

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

NO. 2012-CA-001005-ME

K.J.

APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE TAMRA GORMLEY, JUDGE  
ACTION NO. 11-AD-00041

CABINET FOR HEALTH  
AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY;  
AND S.E.J., A CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, JONES, AND MOORE, JUDGES.

MOORE, JUDGE: K.J., Mother, appeals the findings of fact, conclusions of law, and judgment of the Scott Family Court involuntarily terminating her parental rights to her child, S.E.J. After careful review of the record, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The Cabinet for Health and Family Services (the Cabinet) became involved with Mother shortly after S.E.J. was born on October 5, 2005, when Mother admitted to abusing substances, and the child's meconium tested positive for opiates, hydrocodone, benzoylecgonine, and cocaine. The Cabinet filed a petition alleging neglect on October 12, 2005, and an emergency custody order was entered the next day. The petition also noted that Mother had a number of drug charges that she had pled guilty to in September 2005,<sup>1</sup> and she had been to drug rehabilitation on three separate occasions prior to S.E.J.'s birth. On January 9, 2006, Mother stipulated to neglect of the child, and S.E.J. remained in the custody of the Cabinet.

Numerous services were offered to Mother by the Cabinet through a Prevention Plan including a substance abuse assessment, outpatient chemical dependency treatment, group and individual substance abuse counseling, detoxification programs, psychotherapy, random drug screens, alternative to use of benzodiazepine, a psychological and parenting evaluation, parenting classes, domestic violence counseling, AA/NA meetings, psychiatric and psychotherapeutic care, and medication management through a psychiatrist.

S.E.J. was returned to Mother's care on April 11, 2006. By this time, Mother had entered a detoxification program, was engaged in medication

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<sup>1</sup> Mother was later convicted of criminal attempt to possess a controlled substance (cocaine), possession of marijuana, and possession of drug paraphernalia.

management for bipolar disorder, attended individual counseling, and had been compliant with random drug screens.

A second petition for removal was filed by the Cabinet on September 13, 2007. This petition stated that on September 12, 2007, while in the caretaker role, Mother was arrested by the Georgetown Police Department for DUI, wanton endangerment, possession of a controlled substance, an open container violation, and possession of paraphernalia.<sup>2</sup> The emergency custody order also filed by the Cabinet noted that Mother had physical possession of S.E.J. in the car at the time of the arrest. At the temporary removal hearing on September 17, 2007, an order was entered finding that it would be in the best interests of S.E.J. to be placed in the custody of the Cabinet because Mother was under the influence while driving with the child in the car, was found to be in possession of a controlled substance, and had a history of substance abuse. Mother stipulated to risk of neglect on December 3, 2007, and S.E.J. was committed to the Cabinet on December 17, 2007.

Mother was again offered a substance abuse assessment, random drug screens, AA/NA meetings, a mental health assessment, ongoing substance abuse counseling, medication management, and visitation with S.E.J. Mother had been attending Comprehensive Care Therapy, AA, and had passed drug screens when the Scott Family Court returned custody of S.E.J. to her on April 21, 2008.

Additionally, Family Reunification and Preservation was offered and placed in the home when S.E.J. was returned to Mother's custody.

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<sup>2</sup> Mother was later criminally convicted of wanton endangerment (second degree), possession of a controlled substance (first degree), and DUI.

The Cabinet filed a third petition for neglect and an emergency custody order on behalf of S.E.J. just two months later on June 12, 2008, stating Mother had admitted to a worker the day before to using cocaine on May 23, 2008. Mother tested positive for cocaine when drug screened on May 19, 2008, and she got a second DUI shortly thereafter on May 27, 2008.<sup>3</sup> The petition and order noted that S.E.J. had been removed from Mother's custody three times and had been out of the home for 12 of the last 22 months. The Scott Family Court ordered on June 16, 2008, that S.E.J. was to remain committed to the Cabinet's custody, reasonable efforts for reunification with Mother were to be waived, and the permanency goal for S.E.J. was to be changed to adoption. Despite the fact that reasonable efforts were waived, the Cabinet offered various services to Mother during this removal.

According to a court report prepared by the Cabinet and filed on January 22, 2010, a termination of parental rights petition was filed on July 30, 2008. The family court ordered Mother to get into treatment at the Hope Center. Mother complied by entering the treatment facility, but she did not complete treatment. A termination hearing was held on March 6, 2009. Mother had failed to complete drug treatment by this time, but was given 30 days by the court to enter into a long-term substance abuse treatment facility and complete treatment. The family court changed the permanency goal back to return to parent on July 13, 2009. A plethora of services was again offered to Mother by the Cabinet. Mother

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<sup>3</sup> Mother was later criminally convicted of DUI for this incident.

completed her case plan, and custody of S.E.J. was granted to Mother on July 18, 2011.

Just two months after S.E.J. was returned to Mother's custody, the Cabinet filed a fourth petition for emergency custody on September 19, 2011, stating that the child was in the car with Mother on September 9, 2011, when Mother was found by the police unresponsive and slumped over her steering wheel in the parking lot of a mini-mart in Georgetown. When approached by the police, Mother had slurred speech and an unsteady gait. Mother initially denied having any drugs or alcohol in her system, but then later admitted to police that she had taken Lortab and Xanax that were prescribed to her. Mother showed impairment on all three field sobriety tests and was arrested for DUI.

The family court found S.E.J. to be in danger of imminent death or serious physical injury, that Mother has repeatedly inflicted or allowed to be inflicted other than by accidental means physical or emotional injury, and S.E.J. to be in immediate danger due to the Mother's failure or refusal to provide for the safety or need of the child. S.E.J. was placed in the emergency custody of the Cabinet and was later committed to the Cabinet on December 5, 2011. Mother agreed to make a non-specific admission to the pending allegation of neglect on November 2, 2011.<sup>4</sup> Reasonable efforts were waived during this time due to the

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<sup>4</sup> The stipulation agreement specifically stated: "The parties agree that [Mother] shall enter a non-specific admission to the pending allegation of neglect. This stipulation is not a specific admission by [Mother] that she committed the conduct alleged in the petition filed in this case on September 20, 2011. However, the stipulation is an acknowledgement by [Mother] that if an adjudication hearing is held in this matter, sufficient evidence would be presented at the hearing for the Court to make a finding of the truth of the allegations in the petition by a preponderance

length of time of involvement with the Cabinet and the history and pattern of substance abuse issues in this case.

The Cabinet instituted an involuntary termination of parental rights action against Mother on September 28, 2011.<sup>5</sup> The family court set the matter for trial on May 2, 2012.

At trial, Kelli Shore, the current social worker assigned to Mother from the Cabinet, testified to S.E.J.'s four removals from Mother's custody detailed above and Mother's use of the services offered by the Cabinet. She also testified that the University of Kentucky CATS Clinic consulted on this case and found that the prognosis for change in Mother's lifestyle was poor after a review of the records. Ms. Shore testified that there were no further services that could be offered to Mother to affect a change in Mother.

Officer Lodal, the responding officer to the September 9, 2011 events, also testified at trial. He explained that a reckless driving complaint had been received, and he was nearby. He found Mother's car parked, and she was slumped over the steering wheel. He observed S.E.J. in the back seat. Officer Lodal knocked on the driver's window several times, and there was no response from Mother. He opened the door and touched Mother to see if she would respond or if

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of the evidence. Subsequent to [Mother's] stipulation under the terms of this agreement, the Cabinet shall prepare a disposition report recommending appropriate orders of the court in the best interest of the [S.E.J].”

<sup>5</sup> At some point in time over the course of these proceedings, it was confirmed through DNA testing that Kevin Wigglesworth is the legal and natural father of S.E.J. He executed an entry of appearance waiver and consent to the voluntary termination of his parental rights and subsequent adoption of S.E.J. on September 26, 2011.

it was a medical emergency. Mother then came to, said that she was just really tired, and she and her daughter were upset because they had just given their puppy away. Officer Lodal testified that he noticed Mother had slurred speech and constricted pupils, so he asked her to step out of the car. He had to call another officer to the scene because his vehicle was not equipped with a camera that day. When the other officer arrived, Officer Lodal conducted three standard field sobriety tests with Mother which were recorded on the backup officer's vehicle camera. Mother showed impairment on all tests. She initially denied having any drugs or alcohol in her system, but then later admitted that she had taken Lortab and Xanax for which she had a prescription. Officer Lodal then explained that Mother was arrested for driving under the influence.

Mother testified on her own behalf. She testified that she could not perform the field sobriety tests adequately because her foot was injured and that she was confused by the instructions of the officer. The boot that the doctor had given her for her foot was in the back seat of the vehicle. However, Officer Lodal testified that he told Mother she could perform the tests on either foot, and that he also observed restricted pupils and slurred speech. Mother testified that she had only taken one pain pill that day, but later admitted to the court that she had Lortab and Xanax in her system. She also testified that she knew she was denied bail on September 9, 2011, because she was too intoxicated to be released. Mother testified that she had obtained Xanax on or around the day that S.E.J. was returned to her custody in July 2011.

The doctors' affidavits and prescription records obtained by the Cabinet and introduced to the court show that Mother received three different prescriptions from three different doctors and filled prescriptions for addictive narcotics from three different pharmacies between July 18, 2011, the date S.E.J. was returned to her custody, and September 9, 2011, the date of her arrest at the Georgetown mini-mart parking lot. In less than two months, Mother accumulated 280 pills. The record shows that Mother did not disclose to any of the doctors that she was a drug addict.

The family court entered its findings of fact, conclusions of law and judgment on May 25, 2012, involuntarily terminating Mother's parental rights to S.E.J. The court found that Mother has failed to protect and preserve the child's fundamental right to a safe and nurturing home and that the child was an abused and neglected child pursuant to KRS<sup>6</sup> 600.020. Specifically, the court found that in less than two months, from July 18, 2011, through September 9, 2011, Mother obtained 120 alprazolam, 130 hydrocodone and 30 tramadol. The court found that Mother continues to have a child support arrearage with the Cabinet. The court also found that for a period of not less than six months, mother has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child; that there is no reasonable expectation of improvement in parental care and protection considering the age of the child; for reasons other than poverty alone, has continuously or

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<sup>6</sup> Kentucky Revised Statutes.



repeatedly failed or refused 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 there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child. The court stated in its findings that the Cabinet had provided services to Mother, either directly or by referral, in an effort to keep the family together for over five years and the same problems continued to exist. The court found that Mother has failed to prove by a preponderance of the evidence that the child will not continue to be an abused and neglected child as defined in KRS 600.020(1) if returned to her care. Lastly, the court concluded that termination of parental rights is in the best interest of S.E.J. and that custody be transferred to the Cabinet with authority to place the child for adoption.<sup>7</sup> Mother now appeals.

### **STANDARD OF REVIEW**

“This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR<sup>[8]</sup> 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.” *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

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<sup>7</sup> S.E.J. was placed with the same foster family each time she entered foster care, and they wished to adopt her.

<sup>8</sup> Kentucky Rules of Civil Procedure.

## ANALYSIS

Mother argues on appeal that the Scott Family Court involuntarily terminated her parental rights based upon the false hypothesis and assumption that she was operating a motor vehicle while impaired with S.E.J. in the vehicle. Mother considers the DUI citation she received on September 9, 2011, as the court's primary reason for terminating her parental rights and spends a considerable amount of time throughout her appellant brief disputing the testimony and the circumstances regarding her DUI arrest. Also, Mother argues that the record does not support the family court's decision. And finally, Mother argues that Scott Family Court did not apply the clear and convincing standard to the evidence presented at trial in terminating her parental rights.

First, we must note that the issue of whether Mother was actually driving the vehicle on September 9, 2011, impaired was not before the Scott Family Court. Consequently, this issue is not before this Court.

The family court explicitly stated at trial that the court was not going to consider the most recent DUI charge against Mother. However, the facts surrounding S.E.J.'s most recent removal were relevant and involved the events that transpired on September 9, 2011. The Cabinet's petition stated Mother was found by the police unresponsive and slumped over her steering wheel, and she admitted to the police to having prescription drugs in her system at the time. It was observed by the arresting officer that Mother had slurred speech and an unsteady

gait. This incident alerted the Cabinet and the court to Mother and S.E.J.'s situation.

Next, Mother's argument that the record does not support the family court's decision to terminate her parental rights focuses on immaterial evidence that the Cabinet failed to present. Mother claims that the Cabinet failed to present evidence such as expert testimony to show tissue absorption of prescription medications to indicate how long various prescriptions stay in the bloodstream; expert testimony showing what levels of the drug would need to be in the bloodstream at 8 hours, 24 hours, or 48 hours after ingestion in order to impair a person; evidence of a current substance abuse problem through a positive drug screen during the most recent proceedings; and evidence as to why S.E.J. should not be placed with a relative temporarily. The Cabinet met its burden under the termination statute as we will discuss below, and its failure to produce this evidence suggested by Mother in no way affects the court's determination to terminate Mother's parental rights.

Finally, Mother contends that the family court did not apply the clear and convincing evidentiary standard in making its determination to terminate her parental rights. The family court may involuntarily terminate a person's parental rights pursuant to KRS 625.090 if it finds 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) the existence of one or more of the specific grounds for termination listed in KRS 625.090(2). "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.” *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998). Additionally, “[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 CR 52.01); *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

The family court heard the testimony of several witnesses at trial including: Mother, the current social worker assigned to Mother’s case, the officer who made the arrest on September 9, 2011, Mother’s husband, Mother’s son, Mother’s mental health therapist at Recovery Works, and a Cabinet worker from Lawrence County who had observed recent visitation between Mother and S.E.J. The family court also received extensive documentation regarding the long history of this case and Mother’s prescription drug records.

The finding of abuse or neglect prerequisite to termination may be a previous adjudication of abuse or neglect or a new finding of abuse or neglect. KRS 625.090(1)(a). Mother stipulated to neglect at the time of S.E.J.’s first removal shortly after her birth as she was born with drugs in her system, and Mother stipulated to risk of neglect at S.E.J.’s second removal. The family court also adjudged S.E.J. to be abused and neglected in this proceeding as defined in

KRS 600.020. Specifically, the court found that Mother created or allowed to be created a risk of physical or emotional injury to the child other than by accidental means; engaged in a pattern of conduct that renders Mother incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse; continuously or repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child; did not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being; failed 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 resulted in the child remaining committed to the Cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

It is clear from the long history of this case, as testified to by the assigned case worker, Kelli Shore, and further supported by the documentation provided by the Cabinet, that despite Mother's attempts to remedy her symptoms and control her substance abuse issues, she is unable to make the appropriate lifestyle changes to adequately parent and provide for S.E.J. At the time of trial, the child had resided in foster care for 58 out of the 79 months of her life, or approximately 5 years, due to Mother's repeated episodes of substance abuse. And from June 2008 until the time of trial, S.E.J. resided with Mother for only two months before Mother reverted back to destructive behaviors. The family court's

finding that S.E.J. is an abused and neglected child is supported by substantial evidence in the record and cannot be considered clearly erroneous.

The family court is then required to find that termination would be in the child's best interest. This is done through a consideration of factors listed in KRS 625.090(3)(a)-(f). It is apparent from the court's judgment that in its decision to terminate Mother's parental rights it considered KRS 625.090(3)(b) acts of abuse or neglect; (c) reasonable efforts made by the Cabinet to reunite the parent and child, (d) efforts and adjustments that the parent has made in his or her circumstances, conduct or conditions, and (e) the physical, emotional, and mental health of the child and the child's prospects for improvement.

The court made specific findings of abuse or neglect over the course of S.E.J.'s four removals from Mother's custody as previously mentioned. Also, the Cabinet provided testimony and documentation regarding reasonable efforts and services provided by the Cabinet to Mother since 2005. The court recognized that while Mother may complete the services ordered and provided, she has repeatedly failed to make any permanent changes to her lifestyle in order to care for S.E.J. The court also found that S.E.J. would never achieve permanency if returned to Mother's custody. Accordingly, we discern no error in the Scott Family Court's determination that termination of Mother's parental rights is in S.E.J.'s best interest.

Lastly, the family court is required to find the existence of one or more grounds for termination listed in KRS 625.090(2)(a)-(j). The family court

found that Mother for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or was substantially incapable of providing essential parental care and protection for the child, and there was no reasonable expectation of improvement in parental care and protection considering the age of the child. KRS 625.090(2)(e). The court also found that Mother, for reasons other than poverty alone, continuously or repeated failed or refused to provide or was incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well-being and that there was no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child. KRS 625.090(2)(g).

While only one finding is required under this part of the statute, the evidence supports both of the above findings. S.E.J. has been in foster care for most of her life, and Mother has demonstrated on several occasions since S.E.J.'s birth that her substance abuse issues render her incapable of providing essential care and protection to her child. It was reasonable for the court to find that there was no expectation of improvement as these same problems have repeated themselves since 2005. Therefore, the family court's grounds for termination findings are not clearly erroneous.

KRS 625.090(5) affords a parent the opportunity to prove by a preponderance of the evidence that the child will not continue to be abused or neglected if returned to the parent. However, Mother was unable to demonstrate

that she had made any sufficient progress since last appearing in Scott Family Court for the same issues which had plagued her since 2005. Mother was offered numerous chances by the court, but failed to make any significant or lasting changes to her circumstances. Mother could not explain to the court why she needed the prescription medication again on the day that S.E.J. was returned to her in July 2011 after being clean and sober for two and a half years or why she had accumulated the significant amount of addictive narcotics from July 18, 2011, until her arrest on September 9, 2011. It was reasonable for the court to conclude that S.E.J. would continue to be an abused or neglected child if returned to Mother's custody. It is clear from the record that the Cabinet proved the statutory requirements of KRS 625.090 by clear and convincing evidence, and the family court applied the clear and convincing standard in its findings of fact, conclusions of law, and judgment terminating Mother's parental rights to S.E.J. Finding no error, we affirm.

ALL CONCUR.



BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET  
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