NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTEREST OF V.S.	*	**NO. 2001-CA-1821**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. 01-177-19-WD, SECTION "D"
Honorable Lawrence Lagarde, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Terri F. Love)

PLOTKIN, J., CONCURS WITH WRITTEN REASONS

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AFFIRMED

L.S., mother of V.S., appeals the judgment of the trial court, which ordered the termination of her parental rights pursuant to a petition filed by the State of Louisiana, Department of Social Services. The trial court found that L.S. abandoned V.S. pursuant to La.Ch.C. art. 1015(4)(b) and (c) by not providing significant contact, care or support to V.S. for a period of six consecutive months. For the reasons outlined below, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The State of Louisiana, Department of Social Services (hereinafter "OCS/DSS"), filed a petition on June 26, 2001 to terminate the parental rights of L.S. under La. Ch.C. art. 1015(4)(b) and (c). It should be noted that at all times during these proceedings the father of V.S. was and remains unknown. His parental rights were terminated as part of these proceedings under the same Article.

The petition alleged that L.S. did not provide significant support or

contact for six consecutive months, from December 1, 2000 to June 1, 2001. The trial court decided pursuant to the Article to toll the time from the filing of the petition, June 26, 2001. Therefore the time period considered by the trial court was December 26, 2001 to June 26, 2001.

L.S. visited V.S. on three occasions in December 2000, on the 5th, 12th, and the 26th. There is a contested fact in the record as to whether there was a fourth visit during the week after Christmas. On the 26th, she brought V.S. a couple of gifts.

L.S. was incarcerated when V. S. was born, on May 31, 1999. L.S.' uncle took custody of V.S. V.S. was born with drugs in her system and as a result has chronic and severe health problems that require special care. In December 1999, a protective order was issued because L.S. was threatening to remove V.S. from her uncle's home without having received training to care for V.S.' special needs. On July 21, 2000, OCS received a referral when L.S. left V.S. alone with her 13-year-old son. That same day L.S. missed an appointment for V.S. at Children's Hospital. On September 7, 2000, L.S. did not appear for her appointment with family services and her whereabouts were unknown. On September 11, 2000, V. S. was placed in a foster home. On October 30, 2000, V.S. and her younger sister, W.W. were adjudicated as neglected children in need of care. Both children have

chronic health and developmental problems. L.S.' parental rights as to W.W. were terminated before this action. W.W. is now in the custody of her father.

A case plan was made for L.S. and the court found, in subsequent proceedings, that she was not in compliance. On June 26, 2001, the State filed its petition to terminate parental rights and on August 30, 2001, the trial court entered judgment terminating the parental rights of L.S. It is from this judgment that L.S. takes the instant appeal.

DISCUSSION

Whether a parent's rights should be terminated because she has failed to provide for her child is a question of fact, and the trial court's determination regarding termination of parental rights will not be reversed by the appellate court unless it was manifestly erroneous or clearly wrong. *See In re S.M.W.*, 2000-3277 (La. 2/21/01), 781 So.2d 1223, 1233.

In L.S's first assignment of error, she asserts that the trial court erred in terminating her parental rights.

La. Ch.C. art. 1015(4)(b) and (c) states:

> (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:
>
> (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.

Only one of the grounds of La. Ch.C. art. 1015(4) needs to be established to successfully terminate parental rights; however, OCS/DSS chose to pursue the termination on both grounds. The comments to both sections of the Article state that the contact and contributions are to be "significant", not "token support" or contact. The comments also state that the court is empowered to determine whether sufficient contacts and contributions have been made. La. Ch.C. art. 1035(a) establishes the burden of proof of the petitioner as clear and convincing evidence. Further, art. 1035(b) establishes that a parent asserting a mental or physical disability as an affirmative defense to abandonment under Article 1015(4) bears the burden of proof by a preponderance of the evidence.

L.S. was incarcerated twice during the period considered by this petition, February 5, 2001to February 23, 2001, and again from March 21, 2001to July 12, 2001. Despite L.S.' arguement that her incarceration and her lack of money to buy stamps or OCS refusal to accept collect phone calls from jail were the reasons she could not provide substantiated support and

contact to V.S., our reading of the record shows that the trial court was more persuaded by what L.S. did when she was not incarcerated. The record shows that from the date of her last known visit to V.S., December 26, 2000, to her incarceration on February 5, 2001, L.S. made no attempt to contact V.S. nor did she send any support by way of clothes, money, or otherwise. This lack of concern was repeated when L.S. was released on February 23, 2001, until she was incarcerated again on March 21, 2001. It was during these periods of freedom that L.S. could have made her commitment to V.S. known. Instead she did nothing. She provided no support and did not contact V.S. L.S. further argues that her time in jail qualifies as a physical disability under La. Ch.C. art 1035(b). While this article does not list incarceration specifically as an affirmative defense, the trial court was correct in saying that L.S. did not present evidence that her incarceration was unjust or that the charges were dropped, which would show that her incarceration was not because of a volitional, illegal act. If L.S. were trying seriously to get the court to consider her incarceration a physical disability she should have put forth evidence to show that her incarceration was not her fault. A parent's obligation to support his children is a primary, continuous obligation, which is not excusable except for fortuitous events. When a person commits a voluntary act that results in his incarceration, the

act does not justify the extinction of the child's protected right to support. *State v. Nelson*, 587 So.2d 176, 178 (La. App. 4th Cir.1991). Actions resulting in imprisonment are voluntary acts and may not be used as an excuse to escape the financial obligation to support one's children. *See Salazar v. Salazar*, 582 So.2d 374, 375 (La. App. 4th Cir.1991).

We find no error in the trial court's judgment to terminate parental rights.

In her second assignment of error, L.S. asserts that the trial court erred in excluding relevant evidence.

Our reading of the record reveals no error by the trial court. L.S., on several occasions, tried to bring in evidence at trial of her purported attempts to get off drugs and have a stable lifestyle, which occurred outside the time frame considered by this action. The trial court was correct in excluding this evidence.

In her third assignment of error, L.S. asserts that the trial court erred by using the period of December 26, 2000 to June 26, 2001, instead of the time frame outlined in the petition, December 1, 2000 to June 1, 2001.

The trial court changed the six-month period to coincide with the filing of the petition in accordance with La. Ch.C. art. 1015(4). L.S. argues that the revised period eliminates some of the visits that she made to V.S.

during December from consideration. This Court finds, however, that inclusion of those visits does not amount to substantial support or contact when taking into account the entire six-month period. The judgment that L.S. did not provide substantial contact or support to V.S. is correct whether or not two visits in the month of December are included, given the fact that L.S. chose not to visit, support, or otherwise contact V.S. again, even when she was not incarcerated. We find that the trial court did not err in adjusting the time period of consideration under this petition.

CONCLUSION

For the reasons outlined above, we find that L.S. abandoned V.S. under the standard of La. Ch.C. art. 1015(4) and that the trial court was not manifestly erroneous or clearly wrong in terminating the parental rights of L.S.

AFFIRME

D.