

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTEREST
OF J.W., A.J. AND P.J.

NO. 05-CA-526

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE JEFFERSON PARISH JUVENILE COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 05-CC-09, DIVISION "C"
HONORABLE NESTOR J. CURRAULT, JR., JUDGE PRESIDING

December 27, 2005

COURT OF APPEAL,
FIFTH CIRCUIT

FILED

DEC 27 2005

SUSAN M. CHEHARDY
JUDGE

Clarence E. McManus
CLERK

Panel composed of Judges Susan M. Chehardy,
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AFFIRMED

SMC
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In this appeal, the minor children's father seeks review of the trial court's approval the Office of Community Service's long term case plan for adoption of the minor children, A.J. and P.J.¹ For the following reasons, we affirm the trial court's ruling.

Facts

On February 2, 2005, the minor children, J.W., A.J. and P.J.,² were temporarily placed in the legal custody of the State of Louisiana, Department of Social Services, Office of Community Services ("OCS" or "the Department") by an oral instanter order issued by the Juvenile Court for the Parish of Jefferson. On February 3, 2005, OCS filed a Verified Complaint/Affidavit in Support of an Instanter Order and the court, considering the verified complaint, found that the minor children were in need of care and emergency removal was necessary to secure the children's protection.

According to the Verified Complaint, on February 2, 2005, the minor children's mother, T.S., was hospitalized in critical condition for a gunshot

¹ U.R.C.A. Rule 5-2 reads, "To ensure the confidentiality of a minor who is a party to or whose interests are the subject matter in the proceedings listed in Rule 5-1(a) or (c) above, initials shall be used in all filings and in opinions rendered by the court of appeal to protect the minor's identity." To further ensure their privacy, we will also use initials to identify their mother and fathers.

² On that day, J.W. was 3 years and 3 months old, A.J. was 15 months old, and P.J. was seven weeks old.

wound to the head. T.S. later succumbed to her injuries. E.J., who is A.J. and P.J.'s father, was arrested that night for the shooting.³ The Verified Complaint further states that the three children were on the premises during the shooting. The complaint reports, "The agency explored relatives[sic] resources to no avail." Specifically, E.J. reported that there were no relatives available to care for the children. T.S.'s mother, who is the children's grandmother, also reported that she was unable to care for the children. Therefore, the court ordered that the children were to be removed from the home and placed in the custody of OCS.

On February 11, 2005, the court held a continued custody hearing for the children, which neither father attended. Pursuant to the hearing, the trial judge ordered the minor children to remain in the custody of OCS for their safety and protection. Since that date, the three children have remained in the legal custody of OCS. The children were, subsequently, placed into dually certified foster homes.

On February 25, 2005, the Jefferson Parish District Attorney filed a petition alleging that A.J., P.J., and J.W. were Children in Need of Care("CINC") since their mother was deceased and their fathers had failed to provide adequate care, clothing, food, shelter, and/or supervision in violation of La. Ch. C. Art. 606(A)(2). On March 8, 2005, the juvenile court judge held a hearing in which A.J. and P.J. were adjudicated as children in need of care. At that hearing, E.J. stipulated that A.J. and P.J. were in need of care "without admitting the allegations of the petition." E.J. requested that the State consider placing A.J. and P.J. with his ex-sister-in-law, M.J. The OCS was ordered to investigate M.J. with regard to a relative adoption placement for E.J.'s two minor children.

³ The affidavit further reflects that Jefferson Parish Sheriff's Officers reported that E.J. was intoxicated and uncooperative when they arrived on the scene.

On April 5, 2005,⁴ the juvenile court held a disposition hearing with respect to A.J. and P.J. At that hearing, the children's maternal grandmother testified that her daughter died on February 2, 2005. Further, E.J. refused to voluntarily terminate his parental rights unless OCS could assure him that his sons would be placed in his ex-sister-in-law's custody.

Joe Longo, a Child Welfare Supervisor with OCS, testified at that hearing that his department had developed a case plan with a goal of adoption for all three children with the recommendation that each child remain in their current foster home in the State's custody until OCS can determine if placement with a family friend or relative is appropriate. Mr. Longo noted that E.J. was currently incarcerated, awaiting trial on "serious charges." The OCS report, filed before the hearing and made part of the court record, states that E.J. is incarcerated "for the murder of their mother."

At the close of the hearing, the juvenile court judge found that "the welfare of the ... children cannot be adequately safeguarded without removal from the custody of the parent" because E.J. is "alleged to have shot and killed [T.S.] the mother while the children were in the house." The judge also found that "the Department has made reasonable efforts with the children's health, safety as paramount concern, to finalize the children's placement in an alternative safe and permanent home in accordance with the Children's[sic] permanent plan." Finally, the juvenile court judge found that "the case plan of adoption as I have read this morning, submitted by the Department is consistent with the health and safety of the child, children and is in the best interest of the children." Thereafter, the judge approved the case plan and ordered all parties to comply. Counsel for E.J. objected to the

⁴ That same day, the juvenile court held an adjudication hearing with respect to J.W., in which his father, A.S., stipulated, under La. Ch.C. Art. 647, that J.W. was in need of care without admitting the allegations of the petition.

findings on the basis that the State had not submitted adequate evidence to support the judge's findings that E.J. had shot T.S.

On April 20, 2005, E.J. filed a Motion for Appeal, which was granted. On appeal, E.J. seeks review of the juvenile court's judgment of disposition. E.J. argues three assignments of error: first, the trial court erred in approving a case plan goal of adoption without requiring the State of Louisiana to make reunification efforts as required by federal law, 42 U.S. 671(a)(15)(B) and state law, La. Ch.C. art. 675(B)(2); second, the trial court erred in not requiring the State to follow the procedural steps outlined in federal and state law designed to ensure parents due process, which require the State to demonstrate by clear and convincing evidence that reunification efforts are not required, prior to the court's approving the case plan of adoption; and third, the trial court was manifestly erroneous in finding that the evidence submitted by the State of Louisiana at the Disposition Hearing was sufficient under the law to support the approval of the case plan of adoption and erred in its factual finding that the father allegedly shot and killed the children's mother.

At the outset, we note that the purpose of Title VI of the Children's Code, entitled "Child in Need of Care" and applicable to these proceedings, is "to protect children whose physical or mental health and welfare is substantially at risk of harm by physical abuse, neglect, or exploitation and who may be further threatened by the conduct of others...." La. Ch.C. art. 601. Furthermore, the health, safety, and best interest of the child shall be the paramount concern in all proceedings under this Title. Id.

Article 672(A) of the Louisiana Children's Code provides:

When custody of a child adjudicated in need of care is assigned to the Department of Social Services, the child shall be assigned to the custody of the department rather than to a particular

placement setting. The department shall have sole authority over the placements within its resources and sole authority over the allocation of other available resources within the department for children judicially committed to the department's custody.

The plain language of this statute clearly provides that when the court assigns custody of a child adjudicated in need of care to OCS, the Department has “sole authority” over the placements within its resources of those children.

Article 672(A), however, cannot be interpreted in a vacuum and must be read in conjunction with other statutes that make up the statutory scheme governing child in need of care proceedings. Article 673 provides that once a child enters the custody of a child care agency, the custodian shall develop a case plan detailing the custodian's efforts toward achieving a permanent placement for the child within a specified time period. Article 677 provides for judicial review of the case plan as follows:

A. At the disposition hearing, the court shall consider the content or implementation of the case plan and any response filed concerning it. At any other hearing held subsequent to the filing of the case plan, on its own motion or upon motion of any party for good cause shown, the court may consider the content or implementation of the case plan or of any response filed concerning it.

B. If no party files a written response objecting to the case plan and the court finds the plan protects the health and safety of the child and is in the best interest of the child, the court shall render an order approving the plan.

C. If the court does not approve the case plan, it shall enter specific written reasons for finding that the plan does not protect the health and safety of the child or is otherwise not in the best interest of the child.

Similarly, Articles 688 and 690 provide that the custodial agency shall file a case review report with the court which shall review the status of the child and address, among other things, the continuing necessity for and appropriateness of the child's placement, and the extent of compliance with the case plan. Article 692 provides for periodic review hearings by the

court. Article 700 provides that at the conclusion of the case review hearing, the court may:

(1) Approve the plan as consistent with the health and safety of the child and order compliance by all parties. The court shall inform the parents that:

(a) It is their obligation to cooperate with the department, comply with the requirements of the case plan, including their duty to keep the department apprised of their current address, and to correct the conditions requiring the child to be in care.

(b) A termination of parental rights petition may be filed based on their failure to comply with the case plan, failure to make significant measurable progress toward achieving case plan goals and to correct the conditions requiring the child to be in care, or on any other ground authorized by Article 1015.

(2) Find that the case plan is not appropriate, in whole or in part, based on the evidence presented at the contradictory hearing and order the department to revise the case plan accordingly.

The 1991 Comment to art. 700 provides that this article is “intended to clarify the role of the court vis-a-vis the role of the department as set forth in Article 672.” The Comment goes on to explain that “[t]he court is specifically entitled to accept or reject the department’s plan, based on the evidence presented, but is not authorized to revise the plan itself. The department remains responsible for revision of the case plan.”

Finally, La. Ch.C. art. 702 provides that the court shall conduct a permanency hearing within a specified period of time and shall determine the permanent plan for the child that is most appropriate and in the best interest of the child in accordance with specified priorities of placements. Additionally, art. 702 provides that the court shall determine whether the department has made reasonable efforts to finalize the child's placement in an alternative safe and permanent home in accordance with the child's permanent plan. The 1999 Comment to this article explains that the purpose

of the permanency hearings is to “provide for judicial review and oversight of department planning and decision[-]making on behalf of children who have been removed from their parents’ custody.”

In cases involving the custody of children, the trial court is vested with a vast amount of discretion. Bagents v. Bagents, 419 So.2d 460, 462 (La. 1982). The trial court is in a better position to evaluate the best interest of a child because of its superior opportunity to observe the parties and the witnesses who testified at the trial. In re State Ex. Rel. Thaxton, 220 So.2d 184, 187 (La.App. 1 Cir.1969). As an appellate court, we must afford great deference to the trial court's decision, not only because of that court's better capacity to evaluate witnesses, but also because of the proper allocation of trial and appellate functions between the respective courts. Canter v. Koehring Company, 283 So.2d 716, 724 (La.1973). Thus, the trial court's decision will not be disturbed on review except in the clearest case of abuse of the trial court's great discretion. Bagents, supra.

We have thoroughly reviewed the record in the instant case and are of the opinion that pursuant to La. Ch.C. art. 606 A(2), the trial court's decision in adjudicating A.J. and P.J. to be children in need of care, removing them from the custody of E.J., and awarding custody to the State was supported by the evidence. Thus, for reasons more discussed below, the trial court's decision will not be disturbed by this court.

We note that E.J. has failed preserve his first two assignments of error for review. Specifically, E.J. did not object during the disposition hearing to the trial judge’s acceptance of a case plan goal of adoption on the basis that the State of Louisiana had not made reunification efforts as required by federal law, 42 U.S. 671(a)(15)(B) and state law, La. Ch.C. art. 675(B)(2). This issue has, thus, not been preserved for review. We do not hesitate to

point out that, if the issue had been preserved, we would find no merit in the claim since the testimony at the disposition hearing clearly indicated that reunification was impossible at this point as E.J. is incarcerated for the foreseeable future.

With respect to his second assignment of error, we note that E.J. failed to specifically object during the disposition hearing on the basis that the State did not “follow the procedural steps outlined in federal and state law designed to ensure parents[sic] due process.” This issue has not been preserved for review. Again, we do not hesitate to point out that, if the issue were reviewable, we would find no merit since the State is not required to demonstrate by clear and convincing evidence that reunification efforts are not available before the court can approve the case plan of adoption.

Finally, E.J. argues that the trial court was manifestly erroneous in finding that the evidence submitted by the State of Louisiana at the Disposition Hearing was sufficient under the law to support the approval of the case plan of adoption and erred in its factual finding that the father allegedly shot and killed the children’s mother. We disagree.

Regarding approval of the case plan for adoption, we note that La. Ch.C. art. 677(B) reads, “If no party files a written response objecting to the case plan and the court finds that plan protects the health and safety of the child and is in the best interest of the child, the court shall render an order approving the plan.” Here, E.J. did not file a written response objecting to the case plan. Further, the court found that the plan protected the health and safety of the children and was in their best interest. The statute, thus, mandates approval of the plan.

Furthermore, the record support the trial judge’s finding that the case plan protects the health and safety of the children and is in their best interest.

First, the record reflects that the children's mother is deceased as a result of gunshot wounds to the head. Second, the record also reflects that A.J. and P.J.'s father is incarcerated, accused of inflicting the gunshot wounds on their mother. Thus, neither of their biological parents are available to protect and care for them.

Third, the children's biological grandmother has declined to take custody of them. Additionally, the State is continuing to make efforts towards permanent placement of the children with a family friend or relative. We see no error in the juvenile court judge's acceptance of OCS's case plan for adoption.

With respect to the judge's finding that E.J. allegedly shot and killed the children's mother, we again find no error in the ruling. At a disposition hearing, the rules of evidence are not applicable. La. C.E. art. 1101(C)(3). Rather, under La. Ch.C. art. 680, a court "may consider evidence which would not be admissible at the adjudication hearing," including hearsay. State ex rel. D.H., 04-2105, (La.App. 1 Cir. 2/11/05), 906 So.2d 554, 562 (citing State, in the interest of C.W., R.W., J.W., and J.W. v. Womack, 28,310 (La.App. 2nd Cir.2/28/96), 669 So.2d 700).

La. Ch.C. Art. 680 also states, "The court shall consider the report of the predisposition investigation, the case plan, any reports of mental evaluation, and all other evidence offered by the child or the state relating to the proper disposition." Both the Verified Complaint and the OCS case plan contain statements that E.J. shot the children's mother and is incarcerated awaiting disposition of the charges in that case. This assignment of error lacks merit.

For the foregoing reasons, we find no merit in E.J.'s claims on appeal. In conclusion, we affirm the juvenile court's judgment of disposition in this case.

AFFIRMED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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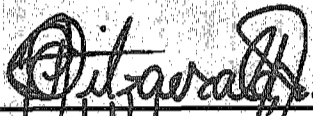
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **DECEMBER 27, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


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