

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN * **NO. 2004-CA-1920**
THE INTEREST OF D.B., D.B., * **COURT OF APPEAL**
A.B., A.B., AND D.R. * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. TR-D-20040070, SECTION "D"
Honorable Lawrence Lagarde, Judge
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Judge Roland L. Belsome
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(Court composed of Judge Charles R. Jones, Judge David S. Gorbaty, Judge Roland L. Belsome)

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MAY 18, 2005

VACATED AND REMANDED

The Appellant, Shanicka Reaux, appeals the trial court judgment terminating her parental rights of her four children. We vacate the judgment and remand the case to the trial court for further proceedings.

FACTS

Ms. Reaux is the mother of three minor daughters and two minor sons. D.B., D.B., A.B., and D.R. were put in foster care on February 8, 2003, and have been there ever since. A fifth child, A.R., was removed with them, but was placed in the custody of her father and is not part of this proceeding. They were found to be “children in need of care” in Orleans Parish Juvenile Court on April 15, 2003, and a case plan for services with the plan of reunification was reached through mediation on May 7, 2003.

On March 17, 2004, the trial court approved the change of the case plan goal from reunification to termination of parental rights. On April 14, 2004, Department of Social Services, Office of Community Services (“DSS/OCS”) filed a petition for termination of parental rights against Ms.

Reaux under La. Ch.C. art. 1015(5). The petition was also filed against the alleged fathers, but they have not appealed. The hearing on the answer to the petition was held on April 19, 2004, and the motion entered a denial. On May 11, 2004, a status hearing was held for the exchange of discovery information and witness lists. Ms. Reaux was present on both occasions and at both, the initial trial date of June 15, 2004 was set and all parties received notice in court.

Trial on the petition was held over several days in 2004: June 15th, July 13th, and August 4th. Ms. Reaux appeared the first two days of trial, but did not appear on the third day of trial on August 4, 2004. The trial court notified her on July 13, 2004, that trial would resume at 9:30 on August 4, 2004. In addition to the transcript, the minute entry also reflects that the mother was served. She did not notify her counsel or the court of the reason for her non-appearance

The trial transcript reflects that Ms. Reaux's lawyer called Shanicka Reaux as a witness, but due to her absence, he requested a brief continuance in order to obtain her testimony. Before ruling on the motion to continue, the trial court asked each of the lawyers whether they wanted to submit written memoranda or if they wanted to have brief argument and then submit the case. After each of the lawyers declined to submit written memorandum,

the trial court stated:

Okay. **If anybody was going to request that**, then when we came back for any final argument after the written memorandum, **we would see if Ms. Reaux was available**, but since nobody is requesting that, and since she had notice and she under - - I mean, this is the third or fourth time that we're coming back for this hearing, I think she realizes the importance of her being here, and for whatever reason she apparently chose not to be here. So your motion in that respect will be denied, to have her called.

[Emphasis added.]

The trial court terminated her parental rights without her presence. The court, in its oral reasons for judgment, stated that DSS/OCS proved the elements for a termination of parental rights required by Children's Code article 1015 and proved that the children cannot be returned to the mother. The court further found that there was proof of grounds to terminate the children's fathers' parental rights and that termination of parental rights and certification of the children for adoption was in the children's best interest. A written judgment was issued on August 13, 2004, after signing on August 6, 2004. Ms. Reaux subsequently appealed.

STANDARD OF REVIEW

The termination of parental rights is a severe and permanent action. *State in the Interest of Z.D.*, 95-1680, p. 5 (La.App. 4 Cir. 2/15/96), 669

So.2d 1312, 1314. A decision to terminate must be scrutinized very carefully. *Id.* Whether a termination of parental rights is warranted is a question of fact. *State in the Interest of K.N.F.*, 96-390, p. 2 (La.App. 3 Cir. 7/17/96), 677 So.2d 166,168. A trial judge is vested with a vast amount of discretion in making a determination of child custody, and that decision will not be overturned in the absence of a clear showing of abuse of that discretion. *Pittman v. Jones*, 89-1751 (La.App. 4 Cir. 04/12/90), 559 So.2d 990, 994.

DISCUSSION

In Ms. Reaux's only assignment of error, she contends that the trial court abused its discretion by denying a motion for continuance of the termination hearing when Shanicka Reaux, the mother of the children, for no apparent reason known to the court or her counsel, failed to appear in court for the continuation and ultimate conclusion of her termination hearing, which had been repeatedly reset and continued during the State's presentation of its case in chief, whereas each and every time Shanicka Reaux was present in court.

In termination proceedings, courts must carefully balance the two private interests of the child and the parents. *State ex rel. C.J.K.*, 00-2504, p. 7 (La.11/28/00), 774 So.2d 107, 113 (citing *State ex rel. J.A.* 99-2905

(La.1/12/00), 752 So.2d 806). While the parents have a natural, fundamental liberty interest in the continuing companionship, care, custody and management of their children, the child has a profound interest, often at odds with those of his parents, in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, and continuous relationships found in a home with proper parental care. *State ex rel. J.M.*, 02-2089, p. 8 (La.1/28/03), 837 So.2d 1247, 1252. In balancing these interests, the courts of this state have consistently found the interest of the child to be paramount over that of the parent. *State ex rel. G.J.L.*, 00-3278, p. 6 (La.6/29/01), 791 So.2d 80, 85.

It has been further recognized that great care and caution must be exercised in these proceedings because the permanent termination of the legal relationship existing between children and their biological parents is one of the most severe and drastic actions the State can take against its citizens. *State ex rel. G.J.L., supra*, p. 7, 791 So.2d at 85. Because due process requires that a fundamentally fair procedure be followed when the State seeks to terminate the parent-child legal relationship, actions to terminate must be scrutinized very carefully. *Id.*

This Court further explained the concept of procedural due process in regards to termination of parental rights in *State In the Interest of A.E.*, 448

So.2d 183, (La.App. 4 Cir. 3/14/84), specifically:

The concept of procedural due process, broadly defined as one of "fundamental fairness," requires that minimal procedural safeguards must be established before the state may deprive a person of fundamental rights of life, liberty, or property.

Whether the procedural safeguards established measure up to due process depends on the nature of the proceeding and the nature of the right or interest affected.

Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). **The rights of parents to the companionship, care, custody and management of their children is a fundamental liberty interest warranting great**

deference and vigilant protection under the law.

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v.*

Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). **Consequently, these proceedings which would irreversibly terminate a parent's rights must comport**

with the highest standard of due process, *Lassiter v.*

Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *State in re Delcuze*, 407 So.2d 707 (La.1981).

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court

defined due process standards which the Court has applied in parental rights termination cases. *Lassiter*; *Santosky v. Kraemer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

When measuring State proceedings against due process standards *Mathews* requires a consideration of:

First, the **private interest that will be affected** by the official action; Second, **the risk of an erroneous deprivation of such interest** through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, **the Government's interest**, including

the function involved and the fiscal and administrative burden that the additional or substitute procedural requirements would entail. 424 U.S. at 334-335, 96 S.Ct. at 902-903.

[Emphasis added.]

Given that termination of parental rights is a severe and permanent action which should be scrutinized very carefully, the trial court clearly abused its discretion by denying the motion to continue when in fact it would have granted the motion and given Ms. Reaux an opportunity to testify if the lawyers would have chosen to submit written memoranda. The trial transcript establishes that the trial court's decision to deny the motion to continue did not hinge upon the private interest that will be affected, the risk of an erroneous deprivation of such interest, nor the government's interest. In this case, the court's decision hinged upon whether the lawyers were either going to submit written memoranda or if they wanted to have brief argument and then submit the case. Moreover, due process requires that a fundamentally fair procedure be followed when the State seeks to terminate the parent-child legal relationship. By the court denying the motion to continue, it affected the private interest of Ms. Reaux, the private interest of her children, and the risk of an erroneous deprivation, which in turn amounted to a fundamentally unfair procedure in regards to due process. Accordingly, the trial judge abused its discretion in not granting the motion

to continue.

It should be noted that this Court is aware that the law requires that termination of parental rights proceedings be expedited under La.Ch.C. art. 1001 and 1032. We are further aware that the Children's Code has special articles about a parent's absence and motions to continue. Specifically, La. Ch.C. art. 1032 and La. Ch.C. art. 1033. However, given the circumstances, jurisprudence, and the requirement of due process in parental termination cases, we find that the trial court did abuse its discretion.

DECREE

For the foregoing reasons, we vacate the judgment of the trial court and remand the matter to that court for proceedings consistent with this opinion. The trial court is ordered to reopen the matter to allow Shanicka Reaux to testify, and to render a decision regarding the best interest of the children based upon its consideration of the totality of the evidence presented in accordance with the procedures established by the Louisiana Children's Code.

VACATED AND

REMANDED