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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
NOVEMBER 19, 2008
(FILE NO. 2008-SC-0318-DE)**

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001288-ME

T.N.H., MOTHER APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 05-AD-500432

J.L.H., A CHILD; COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES; AND
P.N.Y., FATHER APPELLEES

AND NO. 2006-CA-001736-ME

COMMONWEALTH OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 05-AD-500432

T.N.H., MOTHER; P.N.Y., FATHER; AND J.L.H., A CHILD APPELLEES

OPINION

VACATING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

THOMPSON, JUDGE: T.N.H., hereinafter referred to as (mother), appeals from a judgment terminating her parental rights to J.L.H., hereinafter referred to as (son). The Commonwealth of Kentucky, Cabinet for Health and Family Services (the Cabinet) appeals from an order of the Jefferson Family Court which ordered the Cabinet to pay mother's appellate counsel attorney fees and her filing fees. We reverse the termination judgment and reverse the judgment awarding the fees against the Cabinet.

Mother is the natural mother of son born on April 13, 2003, and at the time of the birth, was fourteen years old. Shortly after the birth, on July 30, 2003, the Cabinet filed a petition for dependency and neglect alleging that mother was neglecting son. At that time, both mother and son were placed in the custody of a maternal aunt where they remained until August 28, 2003, when both son and mother were voluntarily committed to the Cabinet's custody.

On November 28, 2005, the Cabinet filed a petition for involuntary termination of parental rights of mother. A local attorney was appointed as guardian ad litem for son and another local attorney, Kenneth McCardwell, was appointed to act as guardian ad litem for mother. Following a termination hearing, the court entered findings of fact, conclusions of law, and a judgment terminating mother's rights.

The court denied mother's motion to alter, amend or vacate the termination judgment. She then requested that the court order the Cabinet to pay her appellate filing

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[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

fees and attorney fees incurred in pursuit of her appeal. On June 22, 2006, the court ordered that the Cabinet pay mother's appellate filing fees. The Cabinet immediately filed a motion to alter, amend or vacate the order. In response, mother's counsel filed a motion for the Cabinet to retain appellate counsel for mother, a motion for contempt against the Cabinet for failing to pay the filing fee, and a motion to withdraw as counsel. Simultaneously, the court denied the Cabinet's motions, granted the withdrawal of mother's court-appointed trial counsel, ordered that the Cabinet retain appellate counsel for mother, and held the Cabinet in contempt for failing to pay mother's appellate filing fee. After the Cabinet informed the court that it had no mechanism in place to hire appellate counsel for one of its wards, the court appointed John H. Helmers, Jr. and Troy Demuth to represent mother and ordered that the Cabinet pay counsel a reasonable fee for their services. Subsequently, the court ordered that the Cabinet pay mother's appointed counsel $195 per hour for his services. The Cabinet appealed. By order, we consolidated the mother's appeal from the judgment terminating her parental rights with the Cabinet's appeal.

We first turn to the merits of mother's appeal.

James Crawford, a Cabinet social worker responsible for the family's case, was the only witness for the Cabinet. He testified the mother and the son were initially placed in a foster home where the son remains. However, after mother was disruptive at the home, ran away, did not participate in the care of the child, and was dismissed from school, she was placed in the Mary Kendall Home in Owensboro where she was provided individual and group counseling which focused on her negative behavior. During her stay at the home, she had periods of positive and negative behavior and numerous

absences without leave (AWOL) including December 20, 2003, March 14, 2004, through April 21, 2004, and October 31, 2004.

Despite her behavior, on February 11, 2004, mother graduated from the treatment program and was returned to Louisville where she was placed in the Home of the Innocents Pregnant Parent Teen Facility. While there, she was offered parenting training and extensive individual and group counseling and was admitted into a program which permitted her to attend high school while caring for her son. Son was brought to mother each morning, rode the bus with her to school where he attended daycare, and together they rode the bus back to the home where son's foster mother picked up the child. On weekends, mother and son went to mother's aunt's home for overnight visits. During her time at the Home of the Innocents, mother continued her pattern of being AWOL. On April 9, 2005, until July 27, 2005, she was AWOL. On one occasion, she returned to the Cabinet's office with two black eyes and a broken nose which were inflicted by her boyfriend. During the months she disappeared, son remained in his foster home and mother had no contact with him or the Cabinet.

Because of her prolonged absence, mother lost her placement at the Home of the Innocents and was temporarily placed in a foster home. On August 4, 2005, she was placed at Kentucky Baptist's Home for Children in Glendale, Kentucky, where she again received individual and group counseling and parenting skills training and was permitted supervised visits with son. While in Glendale, she made progress; however, she was again AWOL during a Christmas 2005 visit, when she left her aunt's home. Mother also reportedly instigated a fight at the Baptist Home. In February 2006, mother graduated from the Glendale program and returned to Louisville. Because she was

seventeen, she was placed in the Boys Haven pre-independent living program where she resided at the time of the hearing.[2]

At the time of trial, mother was working part-time and was about to complete the 11th grade of high school. Her last AWOL occurred in December 2005, when she left her aunt's home. Mr. Crawford testified that mother appeared to be detached from her son and had not been fully cooperative in her participation in the various parenting programs offered. However, he admitted that in the year prior to the termination hearing, she had made progress in developing the required parenting skills but, he believed, it was insufficient for her to act as son's parent. He also testified that son's foster parents were ready to adopt the child.

Mother's maternal aunt testified that mother had made progress in her parenting efforts and relationship with son and was capable of taking care of son's needs. However, she also observed that mother needed further parenting classes or counseling. She stated that if mother's rights were not terminated, she was willing to continue to allow visitations in her home.

Mother testified that she had made progress in the various programs but admitted that she refused to attend all parenting classes offered at Glendale. She further admitted that she was with the same abusive boyfriend during her summer 2005 AWOL and her Christmas 2005 AWOL.

Mr. Crawford was the sole witness to testify on behalf of the Cabinet. There were no psychological assessments performed on T.N.H., no evidence concerning her mental capacity, and no evidence of the likelihood of her developing the necessary

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[2] Appellant is now eighteen years of age and is no longer in the Cabinet's custody.

skills to successfully parent her son. As a result, the Cabinet's entire case rested on the observations of Mr. Crawford who was entrusted with the care and supervision of both mother and son.

The standard of review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-117 (Ky.App. 1998):

> The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore,* Ky.App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky.App., 706 S.W.2d 420, 424 (1986)
>
> "Clear and convincing proof does not necessarily mean contradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt,* 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

Termination of parental right is not a criminal matter, yet, it encroaches on the parent's constitutional right to parent his or her child and is therefore, a procedure that should be employed only when the statutory mandates are clearly met. *O.S. v. C. F.*, 655 S.W.2d 32 (Ky.App. 1983). Although the state has a compelling interest in the protection of our youngest citizens, state intervention into the home and the permanent severance of the parent-child relationship must be done with the utmost caution and is subject to judicial scrutiny. As succinctly stated in *V.S. v. Commonwealth*, 194 S.W.3d 331, 335

(Ky.App. 2006), "the state's effort to sever permanently the relationship between parent and child is a serious affair . . . ."

With this standard in mind, we turn to the issues raised in mother's appeal.

Mother's initial contention is that the Cabinet failed to follow the "proper protocol" for the commitment of a child to the Cabinet, specifically, that there was no adjudicatory hearing prior to son's commitment to the Cabinet. She argues that, therefore, the Cabinet did not legally have custody of the child and could not bring the petition to terminate her rights. Although it is true that no hearing was conducted, the court's records reveal that mother, represented by counsel, agreed to commit son to the Cabinet where he has remained since 2003. She did not appeal the voluntary commitment or request a release of the child pursuant to KRS 620.170(4). On the basis that mother consented to the commitment, we reject her initial contention.

We also find lacking in merit her contention that the Cabinet's petition and the court's judgment are fatally flawed. KRS 625.050(4)(a) states that the name and address of each petitioner shall be contained in a termination of parental rights petition. The Cabinet's mailing address is clearly stated in the petition and it clearly states that son is in the Cabinet's custody and resides in a state approved home. The statute does not, as appellant suggests, require that the precise foster home address of a child involved in an involuntary parent termination proceeding be stated. The risk of harm to the child, as well as their foster families, from emotionally distraught parents is far too great when measured against any beneficial use such information could possibly be to the parent involved. Moreover, we find that the Cabinet sufficiently stated the facts giving rise to the filing of the petition to give the mother notice of the basis for the termination petition.

A recitation of specific facts is unnecessary since those are properly fleshed out during the hearing or by motion for discovery prior to the hearing.

Nor will we reverse the court's judgment because it does not recite that "each petitioner is fully aware of the purpose of the proceedings and the consequences of the provisions of this chapter." KRS 625.100. The cited language is to be included in a voluntary termination of rights petition and has no application where, as here, the parent is a respondent, not a petitioner.

Mother asserts that by filing the petition for termination, the Cabinet breached its duty as *parent patriae* to protect her and to act in her best interest. Involuntary termination is generally sought when the Cabinet's goal is no longer reunification of the family and becomes the termination of the parent's rights and adoption of the child. Thus, the Cabinet's interest are directly adverse to those of the parent who challenges the termination.

This case presents a unique situation where both the mother and the child are in the Cabinet's custody and the Cabinet seeks the termination of the parental rights of its ward. This court is admittedly troubled by the lack of representation of the child-parent in such situations. To assure that the parent has an independent person who seeks to protect his or her interest, we believe there should be a statutory procedure for the appointment of such person, similar perhaps, to our guardianship provision contained in KRS 387.500. Unfortunately, there is no such statutory provision. There are, however, specific and distinct statutory elements that the Cabinet is required to prove by clear and convincing evidence when it seeks to permanently sever the parent-child relationship.

Thus, we find more problematic than the dual status of the Cabinet is its failure to meet its burden of proof.

Mother challenges the sufficiency of the evidence to support the family court's decision to terminate her parental rights. In such cases, this issue may be raised on appeal without regard to whether there was an objection to such findings or whether there was a post-judgment motion. *See V.S.*, 194 S.W.3d at 333.

The grounds for an involuntary termination of parental rights are set forth in KRS 625.090 and those applicable to present case are as follows:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> > (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
> >
> > 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding;
> > [and]
> > . . . .
> >
> > (b) Termination would be in the best interest of the child.
>
> (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:
>
> > (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;
> . . . .
>
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

Sadly, mother was only fourteen years old when she gave birth and, faced with the reality of being a teen mother with no assistance available to her from immediate family or the child's father, she wisely committed herself and son to the Cabinet. We agree with the Cabinet, however, that mother's young age does not excuse her from parenting duties. There is no statutory exception to the duty of every parent to provide parental support, care and attention to a child. The legislature has made no provision purporting to preclude termination actions against minor parents and this court cannot create one by judicial *fiat*. However, if the parent's negative behavior is attributable to his or her immaturity and the parent is reasonably likely to develop the necessary parenting skills within a reasonable time after entering adulthood, we believe termination is a premature severance of the parent-child relationship.

It is well established in our law and recognized in society in general that juveniles are often plagued by their inexperience, poor decision-making skills, and lack

of appreciation for the consequences of their actions. As a result, a juvenile is not held to the same standards of conduct as an adult or to the same punishments. Yet, in this case, we are convinced that mother's rights were terminated based solely on her past conduct as a juvenile with no consideration as to her future parenting abilities.

It is not difficult to conclude that in the years prior to the termination hearing, mother did not provide essential care and protection for son and was incapable of providing for any of his material and emotional necessities. As we have repeatedly stressed, she was, herself, a child in the custody of the Cabinet. However, under either section (e) or (g) the Cabinet must establish by clear and convincing evidence that she is incapable of rendering such care in the reasonable future. Just as incarceration alone cannot serve as the basis for termination, nor can the young age of the parent, by itself, be sufficient. *See, J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky.App. 1985).

Mr. Crawford was the only witness who testified on behalf of the Cabinet. He did not testify in regard to any objective tests or assessments performed which indicated that mother did not have the mental capacity to parent her child or as to when or if mother is reasonably likely to be capable of parenting. To the contrary, Mr. Crawford testified that in the past year mother had been progressing. She had not been AWOL since December 2005, was employed, and had completed the eleventh grade and the various programs offered by the Cabinet.

We simply cannot find that the evidence was clear and convincing that there is no reasonable expectation of significant improvement in the immediate future that mother will be able to parent her child. In cases such as this, where the parent's age

and emotional immaturity undeniably contribute to her lack of parenting skills, we believe that termination must not be based solely on the parent's prior behavior without some objective assessment of her psychological and mental capacity to develop the required abilities to effectively parent a child.

The Cabinet suggested at the hearing and the family court found that mother had abandoned son for a period of six months, apparently on the basis of her AWOL in the summer of 2005. Abandonment is a matter of intent and is demonstrated by facts or circumstances that "evince a settled purpose to forgo all parenting duties and relinquish all parental claims to the child." *Id.,* at 663. At the time of mother's AWOLS, she did not have custody of son, thus, when she left, son was in the care of the foster parents. She testified that she left because she was unhappy in the group living environment. Although certainly her behavior is not condoned, her AWOLS are evidence that she was a troubled teen wanting to escape her situation rather than intent to abandon her child. Mother relinquished custody of the son to the Cabinet when he was three months old and since that time has never had custody of the child. Based on the record, we are not convinced that there is clear and convincing evidence of abandonment.

The remaining ground for termination was that son had been in foster care under the responsibility of the Cabinet for fifteen of the most recent twenty-two months. There is no dispute that son has been in the Cabinet's custody for the requisite period of time. However, that fact is attributable to mother's age rather than any action on her part. At the age of fourteen, with no financial or emotional support, mother responsibly committed herself and son to the Cabinet and, while she was still a minor, the Cabinet filed the termination petition. If, as the Cabinet argues, the time of commitment can

serve as a basis for termination in cases such as this, any young parent would be ill-advised to commit his or her child to the Cabinet. We are unwilling to construe the statute so strictly as to strip a child-parent of her parental rights merely because of the passage of time. Patience in such instances is required so that the state does not prematurely terminate the parent's rights.

We find that there was a lack of substantial evidence to support the family court's termination judgment and, therefore, termination was an abuse of discretion. Our decision in this case, however, does not prohibit the termination of parental rights prior to the age of eighteen nor do we suggest that in all cases where the parent is a minor that termination be delayed. As pointed out earlier, only the legislature can take such action.

Moreover, in instances where the parent has taken no or little action to establish a relationship with the child, physically or otherwise harmed the child, or has sufficient psychological or mental deficiencies to make future progress toward parenting the child reasonably unlikely in the foreseeable future, termination and, hopefully, adoption would be in the best interest of the child. However, we believe that when the parent is also a child, the courts should terminate parental rights with caution and give consideration to the parent's age. In doing so it should specifically state findings which establish that the parent is unlikely to develop the required skills to parent the child.

By vacating the termination judgment, we do not order or suggest that son be immediately returned to mother but hold that the Cabinet failed to meet its burden to establish grounds for termination. Of course, time has passed and this court is not privy to the current state of affairs concerning mother and son. If the Cabinet believes it has sufficient grounds to seek termination at this point, it is well within its authority to pursue

the proper statutory procedure. In the future, in similar cases, it is suggested that the Cabinet present the family court with some testimony, preferably expert testimony, as to the likelihood that when the teen reaches adulthood, the parent cannot effectively parent the child.

Having decided mother's appeal, we now address the issue of the award of costs and fees against the Cabinet. With reluctance, we agree with the Cabinet that the award constitutes error and reverse.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), the United States Supreme Court held that in termination of parental rights proceedings the appointment of counsel is not required as a matter of course, but should be made on a case-by-case basis. Only when the character and difficulty of the case demands is the appointment of counsel required.

Although not required under the United States Constitution, our General Assembly has deemed necessary the appointment of counsel for indigent parents in termination proceedings and those accepting such appointments are to be compensated according to KRS 625.080 (3). That statute provides:

> (3) The parents have the right to legal representation in involuntary termination actions. The Circuit Court shall determine if the parent is indigent and, therefore, entitled to counsel pursuant to KRS Chapter 31. If the Circuit Court so finds, the Circuit Court shall inform the parent; and, upon request, if it appears reasonably necessary in the interest of justice, the Circuit Court shall appoint an attorney to represent the parent pursuant to KRS Chapter 31 to be provided or paid for by the Finance and Administration Cabinet a fee to be set by the court and not to exceed five hundred dollars ($500).

Similarly, CR 17.03 provides that fees allowed to counsel for children and indigent parents in termination cases shall not exceed the amounts specified in KRS 620.100 or KRS 625.080.

Five hundred dollars is the maximum that may be awarded to appointed counsel. The courts have no authority to assess fees against the Commonwealth, its officers, or its agents in an amount above that permitted by statute. *Dept. of Human Resources v. Paulson*, 622 S.W.2d 508 (Ky.App. 1981). As the court stated in *Com.,Cabinet for Human Resources v. Coleman*, 699 S.W.2d 755 (Ky.App. 1985), the maximum award of $500 serves as the cap on attorney fees whether the services are rendered at trial, or on appeal, or both:

> KRS 199.603(8) [currently KRS 625.080(3)]provides for a maximum award of $300 in attorneys' fees as costs. This award is expressly described by the statute as “a reasonable fee for services,” with no distinction being drawn between trial and appellate advocacy. Absent a statute explicitly awarding additional amounts for representation on appeal, the $300 amount of KRS 199.603(8) stands as the outer limit of monies which may be awarded appointed counsel in representing indigent parents in KRS 199.603 actions, whether the rendered services are provided at trial, or on appeal, or both.

Id. at 756.

Despite the statutory language, the family court was persuaded that because mother is a ward of the Cabinet, she is not indigent and, consequently, the Cabinet, as her custodian, is responsible for hiring a private attorney to represent her on appeal. This reasoning is flawed for two reasons.

Mother was committed to the Cabinet because of her indigency. Simply because she receives the basic necessities to survive from the Cabinet does not mean that she has access to its assets. Moreover, KRS 610.060(4) specifically states that the “fact that a child is committed to a state agency shall not be cause for the court to order that agency to pay for counsel.” There is no contrary provision for wards in termination proceedings.

We recognize that $500 is often a woefully inadequate amount to compensate appointed attorneys in termination cases. In this case, mother's appellate counsel is to be commended for pursuing her appeal in a competent and professional manner. However, in 2004, the General Assembly failed to enact into law a proposed amendment to KRS 625.080(3) permitting an additional fee of $500 for counsel's representation. This court cannot ignore the direct language of the statute and the legislature's determination that the maximum remain as stated in the current statute.

Since $500 is the maximum that could be awarded to appointed counsel and, since that was exhausted at the trial level, the family court erred when it ordered that the Cabinet pay mother's appellate attorney fees.

In addition to mother's attorney fees, the court also ordered that the Cabinet pay her appellate filing fee. Again, there is no statutory provision which permits the court to require that the Cabinet pay the fee. As an indigent, mother should have filed a motion to proceed in forma pauperis in the circuit court, thus, she would have avoided the payment of the fee. CR 73.02(1)(b). Presumably because she argues that she is not an indigent and, therefore, the court properly ordered the Cabinet to pay for private counsel, she did not file an in forma pauperis motion. Nevertheless, the court has no authority to assess an appellate filing fee against the Cabinet.

The termination judgment is hereby vacated. The order awarding attorney fees and the appellant's filing fee is also vacated.

GRAVES, SENIOR JUDGE, CONCURS.

MOORE, JUDGE CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

MOORE, JUDGE: I concur fully with the majority's determination regarding the issue of the award of costs and fees against the Cabinet. The answer to this inquiry is unequivocally found in *M.S.M. v. Dep't for Human Resources, Com. of Kentucky,* 663 S.W.2d 752, 753-54 (Ky.App. 1983). If there are to be changes made to the mandated amount allowable for fees and costs, that process lies with a different body rather than this Court. Accordingly, I agree with the majority's opinion that the family court erred when it ordered the Cabinet to pay the mother's appellate filing costs and appellate counsel's fees.

Turning to the harder issues in this matter and ones that are especially difficult to resolve, I understand the reasoning behind the majority's opinion and may even agree that under certain circumstances theirs is the better route, but in the case at hand I respectfully am in disagreement with their conclusion. Sadly, there does not appear to be a good answer to the questions before the Court and unfortunately, there is neither binding case law nor statutory authority addressing how to resolve these issues, namely: (1) how is the apparent conflict wherein both mother and child are in the custody and care of the Cabinet to be resolved, or in other words, does not the Cabinet have a duty to both, and at what point does the Cabinet act in conflict against the interests of a minor mother in its care when it seeks to terminate parental rights; (2) how is a minor mother, who is voluntarily in the care of the Cabinet along with her child, to be evaluated when the Cabinet seeks to terminate the mother's parental rights? I certainly empathize with the majority in attempting to resolve this case and am hopeful that the General Assembly will recognize the need for legislation on this issue.

Having articulated the magnitude of the problem, further discussion on the nature of a nearly unanswerable question will not aid in the necessary determination that the Court must make. Thus, I turn to the resources available to portray my view on the issues.

As stated earlier, I believe there may be a conflict when the Cabinet acts to the peril of one in its care, namely moving to terminate the rights of the minor mother in this matter. But, the question begs: without statutory authority to the contrary, what mechanisms are in place to prohibit the Cabinet from taking the steps it did? Apparently, none. This conflict that causes me so much consternation, however, has not so bothered other courts.[3] Thus, at the end of the day, having no other statutory guidance, my analysis is confined to the boundaries of KRS 625.090, which does not restrict the Cabinet's actions in cases such as the one at hand.

Even if there is a potential conflict, what else is the Cabinet to do when it believes that the mother's rights should be terminated in the best interests of the child, when other statutory factors are met? Certainly, the Cabinet is not duty bound to turn a blind eye to the needs of a young child in its care, even when its actions may be adverse to another minor in its care.

The Cabinet's actions, pursuant to KRS 625.090, were sanctioned by the family court in this matter, and this is of no small significance. As the majority wrote, the family court's decision in a termination matter is given a very high degree of deference by the law in the Commonwealth and will only be reversed if clearly erroneous, and its findings will not be disturbed unless there exists no substantial evidence in the record to

[3] *See, e.g., Lecky v. Reed*, 456 S.E.2d 538 (Va. App. 1995).

support its findings. *See M.P.S.*, 979 S.W.2d at 116-17. I pause to note that this is a seemingly low standard of review, however, given the parent's and child's well-recognized constitutional rights to a relationship with one another and the impact of the permanent severance of this constitutionally protected relationship. *See Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *O.S. v. C.F.*, 655 S.W.2d 32 (Ky.App. 1983). Nonetheless, as an intermediate court, the standard of review articulated *supra* is one that we must employ.

Upon review of this matter and the opinion and findings by the family court, I cannot say that its decision is clearly erroneous or that its findings are without any substantial evidence in the record. Thus, I would affirm the family court on the issue of termination.

My inclinations toward this view are influenced by cases from other states having dealt with similar issues. Particularly, I rely on *Lecky v. Reed*, 456 S.E.2d 538 (Va. App. 1995), a well-reasoned opinion on the topic. Similar to the case at hand, the mother was fourteen years of age when she gave birth to a son and was voluntarily placed by her estranged mother with another family, the Clearys. Thereafter, the minor mother was transferred to the Department of Social Services, while her son remained a short time longer with the Clearys. Within a month, the son was placed with the mother in a "therapeutic foster home." Shortly thereafter, the mother ran away, and the son was transferred to a regular foster care home, where he remained for approximately two years before his mother's parental rights were terminated.

Prior to termination the Department initiated a plan with treatment goals with the intent that ultimately the mother would be able to parent her son in the future.

Despite the support system put in place, the mother continuously disrupted it by running away. As a result of the mother's behavior spanning from September 1991 into early 1992, the Department moved for custody of the son and petitioned to terminate the mother's parental rights.

Home studies and evaluations were completed before the termination hearing. The mother tested borderline mentally retarded and showed a high risk for abuse/neglect of her son. Her relationship with her son was described as one between a babysitter and child. On the other hand, the son was characterized as having a significant attachment and a parent-child interaction with his foster mother. He responded well to the foster mother's rules and expectations and acted appropriately for his age while in her care.

A hearing was originally scheduled in mid-1992 for termination but was postponed on the motion of the Department after the mother demonstrated progress in having her son returned to her custody. Her improvement continued until a December 1992 hearing when the court granted the foster parents custody but denied the termination petition. Thereafter, the mother returned to her earlier ways, ran away and exhibited irresponsible behavior.

In November of 1993, the mother's parental rights were terminated. And, although a hearing on appeal in January of 1994 evidenced that the mother was again doing well in a group home setting, the preceding month she had run away yet again. Based on her past behavior, the appellate court upheld the termination of her parental rights.

Like Kentucky, Virgina's statutory scheme "'provides detailed procedures designed to protect the rights of the parents and their child, balancing their interests while seeking to preserve the family.'" *Id.* at 540 (quoting *Rader v. Montgomery County Dep't of Social Servs.*, 365 S.E.2d 234, 236 (Va. App. 1988)) (internal citations omitted). And, Virginia, again like Kentucky, holds the child's best interest as a paramount concern. *Id.* (citing *Wright v. Alexandria Div. of Social Servs.*, 433 S.E.2d 500, 503 (1993), *cert. denied*, 513 U.S. 1050, 115 S.Ct. 651, 130 L.Ed.2d 555 (1994)); *see also, e.g., Cabinet for Families and Children v. G.C.W.,* 139 S.W.3d 172 (Ky.App. 2004).

The Virginia court did not disregard the age of the mother and the requisite barriers that her young age might create in her attempts at parenting. Nonetheless, the court determined that age "is not a circumstance which prevails over the best interests of the child." *Lecky, supra,* at 541. Furthermore, the court decided that

> [n]othing in [the] record attributes mother's parental deficiencies to her age or suggests that the mere passage of time would resolve her difficulties. Thus, further delay would prolong [the son's] familial instability without the promise of benefit to him, a result clearly contrary to the child's best interests. Under such circumstances, mother's age does not alone constitute good cause to excuse her failure to resolve the conditions which prompted [the son's] foster care in accordance with the statute.

Id.

Regarding the mother's challenge to the sufficiency of evidence in *Lecky*, the court determined that

> [t]he evidence was overwhelming that mother pursued an unstable and irresponsible lifestyle, incompatible with [the son's] needs and reflective of an indifference to his interests. This conduct spanned the child's entire life, despite the best efforts and substantial resources of [the Department] to assist and redirect mother in her behavior and parenting skills.

> Guided by [the son's] best interest, the record therefore provided the requisite "clear and convincing evidence" that termination of mother's residual parental rights in [her son] was the appropriate statutory remedy.

Id. (statutory citation omitted).

Despite limited progress made by the mother and her young age, which undoubtedly was a primary factor in her poor decision-making process, the court's view in *Lecky* can best be stated by its determination that "'[i]t is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming ... responsibilities.'" *Id.* at 540 (quoting *Kaywood v. Halifax County Dep't of Social Servs.*, 394 S.E.2d 492, 495 (Va. App. 1990)).

Virginia is not alone in its view. The court in *In the Matter of A.H.*, 421 N.W.2d 71 (S.D. 1988), held in accord. Therein, the court decided that it "cannot and will not require Son to wait in limbo another year or two or more for a mother who may never be able to properly parent him." *Id.* at 76.

My view of the case at hand comports with that of the courts' views in *Lecky* and *In the Matter of A.H.* I agree with the majority that the mother in this matter made a wise choice in committing herself and her son to the Cabinet and that this type of decision should be encouraged, rather than punished. Nonetheless, I do not believe we can condone her ongoing and irresponsible behavior, including a 107-day period of absence where she was AWOL without any contact or concern for her son, numerous other days of being AWOL, and ongoing defiant behavior.

While the mother was pursuing her own interests during her absences, fortunately, the child was in the care of foster parents for most of his life. I am, however, not of the opinion that this fact releases the mother of her duty to maintain ongoing

contact with her child to develop parenting skills and to bond with him, without continually running away, especially if she had realistic hopes and intentions of having her child returned to her custody. Moreover, simply because the child was in foster care, does not mean that the mother did not abandon him, especially during her 107-day absence. To hold otherwise condones parents' lack of contact with their children while in foster care.[4] Thus, I disagree with the mother's argument that she could not have abandoned her child because he was in foster care. A holding to the contrary cannot be beneficial to efforts to keep families united.

Where the statutory factors under KRS 625.090 are otherwise met, unlike the majority, I am not of the opinion that if a parent's negative behavior is attributable to her immaturity, that termination is premature where the parent is reasonably likely to develop necessary parenting skills with a reasonable time after entering adulthood. I appreciate the majority's qualifier of “reasonableness” in reference to time limitations for a young parent to develop parenting skills. However, my view is that age does not excuse the mother from any of her parenting duties whatsoever for any time period, and especially does not excuse her for her overall failure to be a responsible parent for almost all of her son's entire life.

Moreover, the keys to custody of her child were in the mother's hands at all times. Had the mother complied with the Cabinet, acted responsibly, stopped running away, and modified her defiant behavior, she would have had custody of her child. Her parental rights were not terminated because of her age or immaturity; rather, they were terminated because she continuously refused to act as a responsible parent would to her

[4] Obviously, this statement only relates to situations where contact is allowed.

child in any manner with any long-term consistency. Her actions were sufficiently deficit to meet the termination standards in KRS 625.090.

As in *Lecky* and *In the Matter of A.H.*, I do not believe that the child in this matter, who has been in the care of foster parents for nearly his entire life (nearing four years by this time), who are able and ready to adopt him and who he calls "mom" and "dad," should have to wait in limbo any longer to find out when, or even if, his mother will be capable of assuming reasonable parenting skills within a reasonable time after reaching the age of majority. Even with expert testimony, as suggested by the majority, regarding the mother's expectations as an adult parent, i.e., a look into her future rather than her past, this cannot be an exact science and cannot reliably predict what the future holds for the mother. I have grave concerns that this policy will put children in harm's way, prolong the time until permanency and stability are established in their lives, and lessen their hopes for adoption.

Our courts are full of termination cases involving adult parents. Adulthood is not a guarantee of parenting skills that meet even the minimum required under the law. The age of majority holds no magical formula to transform a mother who for years has refused to take her role as mother seriously. Since his birth, the child in this matter has waited for his mother, while abundant resources were provided by the Cabinet to assist her, to fulfill her parenting responsibilities, but she has failed to do so time and again. Accordingly, having failed to use the keys given to her to unlock the door to custody of her child, I do not believe the child must wait any longer to see when, or if, the mother can become a responsible parent.

The fact that the child has not suffered physical or mental abuse or something otherwise traumatic is fortunate; however, he was rarely left alone with the mother. I appreciate that the few times the child was in the supervised care of his mother, he suffered no harm. Nonetheless, even then, she made several poor choices, such as crawling out a second story bedroom at 2:00 a.m., leaving the child in his crib during her Christmas visit with him without telling her aunt, who was supervising the visit, that she was leaving. The mother returned nineteen hours later despite the fact that during such visits it was her responsibility to take care of her child, under the supervision of her aunt. During this absence, the mother visited a boy who violently beat her in the past. This episode is even more disturbing when put in the context that she knew the Cabinet had filed a petition to terminate her parental rights less than a month earlier. Knowing that at this point she was under even higher scrutiny, she, nonetheless, made decisions that would lessen her chances of keeping her parental rights intact.

The mother also instigated fights in the institutions where she was placed for treatment and was expelled from school. Having left the child in the middle of the night, instigating fights, continuing involvement with an abusive boyfriend, and an overall propensity toward making very bad choices, it is to her credit (or luck) that the child did not suffer any harm while in her care. I do not believe, however, that the Cabinet must wait until a child in its care has suffered injury before steps are taken to secure permanency and a stable home for him. Certainly, the public policy of Kentucky does not dictate this.

I do not intend to be overly harsh to the young mother. She was a very young child having a child and did not have the benefit of a united family behind her to

help her through the trying times. Moreover, it is clear that she has suffered greatly from her past as well and acted out defiantly, as children with bad home lives often do.

The mother has had a difficult road to walk and likely, it will continue to be difficult in the future for her, but not impossible. With effort, she can overcome her history and look into the future as opportunity. While her past behavior as a mother cannot be condoned to the detriment of her child, it does not define who she is or may become. Hopefully, she takes advantage of resources available to her and betters her condition. So long as potential adoptive parents are in agreement, the mother still has the keys in her hands to play some role in her child's life. If given the opportunity, I truly hope she decides to use them.

In conclusion, I believe the family court did not err in determining that the statutory requirements for termination of the mother's parental rights were met in this case. Accordingly, I would affirm.

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