RENDERED: OCTOBER 11, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001352-ME

B.S.B. (BIOLOGICAL FATHER) APPELLANT

v.

APPEAL FROM LAUREL FAMILY COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 18-AD-00017

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES;[1] K.B. (BIOLOGICAL MOTHER); AND M.B.B. (A MINOR CHILD) APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, JONES, AND KRAMER, JUDGES.

KRAMER, JUDGE: B.S.B. (Father) appeals from the Laurel Family Court's Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights

[1] Although the Cabinet for Health and Family Services is named in this appeal, it did not file a brief with this Court. The Cabinet was a named party in the action in family court as required by Kentucky Revised Statute (KRS) 625.060, but did not participate in the proceedings beyond filing a response to the petition. We find it concerning that the Cabinet has chosen not to participate in this appeal, given that it involves the termination of parental rights.

in this case involving his minor child (Child). After a careful review of the record and an oral argument, we REVERSE based on the insufficiency of evidence to support the Laurel Family Court's decisions in this case.

Because of the brevity of the record and the termination hearing held in this matter,[2] the Court can only recite the most basic of facts leading up to this appeal. Child was born in 2009 while Mother and Father were married. The parties divorced in 2012. From 2012 through 2015 Father's visitation with child was at times supervised; at other times it was not. Father paid child support in the year following the divorce, but Mother testified that she had not received a child support payment since 2013. Father does not dispute that he was in arrears at the time of the hearing.

Father has been incarcerated since August 2015 and was later convicted of multiple felonies in the state of Tennessee. In 2015, Father was driving an eighteen-wheel tractor trailer and caused a collision that resulted in the death of six people, including two children.[3] According to statements made by Father,[4] he received a sentence of fifty-five years' incarceration, to serve a

[2] It was precisely eighteen minutes from the time that Father's counsel was able to get him on the telephone at the prison until she ended the call with Father at the conclusion of his testimony.

[3] Because there was no evidence offered by a competent witness or exhibits regarding Father's charges, conviction, sentence, or facts relating to the tractor trailer accident, the Court only cites briefly to these matters.

[4] Father was not sworn in by the family court. Therefore, he did not offer "testimony."

minimum of thirty percent. He stated that he had a motion for retrial pending before the trial court. Depending on whether the Tennessee court granted his motion, he planned to appeal his conviction.

Mother filed a petition for involuntary termination of Father's parental rights in March 2018. Father was appointed counsel. Child was appointed a *guardian ad litem* (GAL). The GAL's report, filed with the family court on May 4, 2018, in its entirety stated as follows:

> Comes James D. Hodge, appointed Guardian ad Litem on March 30, 2018, and for his report states as follows:
>
> 1. Your Guardian ad Litem carefully reviewed the pleadings herein.
> 2. Your Guardian ad Litem met with the minor child and Petitioner, [Mother], on April 29, 2018.
> 3. The undersigned Guardian ad Litem is of the opinion that the best interests of the child are best served by terminating the parental rights of the Respondent, [Father], in the above-styled case.
> 4. Your Guardian ad Litem further requests appropriate fees be awarded him for his services herein.[5]

The GAL did not interview anyone other than Mother and Child. The GAL did not state facts in support of his recommendation of termination.[6]

[5] On May 14, 2018, Mother was ordered to pay Mr. Hodge $500.00 for his fees in this matter.

[6] The GAL did not enter an appearance at the hearing, but it appears he was present. He did not participate beyond asking Father to clarify the length of his sentence and the date of his anticipated parole eligibility.

The family court held a hearing on July 23, 2018. Father was not transported to Laurel Family Court for the hearing. Rather, he remained in prison in Tennessee and apparently was to be conferenced in via telephone. The family court made multiple attempts to call Father in prison, which failed. Apparently, there was a time difference that no one had realized prior to the hearing. Thereafter, the telephonic conference was made by Father's counsel on her cellular telephone at the bench. Mother was sworn in by the family court prior to providing testimony; however, although Father made a few statements, he was not sworn in by the family court. Mother testified but offered no supporting documentation or other evidence. At the conclusion of Mother's testimony, Father stated that he could not hear "anything that is going on." Quite remarkably and without any basis in fact, Mother's counsel stated that "he knows what was said." The family court allowed Father's counsel to summarize Mother's testimony for Father rather than have Mother re-testify. Neither Child's GAL nor the Cabinet offered any testimony or evidence, and no one else offered any testimony or evidence. Inexplicably, the family court instructed Father's attorney to call her next witness *after* counsel had terminated the telephone call with Father. Father's attorney did not call any other witnesses. At the conclusion of the hearing, the family court instructed both parties to tender proposed findings within ten days. Those proposed findings, if tendered, are not contained in the record before us.

However, during oral argument before this Court, counsel for Mother stated that she drafted the findings of fact, conclusions of law, and judgment of termination of Father's parental rights entered by the family court on August 6, 2018.

This appeal followed.[7]

"The liberty interest . . . of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000). Therefore, termination of parental rights must be conducted with the utmost caution. "Termination can be analogized as capital punishment of the family unit because it is so severe and irreversible." *F.V. v. Commonwealth, Cabinet for Health and Family Serv.*, 567 S.W.3d 597, 606 (Ky. App. 2018) (internal citations and quotations omitted). Given the gravity of termination, we must note at the outset that the hearing which resulted in the involuntary termination of Father's parental rights lasted a mere eighteen minutes, during which very little evidence of record was offered or entered.

[7] After the family court allowed Father's counsel to withdraw and collect her fee, Father attempted to pursue his appeal *pro se.* However, this Court remanded the case to the Laurel Family Court for appointment of counsel for Father. *See A.C. v. Cabinet for Health and Family Serv.*, 362 S.W.3d 361 (Ky. App. 2012). The family court appointed the same counsel that represented Father at the hearing for termination of his parental rights.

In Kentucky, termination of parental rights is proper upon satisfaction, by clear and convincing evidence, of a tripartite test. *Cabinet for Health and Family Serv. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, KRS 625.090(1) requires that a child be adjudged neglected or abused. Second, KRS 625.090(1)(c) requires that termination must be in the child's best interest. Third, at least one of the conditions set out in KRS 625.090(2) must be established. The family court's termination decision will be reversed only if it is clearly erroneous. *Cabinet for Health & Family Serv. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support the decision. *Id.*

"To review [a] judge's decision on appeal, it is important to know what facts the judge relied on in order to determine whether he has made a mistake of fact, or to even determine if he is right at law, but for the wrong facts. If a judge must choose between facts, it is clearly relevant which facts supported his opinion." *Anderson v. Johnson*, 350 S.W.3d 453, 455 (Ky. 2011). "Failure to [make the statutorily required findings of fact] allows an appellate court to remand the case for findings, *even where the complaining party failed to bring the lack of specific findings to the trial court's attention*." *Id.* at 458 (emphasis added).

We agree with Father that the family court's findings are both insufficient and not supported by clear and convincing evidence. During oral

argument before this Court and in accord with candor due the Court, Mother's counsel conceded that evidence offered in this case was lacking on a number of points. She attributed this to "everyone knowing what the facts of the case were."

For example, the family court found that "[Father] initially had supervised visitation that was later modified to unsupervised, however, upon positive drug screen results were again restricted to supervised visitation." There was no evidence presented regarding a positive drug screen of Father or *any* drug use by Father. Mother testified that Father had been convicted of driving under the influence in 2015,[8] but that was the extent of any evidence regarding possible substance abuse by Father. The family court's finding is clearly erroneous.[9]

The family court also found that "[i]n January, 2018 the Respondent was convicted of 6 counts of vehicular homicide, 4 counts of reckless aggravated assault, speeding and driving under the influence and was sentenced to at least fifty-five (55) years of incarceration." The family court found that Father testified the accident took place on June 15, 2015, but Father did not testify as to the date of

[8] Father does not dispute that he was convicted of driving under the influence in conjunction with other felony offenses in Tennessee.

[9] We note that it is *possible* that the family court relied on the record from the parties' divorce/custody action for this finding. However, the family court at no time stated that it was taking judicial notice of the other action, and neither party motioned the court to have the record from the divorce/custody case made part of the record in the instant action.

the accident.[10] There was no evidence submitted to the family court regarding the charges for which Father was convicted, nor when he was convicted. Mother testified that Father was convicted of "vehicular manslaughter and several other charges, DUI." Father did not elaborate on the specifics of his conviction in his testimony – with the exception of the length of his sentence – nor was he asked by his counsel or on cross-examination. There was no documentation presented regarding Father's conviction, and Mother did not request that the Court take judicial notice of Father's conviction or the facts surrounding it. It is unknown to this Court whence the family court derived evidence to support its finding. Therefore, it is clearly erroneous.

The family court found that Child was an abused or neglected child pursuant to KRS 625.090(1)(a)(2) but failed to offer any explanation or make any findings as to why the child was abused or neglected by Father. KRS 625.090 requires specific individualized findings, and the Kentucky Supreme Court has reiterated that written, particularized findings are essential in cases involving the welfare and future of children. *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). Nothing was offered into evidence regarding the underlying facts supporting a determination that Father abused or neglected Child. Upon review,

[10] As noted earlier, Father was not under oath at any point during the hearing. Hence, he could not have "testified."

we conclude that the family court did not make adequate findings to support its conclusion that Child is an abused or neglected child.

The family court also concluded that Father has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect.[11] Because the family court failed to make the appropriate findings of fact, we must again only speculate that the family court relied on the fact that the collision caused by Father in Tennessee resulted in the death of two children for support of its conclusion. However, the resulting death of two children in the collision caused by Father – as horrific as it was – was not caused by physical or sexual abuse or neglect of those children by Father. There was no evidence presented to the family court that Father caused the death of another child through abuse or neglect. And, during oral argument before this Court, Mother's counsel conceded that KRS 625.090(1)(a)(2) was not met in this case based upon the accident in which two children were killed. The family court's findings in this regard are not only insufficient, but its conclusion is clearly erroneous because it is not supported by *any* evidence in the record.

The family court goes on to find that Father abandoned Child for a period of not less than 90 days.[12] It is unknown if the family court relied on

[11] KRS 625.090(2)(i).

[12] KRS 625.090(2)(a).

evidence other than Father's incarceration for the basis of its conclusion; however, although it may be one of many factors, "incarceration alone can never be construed as abandonment as a matter of law." *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663–64 (Ky. App. 1985). Both Mother and Father offered testimony that Father had last seen Child in March 2015, even though he did not become incarcerated until August 2015. Mother also testified that Father did not attempt to speak to Child via telephone from March – August 2015. There was no testimony regarding the circumstances surrounding Father's lack of contact with Child during that time. Father stated that, after his incarceration, he wrote letters to Mother asking for a telephone number that he could reach Child but received no response. Mother testified that Father had written letters to her, but not to Child. However, both parties agreed that Father had utilized most or all of his visitation with Child prior to March 2015. The family court made no finding pertaining to this testimony. The family court's findings in regard to Father's purported abandonment of Child are insufficient under KRS 625.090.

The family court further found that Father has, for not less than six months, continuously failed to provide or has been substantially incapable of providing essential parental care and protection for Child and there is no reasonable expectation of improvement considering the age of Child;[13] and that, for

[13] KRS 625.090(2)(e).

reasons other than poverty alone, Father has continuously failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for Child's well-being and there is no reasonable expectation of improvement in Father's conduct in the foreseeable future, considering the age of Child.[14] The family court again made no findings of fact in support of its conclusions, and this Court is left to speculate regarding the evidence in support of this finding.

"Consideration of matters affecting the welfare and future of children are among the most important duties undertaken by the courts of this Commonwealth. In compliance with these duties, it is imperative that the trial courts make the requisite findings of fact and conclusions of law to support their orders." *Keifer*, 354 S.W.3d at 125-26. To that end, the family court failed to make any findings to support its conclusion that termination of Father's parental rights is in Child's best interest. KRS 625.090(3)(e) requires the trial court to consider "[t]he physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered" when analyzing the child's best interests. Here, the family court failed to conduct this analysis. Mother testified that Child sees a counselor. However, Mother did

[14] KRS 625.090(2)(g).

not testify how often or for what reason(s) Child sees a counselor. The counselor was not called to testify. In fact, *no one testified or offered any evidence regarding the physical, emotional, and mental health of Child*. The only documentation in the record regarding Child's best interest is a conclusory and unsupported "opinion" of the Child's GAL contained in his report, as earlier set forth. KRS 625.090 requires individualized and specific findings related to Child's best interests. Moreover, the finding by the family court is clearly erroneous as it is not supported by substantial evidence contained in the record.

Finally, Mother argues Father's history of substance abuse in her brief to this Court, asserting "Father has engaged in a pattern of drug addiction behavior for several years preceding the deadly crash of June, 2015." Mother cites to the record of the hearing in support of this assertion. This citation is at the very least perplexing, if not a misrepresentation of the record to this Court. Mother presented no evidence of Father's alleged history of substance abuse. She presented no evidence that substance abuse impacted Father's relationship with or ability to parent Child. Mother testified that Father had supervised visitation following the parties' divorce and that at some point visitation was unsupervised before the supervision requirement was reinstated by the family court. However, there was no evidence regarding *why* Father's visitation was supervised for periods of time (*i.e.*, whether it was related to a history and pattern of substance abuse by Father).

Mother also failed to present evidence that Father's most recent conviction was part of a broader criminal "lifestyle incompatible with parenting." *See J.H.*, 704 S.W.2d at 664. Indeed, the record before us contains no evidence to suggest that Father was a habitual criminal with frequent incarcerations that interfered with his ability to parent Child prior to 2015. While Mother's arguments to this Court, if true, may be compelling evidence, appellants may not raise new arguments for the first time on appeal. *Pope v. Thompson*, 519 S.W.3d 781, 784 (Ky. App. 2017). "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980).

Upon our review of this matter, it would be a grave understatement to say that we are perplexed that a parent's fundamental rights can so easily be terminated by a *hearing* that at best was an endeavor to simply check off the proverbial box. Father filed a *pro se* notice of appeal, and thereafter this Court remanded the matter to Laurel Family Court for appointment of counsel.[15, 16] But for Father's *pro se* notice of appeal, the reality of what transpired would have not

[15] The family court appointed the same attorney who participated in the hearing at issue.

[16] This Court noted in that order that this case did not appear to be an *Anders* brief case.

been revealed, and his parental rights would have been terminated without so much as even the most basic due process or evidence to support the decision.

We remind the family court and counsel participating in this case that the United States Constitution provides due process for *all* persons.

> **All persons** born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive **any person** of life, liberty, or property, without due process of law; nor deny to **any person** within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. 14, § 1 (emphasis added). There are no exceptions for incarcerated individuals who stand to have their parental rights terminated.[17] We further remind the family court and counsel that, as this Court stated in *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 426-27 (Ky. App. 2015):

> [P]arental rights are a "fundamental liberty interest protected by the Fourteenth Amendment" of the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982).
>
> When the government acts to terminate a parent's rights, it is not merely infringing on those rights; it is ending them. *Lassiter v. Dept. of Social Svcs. of Durham Co., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed.2d 640 (1981).

[17] *See, e.g., M.E.C. v. Commonwealth, Cabinet for Health and Family Serv.*, 254 S.W.3d 846 (Ky. App. 2008).

> Accordingly, termination of parental rights is a grave action which the courts must conduct with "utmost caution." *M.E.C. v. Commonwealth, Cab. for Health and Family Svcs.*, 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* 455 U.S. at 759, 102 S.Ct. at 1398. 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).

For the foregoing reasons, the order terminating parental rights and judgment thereon by the Laurel Family Court is hereby REVERSED based on lack of evidence, and the Laurel Family Court is hereby mandated to enter an order DISMISSING Mother's Petition with prejudice.

JONES, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND WRITES SEPARATELY.

ACREE, JUDGE, CONCURRING: I concur with the majority but write separately to point out why we should not be surprised to have a case like this make its way to this Court.

The "one judge-one family" concept does not intend to blur lines between independent cases involving the same family and presided over by the same judge. But that seems to be an unintended consequence. It is exactly what happened in *S.R. v. J.N.*, 307 S.W.3d 631 (Ky. App. 2010).

In *S.R.*, under circumstances analogous to these, this Court vacated and remanded a family court's order in a dependency, neglect, and abuse case for lack of sufficient evidence. Because of the prior divorce action, the family court judge knew that "[Mother] has engaged in a pattern of conduct over the years which has rendered her incapable of caring for the immediate and ongoing needs of her child." *Id*. at 635. Judge, now Justice, Buckingham believed that was enough given the one judge-one family approach. Citing *Maynard v. Allen*, Justice Buckingham noted "[t]he rule in this jurisdiction is that in a case pending before it a court will take judicial notice of a record in the same court in a case involving the same parties and the same questions[.]" *Id.* at 639 (Buckingham, J., dissenting (quoting 276 Ky. 485, 124 S.W.2d 765, 767 (1939), *superseded by* KRE[18] 201)).

The majority opinion in *S.R.* analyzed the case differently from that expressed by Justice Buckingham; it said:

> A family court is no less bound by procedural, substantive and evidentiary rules of law than any other circuit court simply because the creation of family courts was animated by the "one judge-one family" policy. . . . Family court judges become familiar with the families that appear before them, and with their disputes. Judges will be left with impressions that may or may not be relevant to the issue then before the court. If those impressions are not sufficiently relevant, or do not carry sufficient *veritas* to make them judicial findings, they should have no legal import in any [subsequent] proceeding. We learn by the case before us that if a

[18] Kentucky Rules of Evidence.

> family's various causes of action in family courts are not kept distinct by the court's adherence to well-founded rules, parties or the court itself could leverage mere impressions from a prior proceeding into findings in a subsequent one, despite that in the prior action the impression was not sufficient to merit establishment as a judicially noticeable finding of fact. . . . Dutifully following well-founded rules of court will prevent such manipulation.

Id. at 637-38. The specifically relevant rule is KRE 201 and it is discussed in *S.R.*

In the case now before this Court, mistakes were made because the lesson of *S.R.* was forgotten. But other factors contributed, too. Father's incarceration in another state presented an uncommon challenge in this case.

However, one common challenge that will undoubtedly recur is the legislature's undervaluing the cost of assuring Kentucky's less privileged constituents receive appropriate legal representation. This undervaluing of the needs of their constituents translates to the legislature's decision to under-compensate court-appointed lawyers who have had no increase in their compensation for at least three decades. Under such circumstances, even the most dedicated professionals will focus their best efforts on the most critical aspects of a case, and that tempts both their corners-cutting approach and the family court's sympathetic accommodation of the legislature's affront. Given such factors, we should not be surprised by outcomes such as that in *S.R.* and in this case.

Yes, mistakes were made and, yet, I found the attorneys who appeared before this Court appropriately contrite and their explanation understandable. However, blame for these mistakes should be divvied out as much to the family court and the legislature, not to mention the Cabinet for Health and Family Services whose involvement was superficial and meaningless. Until the legislature values these professional services at a level commensurate with the importance of the task, I will not be surprised to see comparable cases for our review in the future.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE K.B.:
Kelly Kirby Ridings London, Kentucky	Hailey Scoville Bonham London, Kentucky