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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-1359-ME

K.D.H. APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 20-AD-00006

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND J.A.B. APPELLEES

AND

NO. 2020-CA-1361-ME

K.D.H. APPELLANT

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 20-AD-00007

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND E.F.B. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: JONES, MAZE, AND L. THOMPSON, JUDGES.

MAZE, JUDGE: K.D.H. (Mother) appeals from judgments of the Spencer Family Court terminating her parental rights to her two children, J.A.B. and E.F.B. (children).[1] Because our review of the record convinces us that the findings and conclusions of the family court lack the support of substantial evidence, we vacate the judgment terminating Mother's parental rights and remand with directions to dismiss the termination petition.

FACTS AND PROCEDURAL HISTORY

The Cabinet for Health and Family Services received a report on January 10, 2019, concerning possible substance abuse by Mother and others residing in the home with her two children. At the time of the report, Mother and the children were living in Taylorsville, Kentucky, at the home of her maternal grandparents. Mother had previously been removed from the care of her own mother (hereinafter "maternal grandmother") and placed in the custody of her maternal grandparents who raised her (hereinafter "great-grandparents"). At the

[1] Although the parental rights of the children's father were also terminated, he has not prosecuted an appeal. Thus, the issues addressed relate only to the termination of Mother's rights.

time of the incident precipitating the Cabinet's involvement with the children, Mother and the children resided in the great-grandparents' home. Maternal grandmother was living in a shed on the great-grandparents' property and it is there that the alleged drug use occurred. As a result of Mother's positive drug screen on January 11, 2019, the Cabinet filed juvenile dependency, neglect, and abuse petitions in Spencer Family Court on January 23, 2019. At the temporary removal hearing, the family court found Mother to be indigent and appointed counsel to represent her. The family court thereafter removed the children from Mother's care and placed them in the Cabinet's emergency custody. The Cabinet then placed the children in foster care where they have remained ever since.

At an adjudication hearing conducted on February 11, 2019, Mother stipulated to having used illegal drugs. Thereafter, the family court entered adjudication orders on February 12, 2019, continuing temporary placement with the Cabinet. At a disposition hearing on February 26, 2019, the family court committed the children to the Cabinet's care and adopted its disposition recommendations. As enumerated in the judgment terminating Mother's rights, her initial case plan included:

> 1) refraining from using illegal substances;
>
> 2) calling for the Spencer County drug screen protocol Monday through Friday between 8:00 AM and 10:00 AM, screen when requested, and no-show screens will be considered positive;

> 3) attending supervised visitation with the children as scheduled;
>
> 4) participating in substance misuse and mental health assessments, providing honest information, and complying with all recommendations;
>
> 5) completing a parenting class and displaying skills learned;
>
> 6) providing documentation that all assessments, recommendations, and classes have been successfully completed;
>
> 7) obtaining stability by providing documentation of employment, appropriate housing, appropriate individuals living in the [home], and appropriate transportation.

However, on February 11, 2020, the family court changed the children's permanency goals to adoption and waived further reunification efforts based upon the Cabinet's assessment that Mother lacked progress on her case plan. The Cabinet thereafter filed a petition to terminate Mother's parental rights on March 3, 2020, alleging that Mother had abandoned the children for a period of not less than ninety days; for a period of not less than six months had continuously or repeatedly failed or refused to provide essential care and protection for her children; and for reasons other than poverty alone had continuously or repeatedly failed, or was incapable of providing, essential food, clothing, shelter, medical care or education, and there was no expectation of improvement in the immediate foreseeable future.

The family court conducted an involuntary termination of parental rights hearing virtually via Zoom on August 14, 2020. Mother was present at the virtual hearing with new private counsel. The Cabinet called only Kate Ray, a social service worker for the Cabinet's Spencer County Office, to testify on behalf of its involuntary termination petition. Mother was the only other witness to testify. After hearing the evidence adduced at the hearing, the family court directed counsel to tender proposed findings of fact and conclusions of law. On September 30, 2020, the family court entered the Cabinet's proposed findings and conclusions which terminated Mother's parental rights. This appeal followed.

ANALYSIS

We start by reiterating this Court's cogent assessment of the nature of involuntary termination proceedings set out in *F.V. v. Commonwealth, Cabinet for Health and Family Services*:

> When the government acts to terminate a parent's rights, it is not merely infringing on those rights; it is ending them. *Lassiter v. Dep't of Social Servs. of Durham Co., North Carolina*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981). Accordingly, termination of parental rights is a grave action which the courts must conduct with "utmost caution." *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008). Termination can be analogized as capital punishment of the family unit because it is "so severe and irreversible." *Santosky v. Kramer*, 455 U.S. [745, 759, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982)]. Therefore, to pass constitutional muster, the evidence supporting termination must be

> clear and convincing. 455 U.S. at 769-70, 102 S. Ct. at 1403. Clear and convincing proof is that "of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934).

567 S.W.3d 597, 606 (Ky. App. 2018). With these principles in mind, we turn to a review of the evidence offered at the termination hearing.

Ms. Ray testified that Mother was aware of her case plan tasks and that she had specifically reviewed Mother's current case plan with her over the phone in July 2020 due to the COVID-19 pandemic. Ms. Ray also testified that Mother's case plans had remained relatively unchanged except that in January 2020, she had added the requirement that Mother obtain independent housing apart from great-grandparents' residence. Regarding the drug screen protocol, Ms. Ray stated that Mother was fairly compliant with the drug screen protocol and submitted to numerous negative screens. She also stated that although there are no drug screen locations available in Spencer County, facilities were available in neighboring Shelby, Bullitt, and Jefferson Counties and that Mother had chosen to screen at Baptist Works in Jefferson County.

Although acknowledging that Mother had submitted numerous negative drug screens, Ms. Ray stated that on January 11, 2019, Mother had tested positive for amphetamines, methamphetamines, and marijuana and screened positive for marijuana on January 29, 2019, [both dates being at the very onset of

the Cabinet's involvement with the children]; and in a hair follicle test on May 31, 2019, screened positive for amphetamines and methamphetamines. She also testified that Mother had a diluted screen on March 13, 2020, and failed to call on several occasions in June and July 2020. Ms. Ray stated that had Mother screened regularly for six months with no diluted, positive, or missed screens, the Cabinet would have considered removing her from the protocol. She also noted that Mother had requested that the family court order the Cabinet to pay for her drug screens, but her request had been denied.

In addition, Ms. Ray testified as to referrals she made for Mother in June 2019 to Centerstone, a substance abuse assessment facility in Spencer County. Mother then submitted to a comprehensive assessment, both substance abuse and mental health, at that facility on August 8, 2019, which was paid for by Mother's[2] insurance. The assessment resulted in recommendations that Mother participate in and complete substance abuse classes, relapse prevention strategies, individual therapy, and protective parenting classes. Although Mother signed her treatment plan, Ms. Ray testified that she failed to follow the recommendations, stating that Mother had not completed substance abuse classes; had not developed relapse prevention strategies; is not participating in individual therapy; and had not completed protective parenting classes.

[2] The testimony indicated that Mother was covered by great-grandfather's insurance.

Although Mother reported to Ms. Ray that she could not comply with the assessment recommendations because Centerstone refused to continue to accept her insurance, Ms. Ray stated that she attempted to work with Mother to remove this obstacle by 1) giving Mother contact information for the Cabinet's Family Support Office which would assist her with obtaining Medicaid insurance to cover her Centerstone services; 2) discussing obtaining satisfactory insurance with Mother at every monthly[3] home visit until the family court waived reasonable efforts; 3) sending Mother a letter in April 2020 again providing the contact information to resolve the insurance issue; and 4) discussing with Mother the option of contacting her own private insurance to obtain a list of providers covered by her plan and then providing that list to the Cabinet for approval. Ms. Ray testified that she could not provide Mother with a list of other acceptable providers until Mother first provided her a list of providers that accepted her insurance.

Nevertheless, in the spring of 2020, Mother underwent a substance abuse assessment with a new provider which recommended she return to Centerstone to complete its recommendations from its 2019 assessment. Ms. Ray testified that on August 3, 2020, Centerstone conducted another substance abuse assessment and did not recommend ongoing substance abuse treatment. Although

[3] We note that Ms. Ray also testified that home visits had been suspended due to COVID-19 concerns.

Ms. Ray maintained that this assessment was based upon "Mother's self-reported sobriety," Mother produced a letter from that facility dated August 3, 2020 stating:

> This letter is to serve as proof that you completed biopsychosocial and substance abuse assessments via telehealth at Seven Counties Addiction Recovery Center. Your rapid UDS was negative for all illicit substances, BAL 0.000.
>
> Based upon the aforementioned assessments, you do not currently meet criteria for a substance use diagnosis or substance abuse treatment.

However, Ms. Ray complained that Centerstone did not contact the Cabinet prior to issuing its recommendation and testified that the Cabinet was concerned about the validity of that assessment and as to whether Mother was in fact living a clean and sober lifestyle.

Next, Ms. Ray testified that Mother does not have independent and reliable transportation. Although she inherited her grandmother's car in the fall of 2019, Mother does not have a valid driver's license. Ms. Ray also stated that Mother had not maintained stable employment, having worked for UPS for only 30 days between November and December 2019. Although Mother subsequently obtained a job at Value Market in Bullitt County in July 2020, she had only held that employment for approximately 30 days as of the date of trial.

Ms. Ray also testified that Mother had not obtained independent housing as required by her revised case plan. Ms. Ray stated that the Cabinet

wanted Mother to obtain independent housing because she had been residing with great-grandparents. The Cabinet alleged great-grandparents had a history of allowing maternal grandmother, who has longstanding drug addiction issues, to stay on the property. Prior investigations involving maternal grandmother caused the Cabinet to question the great-grandparents' protective capacity as they knew about maternal grandmother's drug use and yet allowed the children to be alone with her. Despite a referral to an entity that assists with housing, Mother never requested additional housing assistance from the Cabinet.

Concerning Mother's interaction with the children, Ms. Ray testified that Mother visited the children fairly consistently from June 2019 to February 2020 at the Cabinet's Spencer County office. Ms. Ray stated that she observed the visits and had concerns about Mother's lack of parenting skills including the inability to console the children or regulate their behavior. In February 2020, the Cabinet moved the visits to the Butterfly House in Shelby County due to the assessment that Mother had made minimal progress with her case plan and the family court's waiver of reasonable reunification efforts. In March 2020, the family court ordered all face-to-face visitation suspended due to the COVID-19 pandemic. During the pandemic, the Cabinet increased Mother's telephonic visitation with the children from two times per week to three times per week. However, due to the Cabinet's assessment that the conversations were not

productive, the phone calls with the children, aged four and six, were reduced from three to two times per week.

In contrast, Mother testified that she had submitted to more than 50 drug screens since January 2019 at a cost of $35 per screen at a total cost to her of $1,675.00. Although she had diluted screens in January 2020, hair follicle tests performed thereafter were both negative. She stated that she was not given the opportunity to take a hair follicle test after another diluted screen in March 2020. Nor was there any way to rebut missed calls.

Mother also testified that because no services under her case plan were provided in Spencer County, she was required to travel to three different counties to complete the services required by her case plan including drug screens, parenting classes, drug and mental health assessments. Despite the court's determination of indigency and appointment of counsel for Mother at the temporary removal hearing, the Cabinet required Mother to pay for all the services required under her case plan. Nevertheless, by October 2019, Mother had completed all her initial assessments but was unable to follow through with the recommended treatment plan because Centerstone no longer accepted her insurance and she could not afford the copay amounts. Although she was able to locate a provider that accepted her insurance, Mother stated that the provider ultimately referred her back to Centerstone. A biopsychosocial and substance

abuse assessment conducted in August 2020 was negative for all illicit substances and resulted in a determination that she did not currently meet their criteria for a substance abuse diagnosis or substance use treatment.

Concerning visitation, Mother testified that she initially had visitation with her children at a private facility known as Butterfly House in Shelbyville, Kentucky, and then the visits were moved to the Cabinet's office in Taylorsville. In February 2020, however, the visits were again moved back to Butterfly house. Mother testified that **she was required to pay Butterfly House $50 per visit to exercise supervised visitation with her children.**

In July 2020, Ms. Ray modified Mother's case plan to require that she obtain independent housing. Mother testified that she continued to live with great-grandfather[4] and that after maternal grandmother had left the premises, the Cabinet failed to raise any issue as to the appropriateness of that living arrangement. Mother testified that she does not have any relationship or contact with maternal grandmother.

On January 15, 2020, the family court entered an order imputing income to Mother and requiring her to pay $298.00 per month in child support, retroactive to November 19, 2019. Mother testified that she had made payments

[4] Apparently, great-grandmother, who had also resided in the home, passed away during the pendency of these proceedings.

each month from March through August 2020. Mother stated that she has a high school education and is currently employed by Value Market in Mount Washington earning $7.25 per hour. She also stated that she had had difficulty maintaining employment due to the drug screen protocol and assessments she was required to complete in three different counties. Concerning transportation, Mother testified that she had recently inherited an automobile from great-grandmother and that she was in the process of obtaining her driver's license.

Finally, Mother testified that the cost of visitation, child support, and drug screens presented a financial hardship for her. She also emphasized that she was clean and sober and would pass a hair follicle drug screen.

1. Statutory Authority

The authority of courts of this Commonwealth to terminate a parent's rights to the care and custody of his or her children is carefully circumscribed by the requirements of KRS[5] 625.090. Thus, our analysis of the propriety of the order terminating Mother's rights necessarily begins with the portions of that statute which are pertinent to this appeal:

> (2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

[5] Kentucky Revised Statute.

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

. . .

(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;

. . .

(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[.]**

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

. . .

(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;

. . .

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

(4) If the child has been placed with the cabinet, **the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.**

(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.

(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:

(a) Terminating the right of the parent; or

(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

(Emphases added.) Our review of the record convinces us that the family court's findings concerning the statutory prerequisites lack the support of clear and convincing evidence.

2. Caselaw

In our view, the termination judgment at issue here suffers from the same deficiencies which caused this Court to vacate the judgment of termination in *M.E.C. v. Commonwealth, Cabinet for Health and Family Services,* 254 S.W.3d 846 (Ky. App. 2008). As we noted in that case, KRS 625.090 provides that the circuit court may involuntarily terminate all parental rights of a parent of a named child only upon findings based on "clear and convincing evidence that the child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), and that termination would be in the best interest of the child." *Id*. at 854.

First, we find no proof that these children were "abused and neglected" as that term is defined in KRS 600.020(1). As in *M.E.C.*, we find the record devoid of clear and convincing evidence that the children suffered any direct emotional or physical injury from Mother. Rather, the temporary removal petition was based upon a single incident of the children being exposed to drug use in a shed occupied by their maternal grandmother in which Mother was allegedly involved. We find absolutely no evidence that Mother failed to attend to the

children's physical needs or subjected them to physical or emotional abuse. We recognize that Mother stipulated to neglect at the temporary adjudication hearing based solely upon the initial positive drug screens. However, her submission to more than 50 drug screens since that time, almost all of which were negative, coupled with the August 4, 2020, assessment from Centerstone that she did not "currently meet criteria for a substance use diagnosis or substance abuse treatment[,]" constitute overwhelming evidence that the children can no longer be considered neglected due solely to their Mother's drug use. Based upon the evidence in the record and presented at the hearing, a finding to the contrary lacks the support of clear and convincing evidence and must therefore be construed to be clearly erroneous.

Next, similar to the holding in *M.E.C.*, we find no evidence that the Cabinet provided reasonable efforts to reunite this family. To the contrary, we view the requirements of Mother's case plan as lacking any reasonable prospect of satisfactory completion given her circumstances. To reiterate, **after having been determined to be indigent and counsel appointed to represent her**, Mother was required to 1) refrain from using illegal substances; 2) call for the Spencer County drug screen protocol Monday through Friday between 8:00 AM and 10:00 AM, screen when requested, and no-show screens will be considered positive, **all at Mother's expense**; 3) attend supervised visitation with the children as scheduled

at a cost of $50 per visit when those visits occurred at Butterfly House; 4) participate in substance misuse and mental health assessments, provide honest information, and comply with all recommendations; 5) complete a parenting class and display skills learned; 6) provide documentation that all assessments, recommendations, and classes have been successfully completed; 7) obtain stability by providing documentation of employment, appropriate housing, appropriate individuals living in the home, and appropriate transportation; and 8) pay child support in the amount of $298 per month based upon imputed income. Again, we emphasize that none of the services or drug screening were available in Mother's home county and that she was required to travel to three different counties for successful completion of the plan. A person with a driver's license and an established educational or employment history would find it difficult, if not impossible, to complete all the required tasks and maintain employment. In addition, without adequate explanation, the Cabinet revised the plan to require Mother obtain **independent** housing which would effectively cut her off from the help of great-grandfather, the only support system she had known since her removal from her own mother's care. After maternal grandmother left the premises, there seems to be little justification for the Cabinet's concern that great-grandfather might allow the children to be left with maternal grandmother unsupervised or fail to be able to protect the children from their **maternal**

grandmother's illicit drug use. As emphasized in *M.E.C.*, the focus in involuntary termination proceedings is on reasonable expectation of improvement in the conditions that brought the family into the system, not upon the possibility of recurrence of situations which have shown to have been remedied. We also adhere to the following conclusion set out in *F.V. v. Commonwealth, Cabinet for Health and Family Services*:

> As we noted in *M.E.C.*, the statute does not require that the parent completely eradicate all problems immediately. But it does require that the Cabinet prove by clear and convincing evidence that there is no reasonable expectation of improvement.

567 S.W.3d at 609. And, as was the case in *F.V.*, we are convinced that the Cabinet "has utterly failed to do so in this case." *Id*. Contrary to the Cabinet's assertions, the evidence clearly shows that this is not a case in which a parent simply chose to ignore the Cabinet's recommendations. Rather, the evidence discloses that despite her indigency and the effects of the COVID-19 pandemic, Mother has made significant efforts to remedy the problem which was the sole cause of the removal of the children from her care – drug use when in the company of maternal grandmother.

Furthermore, we are convinced that the termination judgment fails to take into account the impact of the COVID-19 restrictions on Mother's ability to satisfactorily complete her case plan and the reasonableness of the Cabinet's

efforts to reunite the family. Ms. Ray testified that after in-person visitation was cancelled due to the pandemic, the Cabinet increased Mother's telephone calls with the children from two per week to three per week. However, she also testified that the calls were reduced back to two per week based "upon information" that Mother's conversations with the children were "repetitive and non-productive." Anyone with experience in attempting to converse on the telephone with children aged four and six can attest to the need to resort to repetition. Furthermore, it might well appear to someone overhearing those conversations that they were non-productive. Mother can hardly be faulted for being limited to conversing with her children by telephone after in-person visits were suspended due to the pandemic.

Similarly, it goes without saying that the pandemic had far-reaching impacts on the ability to obtain and/or keep employment. We find it unrealistic to fault Mother for her limited employment history when people throughout this Commonwealth were losing the ability to maintain employment due to the effects of COVID-19 on the state's economy. Thus, Mother's limited employment history during this time does not constitute clear and convincing evidence of her failure to comply with her case plan or provide support for the termination of her parental rights. And again, Mother testified that attempting to comply with the drug screen protocol affected her ability to maintain employment.

The same can be said of Mother's failure to obtain a driver's license. Restrictions related solely to the pandemic have necessitated the shuttering of state driver's license testing and renewal facilities and severely limiting the ability to even receive an appointment to take the driver's test. Again, under these extraordinary circumstances, Mother's failure to obtain a driver's license does not constitute clear and convincing evidence to support the termination of her parental rights.

Nor do we find in this record any indication that a hearing was conducted by the family court prior to ordering retroactive child support. Similarly, we are unable to glean the basis upon which the family court concluded that income should be imputed to Mother, who had been previously adjudged to be indigent. Nevertheless, Mother did not simply choose not to comply with the support order and, as Ms. Ray testified, at the time of the hearing Mother had made payments in March, April, May, June, July, and August 2020 in attempted compliance with an order entered in January 2020.

Which brings us to the most egregious aspect of Mother's case plan – charging a parent who has been determined to be indigent $50 per supervised visit in order to spend one hour with her children in an adjoining county. Without a showing of her ability to pay, that aspect of Mother's case plan alone brings into question the reasonableness of the Cabinet's unification efforts. To ask a parent

who has been previously determined to be indigent and who does not drive to travel from Spencer County to Shelbyville to see her children at a cost of $50 per visit frankly shocks the conscience of this Court and undermines any claim that reasonable efforts were provided to reunite this family. Ms. Ray herself testified that Mother was fairly consistent in her visits as long as they were conducted in the Cabinet's Spencer County office. So punitive is that portion of the case plan which required Mother to travel to Shelbyville at a cost of $50 for the opportunity to visit her children for one hour, the Cabinet might as well have required this indigent, non-driving parent to attempt to visit her children in Pikeville or Paducah.

To reiterate, the statute does not require the complete and immediate eradication of all issues addressed in the case plan to avoid termination of rights. Rather, the statute limits authority to terminate to situations in which there is no reasonable prospect of improvement in the foreseeable future. The evidence in this record is clearly insufficient to support any such finding. It is plain that Mother has made consistent and reasonable efforts to obtain the return of her children to her custody and care. Those efforts include:

- Submitting to more than 50 drug screens since January 2019 at a total cost to her of $1,675.00.
- Completing the required assessments at Centerstone.
- Paying, as she was able due to indigency and unemployment, child support and providing clothes and gifts for the children at the supervised visitations.

- Paying $50 per supervised visit to exercise her limited opportunity to visit her children at Butterfly House, a facility located outside her home county.
- Ensuring that maternal grandmother, whom the Cabinet identified as the source of Mother's drug problem, no longer resided on great-grandfather's property and eliminating all contact with maternal grandmother.
- Attempting to obtain a driver's license.

These actions fall far short of "evinc[ing] a settled purpose to forego all parental duties and relinquish all parental claims to the child[,]" which are pre-requisites to establishing abandonment, desertion, or neglect by clear and convincing proof. *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985) (citation omitted); *see also Wright v. Howard*, 711 S.W.2d 492, 497-98 (Ky. App. 1986). In sum, we are convinced that it was Mother who, given the circumstances, attempted to make reasonable efforts to reunify her family; the Cabinet's case plan appears to have been calculated to put unreasonable obstacles in her way.

Furthermore, while not an issue raised in this appeal, we note that the Cabinet sought to be relieved of its obligation to provide reasonable reunification efforts for this family less than one year from the temporary adjudication order. The children were placed in the emergency custody of the Cabinet on January 23, 2019, and the temporary adjudication order was put in place on February 26, 2019, at which point the Cabinet's reunification plan was adopted. Although that adjudication order triggered the Cabinet's responsibility to provide reunification services, it was less than one year later that the Cabinet sought to be relieved of

further reunification efforts and sought a change in the children's permanency goals from reunification to adoption. In our view, KRS 625.090 presupposes that parents will be afforded a fair opportunity to make changes which will allow them to regain custody of their children. The family court found that the children had "lingered in foster care for approximately nineteen months as of the time of trial" and yet the Cabinet had provided reunification services for less than one year at the time it filed the petition. Thus, while KRS 625.090(2)(j) was not specifically cited in the Cabinet's petition, its fifteen-month foster care provision was considered in favor of termination. Termination may be supported by a finding that a 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[.]" While technically the statute had been satisfied by the time of the termination hearing, the statutory language states that the fifteen-month period *precede* the filing of the termination petition. That did not happen in this case.

Finally, we address Mother's contention that she was deprived of due process by the conduct of the termination hearing via Zoom. On August 4, 2020, Mother's new private counsel filed a notice of substitution of counsel and a motion to continue the termination hearing due to his recent entry into the case and the fact that limited staffing in the Spencer Circuit Court Clerk's office limited his ability

to obtain a full copy of the court file prior to the hearing. He also stated that without a continuance, his ability to subpoena necessary witnesses would be compromised. He renewed his motion at the beginning of the Zoom hearing, stating that Mother was entitled to an in-person hearing, citing the obvious limitations of the Zoom format. The family court considered his request, but upon objection from counsel for the Cabinet, elected to proceed with the Zoom hearing.

Although we cannot fault the family court for proceeding in accordance with the mandate of the Supreme Court concerning in-person proceedings, given the obvious difficulty the family court experienced in understanding Mother's testimony, we are convinced it was incumbent upon the family court to adjourn the Zoom hearing and schedule an in-person proceeding in compliance with appropriate COVID-19 guidelines. The difficulties in understanding Mother's testimony are well-documented on the video record:

- At 2:33:18, the family court asked Mother to repeat her testimony during the swearing-in;
- At 2:33:33, the family court stated that she was having difficulty hearing Mother and indicated that the court had encountered the same issue "the other day." The judge suggested to Mother's counsel that he try to move her a little closer to the microphone, to which he responded that she was as close as she could get.
- At 2:34:37, the family court stated, "Again, I'm not hearing any audible answer from her."
- At 2:36:12, the family court stated, "Again, she's still fading out on me and I want to hear her. What she

has to say is important to me. Is she able to get closer?"

- Throughout the remainder of Mother's testimony, it appears evident from the trial judge's expression that she is continuing to have difficulty hearing and understanding Mother's testimony.

The necessity of conducting Zoom hearings due to the pandemic is not in question. The question is whether, under the circumstances outlined above, the Zoom hearing in this case comported with fundamental concepts of procedural due process. We are convinced that it did not.

The "central meaning of procedural due process" was reiterated and explained by the Supreme Court of the United States in *Fuentes v. Shevin*:

> 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L. Ed. 531 [(1863)]. *See Windsor v. McVeigh*, 93 U.S. 274, 23 L. Ed. 914 [(1876)]; *Hovey v. Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 [(1897)]; *Grannis v. Oredean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 [(1914)]. It is equally fundamental that the right to notice and **an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'** *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 [(1965)].

407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972) (emphasis added).

Given the family court's stated inability to hear and understand Mother's testimony, we are convinced that she was not afforded an opportunity to be heard

"in a meaningful manner." Furthermore, had this been a criminal proceeding, reversal would be required due to the deprivation of procedural due process:

> As articulated by the United States Supreme Court in *Morrissey* [*v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972)], these requirements include:
>
> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) **opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)**; (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

Robinson v. Commonwealth, 86 S.W.3d 54, 56 (Ky. App. 2002) (emphasis added). Although not criminal in nature, the result of involuntary termination proceedings on the family unit are so severe as to require similar procedural protections.

CONCLUSION

In sum, because we find no clear and convincing evidence to support the family court's decision to terminate Mother's parental rights, we vacate the judgment of termination with directions to dismiss the Cabinet's involuntary termination petition. Importantly, as explained in *M.E.C*, we are not ordering the children's immediate return, but rather, hold that the Cabinet prematurely sought to

discontinue reasonable efforts to reunite this family and failed to meet its burden to establish grounds for termination. Because this Court has no way of knowing Mother's current situation relative to drug use or her present ability to care for her children, if the Cabinet believes that it now has sufficient grounds to seek termination it is certainly within its authority to pursue the statutory procedure. However, until that time, all necessary statutory services should be rendered to help this family.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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