection for her children for a period of not less than six months, and that there was no reasonable expectation of significant improvement. KRS 625.090(2)(e).

Furthermore, we believe the record supports the family court's finding that, pursuant to KRS 625.090(2)(g), for reasons other than poverty alone, the mother failed to provide the children's necessities and that there is no reasonable expectation of significant improvement in her conduct. Specifically, we believe there is substantial evidence to support the family court's finding that the mother is incapable of providing essential shelter for the children. As testified to at trial, the mother and father have a tumultuous relationship that is on again and off again. At the time of the children's removal in November 2008, the father had recently moved back in with the mother. Jones testified that while she was the ongoing caseworker, the mother lived with her boyfriend, and that based on his history, the boyfriend would have to submit to drug screens in order for the children to be returned to the mother in that home. At the time of trial, the mother was living with her father-in-law, and she and the father were reconciling.

In support of her argument that there was not substantial evidence to support this finding, the mother points to the testimony of the children's grandparents that the mother kept the house clean, kept the children fed and dressed, and took better care of the children than the foster parents. Although the grandparents testified

favorably for the mother, “the trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it.” *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). Thus, based on the mother’s substance abuse history and her instability in relationships and living arrangements, there was substantial evidence to support the family court’s finding that the mother had previously failed to provide the children’s necessities and that there is no reasonable expectation of significant improvement in her conduct.

Next, we note the mother’s argument that the trial court erred in terminating her parental rights because her case is factually similar to *M.E.C. v. Commonwealth*, 254 S.W.3d 846 (Ky. App. 2008). In *M.E.C.*, the Cabinet removed M.E.C.’s two children. The Cabinet’s case plan for M.E.C. required her to undergo a psychiatric evaluation and a drug assessment, follow any recommended treatment, maintain a bond with her children, complete parenting classes, obtain safe and secure housing for her family, and resolve her legal issues. Subsequently, M.E.C. suffered a nearly fatal car accident and underwent multiple, lengthy hospitalizations. She was also incarcerated on four occasions, always for brief periods. Despite her periods of hospitalization and incarceration, M.E.C. attempted to complete her parenting classes and substance abuse treatment, and visited her children whenever possible. Nevertheless, the Cabinet changed its goal from reunification to termination of parental rights eight months after the children were removed. *Id.* at 848-50.



The case was tried almost eighteen months after the children were removed. At the time of the trial, M .E.C. had resolved almost all of her legal issues, was employed, and had paid some of her child support. The trial court granted the Cabinet’s termination petition, and M.E.C. appealed. *Id.* at 850. This Court found that the Cabinet failed to prove that M.E.C.’s children were abused and neglected, that reasonable services were provided to reunify the family, and that there was no reasonable expectation of improvement in her situation. *Id.* at 854.

This Court also concluded that “the Cabinet failed to meet its burden for establishing grounds for termination because all of its [court] testimony focused on past behavior without any significant evaluation of future parenting capacity.” *Id.* at 855. This Court noted that M.E.C. had never abused her children, that her absences from them had been involuntary, and that “the Cabinet workers themselves testified as to the children’s needs being met by M.E.C.” Of further concern to this Court was the lack of services provided by the Cabinet and the haste with which the treatment goal was changed from reunification to termination. Thus, this Court vacated the judgment terminating the mother’s rights to her two children. *Id.*

The circumstances of this case are different from those presented in *M.E.C.* Case workers from the Cabinet testified that a case plan was developed for the mother, and she was offered services. However, the mother made only minimal efforts to complete her case plan or participate in the services offered. Additionally, she continued to abuse drugs from the time the children were

removed until after the Cabinet filed the petition for termination of her parental rights. Like M.E.C., T.K was involved in a car accident in June 2009 that hindered her ability to attend scheduled visits. However, unlike M.E.C., the mother in this case frequently failed to call to say that she was not going to attend a scheduled visit.

Furthermore, while the Cabinet workers in M.E.C. testified that the children were well-cared for by their mother, the Cabinet workers in this case testified that it was in the children's best interests to terminate the mother's parental rights. Also, unlike in *M.E.C.*, the family court in this case evaluated the mother's future parenting capacity. Thus, we believe M.E.C. is distinguishable from the instant case, and conclude that there was substantial evidence to support the family court's findings.

Finally, the mother argues that the trial court was clearly erroneous in failing to find that the children would not be abused or neglected if returned to her. We disagree. As set forth in KRS 625.090(5), "If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights." The mother argues that she met her burden because she began counseling with Tokle in April 2010, and, beginning approximately six weeks prior to her trial, she consistently had negative drug screens.

Although the mother has made some progress, which is commendable, we believe that she failed to prove by a preponderance of the evidence that the children would not be abused or neglected if returned to her care. Specifically, the mother has a long history of substance abuse problems. Furthermore, a Cabinet worker found a marijuana roach and a Xanax pill on the floor of the mother's home during a routine home visit nearly seven months after the children were removed from her custody. Additionally, the mother testified that she was in the process of reconciling with the father, who has never demonstrated any period of sobriety. Further, as recently as March 2010, she filed a domestic violence petition against the father.

We note that, even if the mother did prove by a preponderance of the evidence that the children would not be abused or neglected if returned to her care, the family court retained the discretion to terminate her parental rights. KRS 625.090(5). We cannot say that, based on the preceding, the family court abused its discretion.

#### CONCLUSION

For the foregoing reasons, we affirm the Boyle Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

Sheila F. Redmond  
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