

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CJ 1742

**STATE OF LOUISIANA IN THE INTEREST OF C.S. III, B.S., M.S.,
T.S. AND S.S.**

Judgment rendered: December 21, 2007

**On Appeal from the City Court of Hammond
Parish of Tangipahoa, State of Louisiana
Individual #22012; Case #21472
The Honorable Grace B. Gasaway, Judge Presiding**

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Albany, LA**

**Counsel for Appellant
Father, C.D.S.**

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C.S. III**

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**Counsel for Appellees
S.W., A.W., and T.S.**

**Theresa A. Beckler
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**Counsel for the Department of
Social Services**

KUHN, J CONCURS
Parro, J., concurs.

BEFORE: PARRO, KUHN AND DOWNING, JJ.

RRJ

DOWNING, J.

C.D.S.¹ appeals a judgment entered by the City Court of Hammond² that terminated parental rights to one of his children. The prospective adoptive parents, S.W. and A.W., together with the birth mother, T.S., had received court permission to file a private petition to terminate C.D.S.'s parental rights so that S.W. and A.W. could adopt the child, C.S., III.³ Of our own motion, pursuant to our authority under La. C.C.P. art. 927B, we notice that S.W., A.W., and T.S. had no right of action to petition for termination of C.D.S.'s parental rights on the grounds asserted. Accordingly, we vacate the judgment and remand to the City Court.

Pertinent Facts And Procedural History

C.S., III, had been in the custody of the Louisiana Department of Social Services, Office of Community Services ("Department"), between August 2003 and early 2005. By May 2005, the Department had provisionally returned C.S., III, to his mother's care. On August 24, 2005, the Department returned custody of C.S., III to his mother, T.S., and closed its case in his regard.

For approximately six weeks in January and February 2006, C.S., III, was allowed to stay with his father, C.D.S. The facts surrounding the return are disputed, but C.D.S. did return C.S., III, to his mother at the end of this period.

In April 2006, T.S. signed a voluntary act of surrender in favor of A.W. The City Court approved the placement of C.S. III, with S.W. and

¹ Pursuant to Rule 5-2 of the Uniform Rules-Courts of Appeal, the initials of the parties involved in this matter will be used instead of their names to protect the privacy of the minor children.

² The City Court of Hammond was exercising juvenile jurisdiction in this matter. *See* La. Ch.C. art. 302(4)/

³ T.S. had already signed a voluntary act of surrender in favor of S.W. and A.W.

A.W. in May 2006. Notice of filing of the surrender was served on C.D.S., notifying him that his parental rights could be terminated and giving him a date for a hearing. The City Court signed an order approving pre-adoptive placement of C.S., III, with S.W. and A.W.

C.D.S. filed an opposition to the termination of his parental rights. He also filed a motion to modify disposition, seeking visitation with C.S., III, and two of his siblings.

Subsequently, A.W. and S.W. filed a motion seeking to have the City Court appoint private counsel to petition for termination of C.D.S.'s parental rights. The court then appointed the adoptive parents' attorney to file this petition. T.S., the biological mother, then filed a "Motion to Terminate Parental Rights," in which she alleged only that C.D.S. was "not a fit parent to raise the child." On the court's leave, the adoptive parents' attorney then filed an amended petition to terminate parental rights. S.W. and A.W. were added as petitioners. The only ground for termination stated in this amended petition is that C.D.S. was "not a fit parent to raise the child, ... , said grounds being contained in LSA Ch.C. article 1015(3)(j)"⁴

After a bench trial, the City Court entered judgment decreeing, among other things, the termination of the mother, T.S.'s, parental rights and responsibilities and the termination of C.D.S.'s parental rights and responsibilities. The judgment also decreed that C.S.,III, was free for adoption. The court rendered a separate judgment the same day denying C.D.S.'s motion for visitation with his children.

Only the first judgment is being appealed. C.D.S. raises three assignments of error.

⁴ The terms of this sub-paragraph are set out in the text within.

DISCUSSION

Termination of a parent's parental rights is one of the most drastic actions the State can take against one of its citizens. **S.J.G. v. A.A.G.**, 07-0625, p. 5 (La.App. 1 Cir. 9/19/07), ___ So.2d ___, ___. As a result, the Louisiana legislature "has imposed strict procedural and evidentiary requirements that must be met before the issuance of a judgment terminating parental rights." **Id.** (Citation omitted.)

Louisiana Children's Code art. 1004 provides the authorization for filing petitions for termination of parental rights.⁵ Only La. Ch.C. art. 1004F

⁵ This article provides as follows:

A. At any time, including in any hearing in a child in need of care proceeding, the court on its own motion may order the filing of a petition on any ground authorized by Article 1015.

B. Counsel appointed for the child pursuant to Article 607 may petition for the termination of parental rights of the parent of the child if the petition alleges a ground authorized by Article 1015(4), (5), or (6) and, although eighteen months have elapsed since the date of the child's adjudication as a child in need of care, no petition has been filed by the district attorney or the department.

C. The district attorney may petition for the termination of parental rights of the parent of the child on any ground authorized by Article 1015.

D. The department may petition for the termination of parental rights of the parent of the child when any of the following apply:

(1) The child has been subjected to abuse or neglect after the child is returned to the parent's care and custody while under department supervision, and termination is authorized by Article 1015(3)(j).

(2) The parent's parental rights to one or more of the child's siblings have been terminated due to neglect or abuse and prior attempts to rehabilitate the parent have been unsuccessful, and termination is authorized by Article 1015(3)(k).

(3) The child has been abandoned and termination is authorized by Article 1015(4).

(4) The child has been placed in the custody of the state and termination is authorized by Article 1015(5).

(5) The child is in foster care because the parent is incarcerated and termination is authorized by Article 1015(6).

E. When termination is authorized by Article 1015, other than on the grounds specified by Paragraph D of this Article, by special appointment, the district attorney may designate counsel for the department as a special assistant authorized to act in his stead in all such termination actions or in a particular case.

F. By special appointment for a particular case, the court or the district attorney may designate private counsel authorized to petition for the termination of parental rights of the parent of the child on the ground of abandonment authorized by Article 1015(4).

G. Foster parents who intend to adopt the child may petition for the termination of parental rights of the foster child's parents when, in accordance with Article 702(D), adoption is the permanent plan for the child, the child has been in state custody under the foster parent's care for seventeen of the last twenty-two months, and the department has failed to petition for such termination.

allows a court to designate and authorize private counsel to file a petition for termination of parental rights. And “private counsel may be designated pursuant to Article 1004(F), to file a petition for termination of parental rights **only if the ground for termination is abandonment.**” (Emphasis added.) **State ex rel. D.M.**, 00-0451, p. 3 (La.App. 4 Cir. 3/14/01), 785 So.2d 857, 859.

Here, the petitioners filed a petition for termination of parental rights solely on the grounds that C.D.S. was an unfit parent according to La. Ch.C. art. 1015(3)(j). This paragraph provides as follows:

(3) Misconduct of the parent toward this child or any other child of the parent or any other child in his household which constitutes extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency, including but not limited to the conviction, commission, aiding or abetting, attempting, conspiring, or soliciting to commit any of the following:

* * *

(j) Abuse or neglect after the child is returned to the parent's care and custody while under department supervision, when the child had previously been removed for his safety from the parent pursuant to a disposition judgment in a child in need of care proceeding.

This is not a grounds on which private counsel may be appointed to petition for termination of parental rights. *See D.M.*, 00-0451 at p. 3, 785 So.2d at 859. In **D.M.**, the petitioner sought permission to file a petition to terminate a father’s parental rights under La. Ch.C. art. 1004F, but she alleged rape under La. Ch.C. art. 1015(3) as the grounds for termination. **Id.**, 00-0451 at p. 3, 785 So.2d at 858-59. The **D.M.** court recognized on its

H. When termination is authorized by Article 1015(1) or (2) and no petition is filed to terminate the parental rights of the surviving parent pursuant to Paragraph A, C, or E of this Article after a written request to file such action is made to the district attorney by any interested person and no petition is filed within sixty days by the district attorney, that person may file suit to terminate the parental rights of the surviving parent.

own motion in accordance with La. C.C.P. art. 927 that the petitioner had no right of action to terminate the father's parental rights on the grounds stated.⁶

We observe that at the trial of the matter, the court did admit evidence relating to abandonment over C.D.S.'s objection, and abandonment was one of the grounds on which the trial court entered judgment. S.W., A.W., and T.S., however, never sought to amend the pleadings to assert this ground. La. C.C.P. art. 1154 gives the trial court liberal discretion to allow amendment.⁷ But, "[a] timely objection to an attempt to enlarge the pleadings, coupled with the failure to move for an amendment to the pleadings, is fatal to an issue not raised by the pleadings." **Barham & Arceneaux v. Kozak**, 02-2325, p. 17 (La.App. 1 Cir. 3/12/04), 874 So.2d 228, 242. *See also* **Barker v. Loxco, Inc.**, 432 So.2d 975 (La.App. 1 Cir. 1983), and **Gar Real Estate & Ins. Agency v. Mitchell**, 380 So.2d 108, 109 (La.App. 1 Cir. 1979).

Since the pleadings do not assert the only grounds on which private counsel may be authorized to petition for termination of parental rights, we must recognize of our own motion that S.W., A.W. and T.S. had no right of

⁶ The **D.M.** court also found the petitioner had no right of action because she was the mother of the child at issue. The court ruled, "There are no circumstances under which one parent may file a petition to terminate the parental rights of another parent." **D.M.**, 00-045 at pp. 2-3, 785 So.2d at 858. *See also* S.J.G, 07-0625 at p. 5, ___ So.2d at ___. Here, the mother is one of the petitioners. Due to the disposition here, we need not determine the effect of her voluntary surrender on her status as a proper petitioner.

⁷ Louisiana Code of Civil Procedure art. 1154 provides as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

action to file the petition.⁸ In **S.J.G.**, 07-0625 at p. 6, ___ So.2d at ___, this court noticed on its own motion that the petitioners had no right of action. Accordingly, it vacated a judgment terminating parental rights because proper procedures were not followed, noting that the procedure employed “contravene[d] the strict procedural requirements of termination proceedings, implemented by the legislature to safeguard parental rights.”

Id.

Therefore, we vacate the judgment of the City Court. Rather than dismiss the proceeding, however, pursuant to La. C.C.P. art. 934, we remand the matter to the City Court 1) to allow, if feasible, the substitution of a proper petitioner as allowed by La. Ch.C. art. 1004 (*see D.M.*, 00-0451 at pp. 4-5, 785 So.2d at 859-60.) and 2) to designate private counsel, if appropriate, and to authorize such counsel to petition for the termination of the parental rights of C.D.S., the father of C.S., III, on the ground of abandonment.

DECREE

For the foregoing reasons, we vacate the judgment of the City Court. We remand this matter for further proceedings consistent with this opinion, with instructions. Costs of this appeal are assessed to S.W., A.W. and T.S.

VACATED; REMANDED WITH INSTRUCTIONS

⁸ Louisiana Code of Civil Procedure art. 927B allows us to recognize the lack of a right of action on our own motion. This article provides in pertinent part: “The nonjoinder of a party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, may be noticed by either the trial or appellate court of its own motion.”