NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTERST OF J.J.A., JR. AND C.N.A.

NO. 05-CA-448

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE JEFFERSON PARISH JUVENILE COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 04-TP-05
HONORABLE NESTOR J. CURRAULT, JR.,
JUDGE PRO TEMPORE PRESIDING

NOVEMBER 29, 2005

THOMAS F. DALEY
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Thomas F. Daley, and Clarence E. McManus

SHERRY A. WATTERS
KATHERINE DOWLING
Office of General Counsel
1010 Common Street
Suite 1441
New Orleans, Louisiana 70112
COUNSEL FOR PLAINTIFF/APPELLEE

EUNICE SLATON CHARLES
401 Westbank Expressway
Suite 207
Gretna, Louisiana 70053
COUNSEL FOR DEFENDANT/APPELLANT

M. ELIZABETH TOCA
Post Office Box 1726
Gretna, Louisiana 70054
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

In this civil appeal, the plaintiff/appellants appeal the trial courts termination of their parental rights.[1]

On July 9, 2004, the State of Louisiana, Department of Social Services, Office of Community Services ("OCS") filed a Petition for Termination of Parental Rights of B.M. and J.A., Sr. for violation of La. Ch.C. art. 1015, § 4 and 5. The State alleged that both biological parents had abandoned their children, J.J.A., Jr. and C.N.A., by leaving them under circumstances demonstrating the intention to permanently avoid responsibility by not paying child support, thereby failing to make significant contributions to the care and support of their children, from April 11, 2003[2], to July 1, 2004. The mother only provided occasional snacks. The father "failed to make or maintain contact with the agency; . . . consistently [inquire] about the children's status or [assist] in planning for their future." In

[1] Pursuant to La. R.S. 46:1844(W) in order to protect the identity of the juveniles, who are crime victims, the names of the juvenile and their parents are substituted with their initials throughout this opinion. B.M. is the mother, J.A., Sr. is the father, J.J.A., Jr. and C.N.A. are the two children involved in this termination proceeding.

[2] The children were placed in State custody, on this date.

addition, neither parent complied with the State's case plan for return of the children.

At the November 12, 2004 hearing, B.M. admitted testing positive seven times for cocaine, twice for opiates, and once for amphetamines from August 5, 2003 to September 22, 2004. She also failed to complete the drug treatment programs at Fairview, the Jefferson Parish Human Services Authority, the New Orleans Center for Additive Disorders, and the Tulane Jefferson Infant Team, and tested positive in drug tests at Rivarde and International Drug Detection. She testified that she had been attending Alcoholics and Narcotics Anonymous as part of her case plan, but failed to inform OCS of proof of attendance and obtain a female sponsor as required by the plan. In addition, she was off her prescribed medications in November 2004. B.M. also admitted that she has not paid child support, even though she has been making on average $300.00 dollars a week for a year and a half, while employed by her fiancé. She has, however, provided birthday and Christmas presents, and snacks during visitations.

J.A., Sr. testified that he is currently in jail serving a three-year sentence on two counts of child abuse involving his children, who are involved in this termination proceeding, and one count of child molestation involving another child. He testified that he completed his case plan except for therapy with his children[3], attending a batterer's group, and paying child support. He claimed that he did not participate in therapy with the children, because the Infant Team told him that he could not see the children, until he got out. He claimed that he did not attend a batterer's group program, because it required him to admit he battered B.M., in order to attend the program. He claimed that he refused to admit he battered B.M., because he did not do it. He claimed that B.M. committed all of the

[3] He attended substance abuse meetings three nights a week before his incarceration, and provided documentation to OCS. He had no positive drug screenings.

violence in their home. However, he did complete an anger management program. J.A., Sr. testified that he did not pay child support during the relevant period of April 11, 2003[4] to July 1, 2004, because he did not know about the court ordered child support for the children. But earlier, in his testimony he responded affirmatively that he knew he was suppose to pay child support and provide a safe and stable home for the children as part of his case plan.

Letia Bailey, a clinical social worker, was a primary clinician for B.M. with the Tulane Jefferson Parish Infant Team. She testified that the Infant Team worked in tandem with the Westbank Addictive Disorders Clinic with clients like B.M., who had substance abuse problems. While at the Westbank Addictive Disorders Clinic, B.M. took Antabuse for her alcohol addiction. Bailey did not believe she was in a treatment program utilizing the drug, since leaving that clinic. B.M. had a family history of abuse and she would self-medicate using alcohol (one to two six packs a day and drinking to pass out on the weekends). Her individual therapy treatments were terminated after a series of positive drug screenings, because therapy under the influence of drugs impeded her ability to make meaningful progress. Bailey testified that B.M. continued to use drugs, even though she knew she would be tested at therapy and that the positive drug screens would affect reunification with the children. Her therapy with the children was terminated as a result of her continued drug use. Bailey opined that B.M.'s prognosis for the future was poor, unless she acknowledged her substance abuse problem and its severity. Bailey stated that B.M. needed long term residential inpatient substance abuse treatment, which she refused.

Bailey testified that she was also involved in the recommendations for treatment of J.A., Sr. His treatment included an anger management and a twenty-

[4] The children were placed in State custody, on this date.

week batterers group. J.A., Sr. could not be evaluated with the children, because he was not allowed contact with them. Bailey opined that the substance abuse and the level of violence allegedly perpetrated in the home by both B.M. and J.A., Sr. against each other and witnessed by the children affected their safety, and was even more detrimental than if the children had been victims of the physical violence, because it was frightening, destabilizing, and deregulating to the children.

On January 26, 2005, the trial court totally and irrevocably terminated and dissolved all parental rights and obligations of the plaintiffs, B.M. and J.A., Sr. In its Reasons for Judgment, the trial court found that the children were abandoned by both B.M. and J.A., Sr., and they failed to rehabilitate pursuant to the court approved case plan. In regards to the mother, the court found that B.M. abandoned her children pursuant to La. Ch.C. art. 1015(4) by demonstrating an intention to permanently avoid parental responsibility by "failing to provide significant contributions to the children's care and support for more than six consecutive months, from April 11, 2003 to July 1, 2004." The court noted that although the State had not assessed B.M.'s support obligation, she did not make any significant contributions to support the children, as required by statute. She failed to provide for the children's necessities while they were in foster care, such as clothing and food, except for the snacks, and birthday and Christmas gifts, even though she made $300.00 per week in salary. The court noted that B.M. was dependant on her fiancé for income and housing alluding that she failed to provide a permanent, stable home for the children, since both her income and housing were at the whim of what her testimony suggested was an unstable relationship. In addition, the court found that B.M. had failed to complete her court approved case plan, her pattern of behavior indicated that she was unable or unwilling to provide an

adequate permanent home for the children[5], and there was no reasonable expectation of significant improvement in her condition or conduct in the near future establishing grounds for termination of her parental rights pursuant to La. Ch.C. art. 1015(5). The court noted that B.M.'s case plan required her to do the following and verify compliance with OCS: attend a battered women's program, obtain and maintain safe and stable housing for the children, visit with the children, obtain employment other than at a bar, participate in and complete a substance abuse program, participate in therapeutic services through the Infant Team[6], and submit to and follow a psychological evaluation.[7] The court found that B.M. failed to successfully complete numerous drug treatment programs, even refusing to enter a residential program, and continued to use drugs while the children were in foster care, knowing that she might loose her children as a result.

In regards to J.A., Sr., the trial court found that he abandoned his children pursuant to La. Ch.C. art. 1015(4) by demonstrating an intention to permanently avoid parental responsibility in "failing to provide significant contributions to the children's care and support for more than six consecutive months from April 11, 2003 to July 1, 2004." The court found that J.A., Sr. had only paid a trivial $20.00 toward his child support obligation, and noted his incarceration pursuant to guilty pleas on two counts of cruelty to a juvenile involving his sons and one count of molestation of a juvenile did not relieve him of his child support obligation. In addition, the court found that J.A., Sr. had failed to complete his court approved case plan, his pattern of behavior and an expert opinion indicated that he was

---

[5] See, La. Ch. C. art. 1036(D)(3).

[6] The Infant Team recommended that B.M. receive individual therapy, take anti-depressant medication, participate in dyadic therapy with the children, and obtain a female sponsor in her substance abuse program. B.M. testified that she never obtained a female sponsor.

[7] The psychological evaluation recommended that B.M. obtain parental training, participate in anger management, maintain sobriety for a year, and attend an Alcoholics Anonymous group twice a week. B.M. never provided OCS with verification of her AA attendance.

unable or unwilling to provide an adequate permanent home for the children[8], and there was no reasonable expectation of significant improvement in his condition or conduct in the near future establishing grounds for termination of his parental rights pursuant to La. Ch.C. art. 1015(5). The court noted that J.A., Sr.'s case plan required him to provide a safe and stable housing for the children and financial support, participate in and complete a psychological evaluation, a substance abuse and anger management program, receive parental training, attend Alcoholics Anonymous and maintain sobriety for at least a year. The court found that J.A., Sr. not only failed to complete his case plan, but he refused to participate in a batterer's group because he denied responsibility for the violence in his relationship with B.M..

DISCUSSION:

In her appellate brief, B.M. claims that the evidence was insufficient to prove: 1) that she failed to provide significant contributions to her children's care and support; 2) that she failed to maintain significant contact with her children for six consecutive months; 3) that she abandoned her children by demonstrating an intention to permanently avoid parental responsibility; and 4) that termination is in the children's best interest.

She relies, in support of her Assignments of Error, on the fact that the Tulane Infant Team testified that she visited the children sometimes twice a week, and always brought snacks or a gift. She argues that her sporadic employment and her drug habit prevented her from providing more significant contributions to the children's care and support. She asserts that she did put her daughter in her current stable placement with her godmother. Also, she notes that she was never assessed

[8] See, La. Ch. C. art. 1036(D)(3).

any child support in her case plan, nor did the court have a child support hearing, as required by La Ch.C. art. 685, to determine whether she should pay support. In addition, B.M. claims that the State, in placing her with the Tulane Infant Team, failed to make reasonable efforts to refer her to a provider who could address her drug problem, and this affected her ability to parent her children. She claims that her positive drug screens were a result of this lack of proper treatment, but notes that the positive drug screens have declined since this case began. B.M. argues that termination is not in the children's best interest. She claims that her son is attached to her, and she maintained a significant relationship with the children until December 19, 2004. She claims that termination of her parental rights will traumatize the children.

In his brief, J.A., Sr. argues that the trial court erred in finding that the State proved he had abandoned his children, every element of La. Ch. C. art. 1015(4) by clear and convincing evidence, and failed to complete the elements of his case plan.

J.A., Sr. claims that he did not abandon his children by demonstrating an intent to permanently avoid parental responsibility, rather he was incarcerated. He claims that the trial court erred in finding Toups v. Toups, 97-620 (La. App. 1 Cir. 4/8/98), 708 So.2d 849, is applicable to his case, because he never requested a reduction in child support due to his incarceration. In fact, he claims that he was never assessed a child support obligation.

Additionally, J.A., Sr. claims that the State never proved all of the conditions in subsection La. Ch. C. art. 1015(4) by clear and convincing evidence. He claims that he never placed the children in the custody of OCS; rather he claims that OCS took custody of the children away from him. In fact, he claims that in order to avoid OCS custody of the children, he provided the names of relatives and friends,

who would care for the children, while he worked on his case plan to regain custody. In addition, he claims that he did not abandon his children by demonstrating an intention to permanently avoid parental responsibility. He claims that he wanted to maintain contact with and regain custody of his children, despite his incarceration. He asserts that he was prevented from visiting with the children by a court stay away order, which he tried, but failed to have lifted. OCS also prevented his maintaining other forms of contact with the children. J.A., Sr. claims that he was never subpoenaed to attend a hearing on child support, ordered to pay child support, or required to pay child support as part of his case plan. He claims that he also pursued actions to regain custody of the children, which included requesting that the stay order preventing visitation be lifted, cooperation and participation with the Infant Team, completion of substance abuse and anger management programs, and attending AA meetings.

Finally, J.A., Sr. argues that the State failed to prove that he did not substantially comply with the elements of his case plan. He claims that the trial court found that he only failed to comply with two areas in his case plan, the ability to provide the children with a safe and suitable home and the participation in and completion of a batterer's program.

In response to the trial court's finding, J.A., Sr. argues that he provided the name of his sister to care for his son, and his daughter's godmother to care for her. Also, when his sister was no longer able to care for his son due to health problems, his son was also placed with his daughter's godmother. He claims that it was stipulated by all parties, in court, that his sister was now willing and able to care for the children. J.A., Sr. claims that his incarceration is irrelevant, because the State did not seek termination under La. Ch. C. art. 1015(6) for his inability to care for the children for an extended period due to his conviction and sentencing to a

period of incarceration. In addition, La. Ch. C. art. 1036(E) states that "[u]nder Article 1015(6), a sentence of at least five years of imprisonment raises a presumption of the parent's inability to care for the child for an extended period of time." He claims that he was sentenced to three years with credit for time served, therefore, the latest he will be released is November 2006. At that time, J.A., Sr. claims that he will be able to provide a safe and suitable home for the children. He claims that he was employed at the same business for many years before his incarceration and upon his release, he will be employed again.

Second, J.A., Sr. claims that he attempted to comply with the participation in and completion of the batterer's program, but was refused admittance because he refused to admit he battered B.M. He claims that he refused to admit to the abuse because he was innocent and on advice of counsel, since there were pending criminal charges. He notes that it was stipulated in court that if his sister testified she would state that she lived with her brother and B.M. for extended periods, and that during those times B.M. would initiate all domestic violence. In addition, he claims that it was undisputed that there were no allegations of abuse in his previous marriage of nineteen years towards either his wife or their children.

Parents have a primary obligation to support, maintain, and educate their children. La. C.C. art. 227. Toups v. Toups, 708 So.2d 850-851. This parental obligation of support is a primary, continuous obligation, which is not excusable except for fortuitous events. Id. Parents are not relieved of this obligation, because of a financial condition or voluntary act, i.e. imprisonment, which they have brought upon themselves, regardless of the temporary nature of the situation. *Id.* Therefore, the fundamental purpose of involuntary termination is to provide an expeditious judicial termination of parental rights and responsibilities, in order to protect children whose parents are unwilling or unable to provide for their

physical, emotional, and mental health needs, and to achieve permanency and stability for the children. State ex rel. J.T.C., 04-1096 (La. App. 5 Cir. 2/15/05), 895 So.2d 607, 614, writ denied, 05-0466 (La. 4/8/05), 899 So.2d 11. Involuntarily termination of parental rights involves the private interests of both the parents and the child, but the interest of the child is paramount. *Id.* However, parental rights regarding the care, custody, and management of their children are fundamental liberty interests warranting great deference and protection under the law and due process because termination is permanent and one of the most drastic actions the State can take against one of its citizens. Id. Therefore, strict procedural and evidentiary requirements must be met before parental rights are terminated. State ex rel. B.J., 00-1434 (La. App. 1 Cir. 7/27/00), 767 So.2d 869, 872-873.

In order to terminate parental rights the State must prove by clear and convincing evidence[9] of at least one statutory enumerated in La. Ch. C. art. 1015, and the trial court must determine that the termination is in best interest of the child. State ex rel. L.B. v. G.B.B, 02-1715 (La. 12/4/02), 831 So.2d 918. The State must demonstrate that the parent is currently unfit, i.e. that the parent has failed to change by significantly altering or modifying behaviors that caused removal of the child from the home, and that there is no reasonable expectation that the parent will reform in the foreseeable future. State ex rel. F.H. v. House, 35,451 (La. App. 2 Cir. 10/2/01), 801 So.2d 1123, 1125-1126. Therefore, it is not enough for a parent to profess an intention to exercise parental rights and responsibilities, there must take some action demonstrating the intention, in order to avoid termination. Id.

[9] See, La. Ch. C. art. 1035.

Parental compliance with a case plan, expected success of rehabilitation, and the expectation of significant improvement in the parents' condition and conduct are questions of fact in a termination proceeding. State ex rel. J.T., 38,149 (La. App. 2 Cir. 12/17/03), 862 So.2d 1130, 1135. An appellate may not overturn a trial court judgment determining that the requirements of La. Ch. C. art 1015 have been satisfied, absent an error of law or a factual finding that is manifestly erroneous or clearly wrong, i.e. significant substantial indication of reformation and likelihood of reform. State ex rel. B.J., supra.

In this case, we do not find that the trial court was manifestly erroneous or clearly wrong in determining that the requirements of La. Ch. C. art 1015 have been satisfied. The State proved that both B.M. and J.A., Sr. failed to provide significant contributions to the care and support of their children for six consecutive months, and they are currently unfit having failed to significantly alter or modify the behaviors that caused removal of the children from the home. In addition, there is no reasonable expectation that they will reform in the foreseeable future. While both B.M. and J.A., Sr. profess an intention to exercise parental rights and responsibilities, they have not taken the necessary actions to avoid termination.

B.M. has failed to provide significant contributions to the care and support of her children and substantially comply with her case plan. Therefore, there is no reasonable expectation of significant improvement in her condition or conduct in the near future. B.M. had numerous positive drug screenings while in individual therapy. She even tested positive for cocaine during a therapy session with her children. In addition, she admitted that she failed to provide significant contributions to the children's care and support from April 11, 2003 to July 1, 2004. While she was not assessed a child support obligation by the court, as a

parent she had the inherent obligation to support, maintain, and educate her children. She has failed to provide significant contributions to the children's care and support. Her obligation to care for her children is not excused by her drug addiction, a voluntary act, which according to her has affected her financial condition as well. As the trial court noted in his Reasons for Judgment, as an adult, B.M. was aware of the monetary cost of raising children, and that cost did not disappear simply because the children were not living with her. In addition, we find that there is insignificant indication of reformation and an unlikelihood of reform regarding B.M.'s substance abuses. She has continued to use drugs after her children were placed in State custody, even though this seriously affected the possibility of reunification. She even tested positive for cocaine during a supervised visit with her children. B.M. claims that the State failed to make reasonable efforts to refer her to a provider who could address her drug problem, and that her positive drug screens were a result of this lack of proper treatment. However, she has failed to avail herself of the various drug rehabilitation programs put at her disposal, including the Westbank Addictive Disorders Clinic that worked in tandem with the Tulane Jefferson Infant Team. In addition, she has refused to enroll in the long-term residential inpatient substance abuse treatment recommended by one of her primary clinicians. While B.M. claims that termination of her parental rights will traumatize the children, the social worker assigned to her case opined B.M.'s son is attached to his foster mother and B.M. is not psychologically the children's mother.

J.A., Sr. also has failed to provide significant contributions to the care and support of his children and substantially comply with his case plan. Therefore, there is no reasonable expectation of significant improvement in his condition or conduct in the near future. He admitted that he failed to provide significant

contributions to the children's care and support from April 11, 2003 to July 1, 2004. While he was not assessed a child support obligation by the court, as a parent he had the inherent obligation to support, maintain, and educate his children. He has failed to provide significant contributions to the children's care and support. His obligation to care for his children is not excused by his incarceration for criminal acts against children, one of which is a party to this proceeding. Also, J.A., Sr. admits that he has failed to complete his case plan indicating insignificant reformation and unlikelihood of reform in the future.

Finally, based on expert testimony, it is in the children's best interest to be in a loving home with parents capable of taking care of their needs, instead of the frightening, destabilizing, and deregulating environment created by B.M. and J.A., Sr. As the trial court noted, the children are now in a safe, loving home with adults, who are devoted to them and capable of providing for their needs.

For the foregoing reasons, we affirm the trial court's termination of parental rights.

AFFIRMED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **NOVEMBER 29, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR
CLERK OF COURT

05-CA-448

Sherry A. Watters
Katherine M. Dowling
Attorneys at Law
Bureau of General Counsel
900 West Commerce Road
Suite 300
Harahan, LA 70123

Eunice S. Charles
Attorney at Law
401 Westbank Expressway
Suite 207
Gretna, LA 70053

M. Elizabeth Toca
Attorney at Law
P. O. Box 1726
Gretna, LA 70054