

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CJ 0923

**STATE OF LOUISIANA IN THE INTEREST OF
A.M., C.M., K.M., B.S., M.S., R.S.**

*gmt.
JEK
by [unclear]
TMH*

Judgment Rendered: December 27, 2013

**Appealed from the
21st Judicial District Court
In and for the Parish of St. Helena
State of Louisiana
Case No. J-1499**

The Honorable Blair Edwards, Judge Presiding

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**Counsel for Appellee
V.S., Father of Minor Children**

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**Counsel for Appellee
C.M. and B.S., Minor Children**

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The State, through the Department of Children and Family Services (DCFS), appeals the judgment of the Twenty-First Judicial District Court that dismissed DCFS's petition for termination of parental rights against the biological father of two children in DCFS's custody. For the following reasons, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

The children C.M. and B.S.¹ were placed in the custody of DCFS due to allegations of lack of supervision by the biological father of both children, V.S., the biological mother, J.S., and the legally named father of C.M., K.M.² DCFS's verified affidavit also cited habitual drug abuse and unsanitary conditions in the home. Due to the parents' nonpayment of support and lack of substantial compliance with their court-approved case plans, the State filed a petition to terminate their parental rights as to C.M. and B.S.

A trial on the petition for termination of parental rights was held on January 14, 2013. Based on the testimony and reports entered into the record by the State, the trial court found compelling grounds existed to terminate the parental rights of J.S. and K.M. The trial court found it was not in the children's best interest to terminate the parental rights of V.S., and therefore the trial court dismissed the State's petition as to V.S. The trial court further ordered that DCFS maintain the custody of the children and approved a case plan of an alternative permanent living arrangement for the children. V.S. was allowed to have supervised visitation with the children

¹ The initials of the children and parents rather than their full names will be used throughout this opinion in the interest of maintaining confidentiality. See La. URCA Rule 5-2.

² A.M., the biological child of J.S. and K.M. was also taken into DCFS custody on October 6, 2011. M.S. and R.S., the biological children of J.S., are not involved with this appeal.

but only upon the children's request. Notice of the judgment was mailed on March 26, 2013, and DCFS filed the instant appeal on April 4, 2013.

ASSIGNMENT OF ERROR

DCFS claims the trial court committed manifest error by dismissing the petition for termination of parental rights as to the father, V.S., and setting the permanent plan as long term foster care, where the record was absent of any compelling reasons and a ground for termination was proven by clear and convincing evidence under Louisiana Children's Code art. 1015(4) and art. 1015(5).³

STANDARD OF REVIEW

In an involuntary termination of parental rights proceeding, a court must delicately balance the natural parent's fundamental right and the child's right to a permanent home. *In re D.M.*, 2005-2046, p. 3 (La. App. 1 Cir. 2/10/06), 928 So.2d 624, 627, citing *State ex rel. SNW v. Mitchell*, 2001-2128, p. 8 (La. 11/28/01), 800 So.2d 809, 814-815. A trial judge's findings

³ La. Ch. Code art. 1015 states, in pertinent part:

The grounds for termination of parental rights are:

...

(4) Abandonment of the child by placing him in the physical custody of a nonparent, or [DCFS], or by otherwise leaving him under circumstances demonstrating an intention to permanently avoid parental responsibility by any of the following:

(a) For a period of at least four months as of the time of the hearing, despite a diligent search, the whereabouts of the child's parent continue to be unknown.

(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.

(c) As of the time the petition is filed, the parent has failed to maintain significant contact with the child by visiting him or communicating with him for any period of six consecutive months.

(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 [DCFS] 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.

on factually-intense termination issues are governed by the manifest error standard of review. *In re D.M.*, 928 So.2d at 627.

DISCUSSION

DCFS's Right to Appeal Judgment

Initially we must consider an argument raised by the attorney for the children that since DCFS never raised an objection to the trial court's ruling or gave the trial court notice of its intent to seek an appeal, DCFS lost its right to appeal. An appeal may be taken from any final judgment of a court and shall be to the appropriate court of appeal. La. Ch. Code art 330(A). A party to the proceedings or any other party in interest shall have the right to appeal. La. Ch. Code art. 331(A).

The judgment is adverse to DCFS in that its petition was partially dismissed. DCFS is not appealing a specific issue to which it objected at trial; it is appealing the adverse judgment itself. DCFS has therefore made an unrestricted appeal from a final judgment, to which it is entitled to seek review. See Louisiana Local Government Environmental Facilities v. All Taxpayers, 2011-0027, p. 13 (La. App. 1 Cir. 2/2/11), 56 So.3d 1194, 1200, writ denied, 2011-0467 (La. 4/25/11), 62 So.3d 93.

Appeals of judgments on petitions to terminate parental rights shall be taken within fifteen days from the mailing of notice of the judgment. La. Ch. Code art. 332(A). The notice of judgment in the instant case was mailed March 26, 2013, and DCFS filed its appeal nine days later on April 4, 2013. DCFS therefore has the right to appeal the instant judgment, and has done so timely.

The Trial Court's Judgment

According to Dr. David Atkins, the licensed professional counselor of B.S. and C.M. who testified at the trial, the children had developed severe

behavioral problems through the unstable home environment provided by the parents. The children have an extensive history dating back to 2004 of going in and out of foster care. The children have lived with more than one foster family in more than one foster placement. Dr. Atkins testified that while the children were placed in a stable foster home, their severe and sometimes violent behaviors would cease; however, whenever they would come into contact with their parents, either through visitation or living with them, the behavioral problems would increase.

At the time of the trial, B.S. had been placed with a potentially adoptive foster family. C.M., while placed with a foster family, had not yet been considered for adoption. DCFS claims that this cycle of going in and out of foster care is detrimental to the stability and development of the two children, and that the cause of the instability has been the children's contact with their parents, who have proven to be either unwilling or unable to properly care for their children.

Jolene Hernandez, the DCFS foster care worker assigned to this case, testified that V.S. was assessed for drug abuse treatment, and it was determined he was not in need of any further treatment. He had also completed his psychological evaluation and parenting classes, and made regular supervised visits with the children. It was at these visits that Ms. Hernandez witnessed very chaotic behavior by the children with little or no intervention by V.S. or the other parents, which brought her to the conclusion that they did not learn anything from their parenting classes. When overnight visits commenced, the children returned from their parents' home dirty, hungry, and covered with insect bites.

Ms. Hernandez testified that at the time of the trial, V.S. still had not provided names of relatives with whom the children could be placed, had not

made any support payments, had not improved the unsanitary condition of his home, and was still living with J.S., who by court order was not allowed to be present with the children unsupervised. Ms. Hernandez testified that while B.S. and C.M. have stated that they did not want to visit or have contact with their mother, they were ambivalent as to their desire to visit with V.S. DCFS states that the testimony and evidence provided at trial is clear and convincing proof that the trial court should have terminated the parental rights of V.S. and freed the children for adoption.

In its oral reasons, the trial court interpreted the children's ambivalent attitude toward V.S. as not being an obstacle to further contact. Further visitation would be absolutely barred if V.S. continued to live with J.S., but should he separate from her, the trial court believed further visitation would be possible if the children desired it. Because of her continued drug abuse and noncompliance with her case plan, the trial court viewed J.S. as the source of instability in the home, not V.S. In an effort to avoid breaking all ties with the parents, the trial court did not terminate V.S.'s parental rights; however, the trial court did not require DCFS to continue V.S.'s case plan. The children were kept in their foster placements to maintain the status quo, and their visitation with V.S. was ordered supervised and would occur only upon the request of the children.

DCFS states that the trial court's judgment does not resolve the issue of instability, but aggravates it. It is the belief of DCFS that the children have no realistic chance of reuniting with V.S., and that by keeping them in long term foster care, the possible adoption of B.S. by his foster family will be unnecessarily delayed, and the chance of C.M. finding an adoptive family will diminish with time.

A court considering a petition to terminate parental rights must make two findings: (1) that DCFS established one of the enumerated grounds for termination set forth in La. Ch. Code art. 1015 by clear and convincing evidence, and (2) that termination is in the best interest of the child. *State ex rel. D.L.R.*, 2008-1541, p. 12 (La. 12/12/08), 998 So.2d 681, 688. While we agree with DCFS that it has proven by clear and convincing evidence that V.S. was in violation of both La. Ch. Code art. 1015(4) and La. Ch. Code art. 1015(5), this fact alone does not terminate V.S.'s parental rights. Once a ground for termination has been established by clear and convincing evidence, the judge *may* terminate parental rights if the termination is in the best interest of the child. See *ex rel. D.L.R.*, 998 So.2d at 688.

Once the trial court found that grounds were established that V.S.'s parental rights could be terminated, it then had to make a separate determination as to whether the termination would be in the best interest of the children. For the reasons given above, the trial court determined it was in the best interest to terminate the parental rights of J.S. and K.M., but not of V.S. We find the oral reasons provided by the trial court are not an abuse of its discretion and not clearly wrong. This assignment of error is without merit.

CONCLUSION

DCFS had the right to appeal the adverse judgment within fifteen days of its mailing, regardless of whether or not an objection was raised in court.

A trial court considering a petition to terminate parental rights must make two findings: 1) enumerated grounds for termination exist by clear and convincing evidence, and 2) termination of parental rights is in the best interest of the child. In the instant case, the trial court reached the

reasonable conclusion that terminating the parental rights of V.S. was not in the best interest of B.S. or C.M.

DECREE

The judgment of the trial court to dismiss the State's petition to terminate the parental rights of V.S. as to B.S. and C.M. is affirmed. Costs in the amount of \$2,003.00 are assessed to the State, through the Department of Children and Family Services.

AFFIRMED.