NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CJ 1609

STATE OF LOUISIANA, IN THE INTEREST OF D.L.G., D.P.B., D.M.G., AND D.J.G.[1]

On Appeal from the 17th Judicial District Court
Parish of Lafourche, Louisiana
Special Juvenile Docket Nos. 10121, 11351, and 10068, Division "C"
Honorable Walter I. Lanier, III, Judge Presiding

David G. Arceneaux **Thibodaux, LA**	**Attorney for Appellant** **B.G., Sr.**
Linda A. Mitchell **Houma, LA**	**Attorney for Appellee** **State of Louisiana, Department of Children and Family Services**
Collin P. Constantin **Southeast Louisiana Legal Services** **Houma, LA**	**Attorney for** **D.L.G., D.P.B., D.M.G. and D.J.G.**

BEFORE: PARRO, WELCH, AND KLINE,[2] **JJ.**

Judgment rendered MAY 31 2013

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[1] **Initials of the minors are used in accordance with LSA-R.S. 46:1844(W)(3).**

[2] **Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

The father of four minor children adjudicated in need of care appeals the judgment of the juvenile court,[3] which terminated his parental rights as to those children and further determined that it was in the best interest of the minor children that they be freed for adoption. For the reasons that follow, we affirm the judgment of the juvenile court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

B.G., Sr. (B.G.) and S.M. are the parents of five children, D.G., D.L.G., D.P.B., D.M.G., and D.J.G.[4] On June 21, 2010, the State of Louisiana, through the Department of Children and Family Services (DCFS), obtained an oral instanter order removing these children from the custody of their parents and placing them in the custody of DCFS, based on allegations of physical abuse and neglect by the parents.[5] More specifically, it was alleged that B.G. had attempted to strangle D.G. and that, as a result, B.G. was arrested and charged with cruelty to a juvenile.[6] In addition, DCFS contended that S.M. had neglected the children, because she had alleged that B.G. had previously abused all of the children, but she had failed to protect them by filing a civil rule to gain custody of her children. Furthermore, DCFS alleged that S.M. had not provided any clothing or any financial, medical, dental, or psychological support for her children. The children were subsequently maintained in the custody of DCFS pursuant to a continued custody order signed by the juvenile court on July 1, 2010, and they were again adjudicated in need of care pursuant to a judgment rendered in open court

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[3] The Seventeenth Judicial District Court exercises original juvenile jurisdiction for the parish within its district pursuant to LSA-Ch.C. art. 302(2). As a court exercising juvenile jurisdiction, it has exclusive original jurisdiction, in conformity with any special rules prescribed by law, over any child alleged to be in need of care and the parents of any such child. LSA-Ch.C. art. 604.

[4] The children and their parents are referred to by their initials to preserve their anonymity in this confidential proceeding.

[5] The children had previously been removed from the custody of their parents pursuant to an instanter order dated August 17, 2007, and had been adjudicated in need of care by judgment signed September 26, 2007. The children were later returned to the custody of their father by judgment signed January 21, 2009.

[6] B.G. remained incarcerated on this charge from June 21, 2010, the day the children were taken into the custody of DCFS, until October 2010. The charges against B.G. were ultimately dismissed.

on August 10, 2010.

A case plan was developed for the parents and approved by the juvenile court, which was designed to remove the need for the children to remain in DCFS custody. According to the case plan, B.G. and S.M., who were not living together, were required to secure and maintain housing that was physically safe and met the needs of their children. Each parent was further required to verify employment and to support the children financially while they were in foster care by making individual contributions of $125 per month toward the maintenance and care of the children. The parents were required to submit to psychological evaluations, parenting classes, and substance abuse assessments and treatment, if necessary.[7] In addition, the juvenile court ordered B.G. to enroll in an anger management program.

In the initial case plan, the permanent plan for the children was stated as reunification with the parents; however, several months later, this goal was changed to adoption after the parents failed to comply with all aspects of the case plan. On February 29, 2012, DCFS filed a petition for termination of the parental rights of S.M. and B.G. as to D.L.G, D.P.B., D.M.G., and D.J.G.[8] After a hearing, which took place on May 15 and June 26, 2012, the juvenile court found that DCFS had proven by clear and convincing evidence that S.M. and D.G. had abandoned their children within the meaning of certain provisions of LSA-Ch.C. art. 1015(4). The juvenile court further found that DCFS had proven by clear and convincing evidence that S.M. and B.G. had failed to successfully complete their case plans. See LSA-Ch.C. art. 1015(5). After finding that it was in the best interests of the minor children that they be freed for adoption, the juvenile court terminated the parental rights of S.M. and B.G. as to D.L.G,

[7] As part of the case plan, the parents were also required to attend all family team conferences with the children and DCFS representatives, all court hearings, and all visits with their children.

[8] D.G. was not a party to that proceeding; therefore, the parental rights of S.M. and B.G. as to him are not at issue at this time.

D.P.B.,[9] D.M.G., and D.J.G. It is from this judgment that B.G. has appealed. S.M. has not appealed the judgment; accordingly, the judgment is final with regard to the issue of the termination of S.M.'s parental rights as to D.L.G, D.P.B., D.M.G., and D.J.G.

DISCUSSION

Title X of the Louisiana Children's Code governs the involuntary termination of parental rights. The grounds for termination of parental rights, as applicable to this matter, are found in paragraphs (4) and (5) of LSA-Ch.C. art. 1015, as follows:

> (4) Abandonment of the child by placing him in the physical custody of a nonparent, or the department, or by otherwise leaving him under circumstances demonstrating an intention to permanently avoid parental responsibility by any of the following:
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> (b) As of the time the petition is filed, the parent has failed to provide significant contributions to the child's care and support for any period of six consecutive months.
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> (5) Unless sooner permitted by the court, at least one year has elapsed since a child was removed from the parent's custody pursuant to a court order; there has been no substantial parental compliance with a case plan for services which has been previously filed by the department and approved by the court as necessary for the safe return of the child; and despite earlier intervention, there is no reasonable expectation of significant improvement in the parent's condition or conduct in the near future, considering the child's age and his need for a safe, stable, and permanent home.

In order to terminate parental rights, the petitioner must prove each element of a ground for termination of parental rights by clear and convincing evidence. See LSA-Ch.C. art. 1035(A). The method of proving parental misconduct under LSA-Ch.C. art. 1015(5) is found in LSA-Ch.C. art. 1036(C) and (D), which provide:

> C. Under Article 1015(5), lack of parental compliance with a case plan may be evidenced by one or more of the following:
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> (1) The parent's failure to attend court-approved scheduled visitations with the child.

[9] According to his birth certificate, D.P.B.'s father was D.R.B., who was previously married to S.M. However, B.G. testified at trial that he had previously formally acknowledged D.P.B., and he further acknowledged at trial that he was D.P.B.'s biological father. Although S.M. testified that D.R.B. was deceased, a curator was appointed for him, and attempts were made to notify him about the termination proceedings. When D.R.B. failed to appear and contest the proceedings, his parental rights as to D.P.B. were terminated. He has not appealed.

(2) The parent's failure to communicate with the child.

(3) The parent's failure to keep the department apprised of the parent's whereabouts and significant changes affecting the parent's ability to comply with the case plan for services.

(4) The parent's failure to contribute to the costs of the child's foster care, if ordered to do so by the court when approving the case plan.

(5) The parent's repeated failure to comply with the required program of treatment and rehabilitation services provided in the case plan.

(6) The parent's lack of substantial improvement in redressing the problems preventing reunification.

(7) The persistence of conditions that led to removal or similar potentially harmful conditions.

D. Under Article 1015(5), lack of any reasonable expectation of significant improvement in the parent's conduct in the near future may be evidenced by one or more of the following:

(1) Any physical or mental illness, mental deficiency, substance abuse, or chemical dependency that renders the parent unable or incapable of exercising parental responsibilities without exposing the child to a substantial risk of serious harm, based upon expert opinion or based upon an established pattern of behavior.

(2) A pattern of repeated incarceration of the parent that has rendered the parent unable to care for the immediate and continuing physical or emotional needs of the child for extended periods of time.

(3) Any other condition or conduct that reasonably indicates that the parent is unable or unwilling to provide an adequate permanent home for the child, based upon expert opinion or based upon an established pattern of behavior.

In the judgment, the juvenile court specifically found that DCFS had proven the elements of two of the grounds for termination by clear and convincing evidence. Specifically, the juvenile court determined that B.G. had abandoned his minor children pursuant to LSA-Ch.C. art. 1015(4)(b), in that he had failed to provide significant financial contributions for the children's care and support for a period in excess of six consecutive months. The juvenile court further found that DCFS had proven by clear and convincing evidence that B.G. had failed to successfully complete his case plan and that his parental rights should be terminated in accordance with LSA-Ch.C. art. 1015(5).

On appeal, B.G. challenges these findings by the juvenile court, contending that DCFS failed to meet its burden of proof by clear and convincing evidence.

It is well-settled that an appellate court cannot set aside a juvenile court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. In re A.J.F., 00-0948 (La. 6/30/00), 764 So.2d 47, 61. Pursuant to this standard, the two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the juvenile court; and 2) whether the record further establishes that the finding is not manifestly erroneous. See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, Through Department of Transportation and Development, 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092. Even though an appellate court may feel its own evaluations and inferences are as reasonable as the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989).

Proof by clear and convincing evidence requires a party to persuade the trier of fact that the fact or causation sought to be proved is highly probable, i.e., much more probable than its non-existence. Chatelain v. State, Through DOTD, 586 So.2d 1373, 1378 (La. 1991). This burden of proof is an intermediate one between the burden of proof by a preponderance of the evidence and the burden of proof beyond a reasonable doubt. See Louisiana State Bar Ass'n v. Edwins, 329 So.2d 437, 442 (La. 1976). Proof by clear and convincing evidence requires more than a "preponderance" of the evidence, the traditional measure of persuasion, but less than "beyond a reasonable

doubt," the stringent criminal standard. Succession of Bartie, 472 So.2d 578, 582 (La. 1985); Succession of Lyons, 452 So.2d 1161, 1164-65 (La. 1984).

The initial case plan developed for B.G., which was dated December 6, 2010, required him to: (1) secure and maintain housing that was physically safe and met the basic needs of his children; (2) provide verification of income; (3) support his children financially by making contributions of $125 per month toward the cost of their care while they were in foster care;[10] (4) submit to a psychological evaluation and follow up with therapy if recommended; (5) complete a substance abuse assessment; (6) participate in parenting classes; (7) attend all family team conferences, court hearings, and visits with his children; and (8) enroll in an anger management program.

As noted above, the juvenile court found that DCFS had proven by clear and convincing evidence that B.G. had failed to successfully complete his case plan and that his parental rights should be terminated in accordance with LSA-Ch.C. art. 1015(5). There is no dispute that the first element of this provision had been met, in that more than one year had elapsed from June 2010, the date the children had been removed from the parents' custody pursuant to a court order.[11]

In determining that there had been no substantial compliance with the case plan that had been previously filed and approved by the court as necessary for the safe return of the children, the juvenile court first acknowledged that B.G. had complied with various aspects of the case plan. The juvenile court noted that B.G. had completed the psychological evaluation, substance abuse assessment, and parenting classes required of him. The juvenile court also noted that B.G. was in contact with his children and attended the meetings and visitations as set forth in the case plan. However, the juvenile court determined that B.G. had failed to comply with his case plan in three ways: (1) by failing to contribute to the costs of the children's foster care, after being ordered to do so by the court when approving the case plan; (2) by repeatedly failing to

[10] According to the case plan, which was approved by the juvenile court, the payments were to be made by money order and sent to "DCFS State Office Parental Contributions" by the 15th of each month.

[11] The petition to terminate was filed on February 29, 2012, and the hearing on the petition was held in May and June 2012.

comply with the required program of treatment, specifically an anger management program, provided in the case plan; and (3) by his lack of substantial improvement in redressing the problems preventing reunification. See LSA-Ch.C. art. 1036(C)(4),(5), and (6).

The case plan required B.G. to secure and maintain housing that was physically safe and met the basic needs of his children. At the time of the hearing on the petition to terminate parental rights, B.G. was living in a three bedroom, one bath trailer with his cousin, her boyfriend, and their two children. The trailer was inspected by Rebecca Silverii, the DCFS foster care worker for the family, and CASA supervisors, Tiffany Lee and Aimee Lemon, who stated that it was not a suitable or healthy place for the children to live. According to the record, there was a dirty mattress on a box spring in the living room of the trailer, which was where B.G. had been sleeping since he had hurt his leg at work, although there was a bedroom set aside for his use. There were no sheets or any other bedding on this mattress. The two children were sharing one bedroom, which contained only a mattress without any sheets or other bedding, and B.G.'s cousin and her boyfriend were in the third bedroom. The one bathroom was dirty, and there was mildew in the tub.

The women who inspected the trailer noted that the walls of the trailer appeared to be made only of plywood or particle board. In addition, there was a hole in the ceiling where the insulation was coming out, and there was a gap where the floor of the trailer met one of the walls, through which they could see the grass outside. The trailer had cigarette butts and dirty clothes on the floor, spoiled food in the kitchen, and garbage overflowing the garbage cans. Furthermore, although B.G. insisted that his four children would be welcome to come live with him there any time, Ms. Lemon noted that there was not adequate space for the children in the trailer.

B.G. testified that he was in the process of purchasing a two-bedroom trailer, which required some repairs. He further testified that, after these repairs were completed, it was possible that the trailer could be made into a three-bedroom trailer.

However, he did not have the trailer at the time of trial, and he testified that he was not sure how long it would take until he could obtain the trailer, move it to the trailer park he had selected, and complete the repairs.

The juvenile court found that B.G.'s current living situation did not constitute suitable housing for his children. The court further noted that there was no reasonable expectation of significant improvement in B.G.'s conduct in the near future, because it had become "to some degree a standard in this case, everything will get done tomorrow." The record indicates that B.G. had tried at various times to obtain suitable living arrangements for himself and the children, but that he was unable to maintain those living arrangements for any length of time for one reason or another. At the time of the hearing at issue in this matter, the children had been in foster care for two years, and B.G. had still failed to obtain and maintain suitable housing for himself and his children as required by the case plan for reunification.

The case plan also required B.G. to enroll in an anger management program. At a case review hearing on November 18, 2011, the juvenile court entered an order specifically reiterating the requirement that B.G. was to enroll in an anger management program.[12] Nevertheless, at the time of trial, B.G. had not fulfilled this condition of the case plan. When questioned about his failure to complete the required anger management program, B.G. contended that he had attempted to schedule the classes, but he never had the money to pay for them. He further argued that he had already completed parenting classes that addressed anger management issues, and he believed those classes should have been sufficient to satisfy the anger management requirement as well. He also claimed that he was unable to enroll in the anger management program, because his employers had told him that he was in danger of losing his job because of the amount of time he had missed from work. However, it is not clear from the record how attending the anger management program would have affected his work. Finally, B.G. denied that he had any problem with anger issues and stated that

[12] The order was signed on November 28, 2011.

he did not understand why he needed an anger management program at all.

In addition, the case plan required B.G. to make parental contributions of $125 per month to support his children while they were in foster care. In November 2011, the juvenile court entered an order restating the requirement that the parental contributions be made, even though this condition from the case plan had been in place for almost a year.[13] Nevertheless, Ms. Silverii testified at trial that B.G. never made the payments to DCFS as ordered. B.G. acknowledged his failure to make his parental contributions; however, B.G. insisted that he had been told that, if he purchased snacks, gifts, and other items to give to his children at their monthly visits and kept his receipts, he could apply those purchases toward his parental contribution requirement.

According to B.G., he purchased many items for his children, sometimes spending more than the amount required by the case plan. However, he failed to produce any receipts for these purchases at trial. In addition, the testimony of Ms. Silverii, as well as one of the children, was that the items provided at these visits were simple snacks and toys that had come from a place like the Dollar Store. There was testimony that, at some point, B.G. began providing a phone card to his daughter, D.L.G., in the amount of $15 per week; however, he conceded that there were times that he had been unable to afford to purchase the card for his daughter.[14]

B.G. testified that, during the time his children were in DCFS custody, he "stayed working all the time." According to his testimony, he would work one job until it ended, and then he would look for another. He acknowledged being out of work for approximately one month at one point, but stated that he had been employed steadily since he had been released from jail in October 2010. However, despite this steady employment, it is undisputed that B.G. failed to make the parental contributions as required.

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[13] This order was entered as part of the same November 18, 2011 case review hearing in which the juvenile court specifically reiterated the condition of the case plan requiring B.G. to enroll in an anger management program.

[14] B.G. also testified that D.L.G.'s phone was not always activated, because the family member with whom she was living would sometimes take it away from her.

The record clearly demonstrates a history of repeated nonperformance by B.G. of certain conditions of the case plan, despite specific orders of the court and despite ample time to comply. By the time of the trial of this matter, the children had been in foster care for approximately two years, and B.G. had been out of jail for approximately twenty months. However, in that time, B.G. had failed to complete his anger management program, contrary to the case plan and in violation of the specific order of the juvenile court, and he continued to deny that he needed such a program. B.G. had further failed to financially support his children as provided in the case plan and as ordered by the court, providing only nominal snacks and gifts to his children. Finally, B.G. had not obtained suitable housing for his children. At the time of trial, he continued to live in a three bedroom, one bath trailer, with four other people, in which he insisted his children would be welcome to live.

Clearly, the record demonstrates, by clear and convincing evidence, that B.G. had not substantially complied with the case plan: (1) by failing to contribute to the costs of the children's foster care, after being ordered to do so by the court when approving the case plan; (2) by repeatedly failing to comply with the required program of treatment, specifically an anger management program, provided in the case plan; and (3) by his lack of substantial improvement in redressing the problems preventing reunification. See LSA-Ch.C. art. 1036(C)(4),(5), and (6). The record also exhibits, by clear and convincing evidence, a pattern of established behavior that indicates that B.G. is unable or unwilling to provide an adequate permanent home for his children. See LSA-Ch.C. art. 1036(D)(3). Accordingly, we find no error in the trial court's finding that B.G. did not substantially comply with the case plan pursuant to LSA-Ch.C. art. 1015(5).

Furthermore, we note that the record demonstrates that B.G. failed to provide significant contributions to his children's care and support for a period in excess of six months within the meaning of LSA-Ch.C. art. 1015(4)(b). As noted above, it is undisputed that B.G. never made the parental contributions of $125 per month as ordered. Although B.G. contended that he provided his children with certain snacks and

gifts at their monthly visitations, he never provided any receipts to prove the cost of these items. Furthermore, the testimony at trial was that these items were of nominal value. B.G. also testified that he provided his daughter with a $15 phone card on a weekly basis when he could afford it; however, even that purchase was subject to interruption, when his daughter's phone was not activated for various reasons. Even assuming he purchased phone cards for his daughter on a regular basis, we find no error in the juvenile court's findings that these purchases, along with the nominal snacks and gifts he sometimes provided his children at their visitations once a month, did not constitute significant contributions to his children's care and support as required by LSA-Ch.C. art 1015(4)(b) and that B.G. had failed to make these contributions for a period in excess of six months.

Louisiana Children's Code article 1037(B) provides, in pertinent part:

> When the court finds that the alleged grounds set out in any Paragraph of Article 1015 are proven by the evidentiary standards required by Article 1035 and that it is in the best interests of the child, it shall order the termination of the parental rights of the parent against whom the allegations are proven. The court shall enter written findings on both issues.

In the judgment at issue, the juvenile court specifically found that it was in the best interest of the children for them to be freed for adoption; however, the court made no specific finding that termination of B.G.'s parental rights was in the children's best interest. B.G. contends that the juvenile court erred in terminating his parental rights without making such a finding as to the children's best interest.

Although it is true that the determination of whether a person's parental rights should be terminated is separate from the determination of whether the child will ultimately be adopted, a child cannot be freed for adoption unless the parental rights of his parents as to him are terminated. Thus, we find that the juvenile court's conclusion that it was in the best interest for the children to be freed for adoption necessarily incorporated the finding that it was in the best interest of the children that B.G.'s parental rights as to them be terminated. Accordingly, this assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the juvenile court. All costs of this appeal are assessed to B.G.

AFFIRMED.