NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CJ 0567

STATE OF LOUISIANA, IN THE INTEREST OF R.S., D.S., AND L.S.[1]

On Appeal from the
City Court of Thibodaux, Juvenile Division
Parish of Lafourche, Louisiana
Docket No. 4097
Honorable Mark D. Chiasson, Judge Presiding

Mary M. McMillan
Southeast Louisiana Legal Services
New Orleans, LA

Attorney for Appellee
L.S.

David G. Arceneaux
Thibodaux, LA

Attorney for Appellant
C.P. (father of L.S.)

Linda A. Mitchell
Houma, LA

Attorney for Appellee
State of Louisiana, Department of Children and Family Services

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered DEC 06 2013

Guidry, J. concurs.

[1] The children and the parents are referred to by their initials to preserve their anonymity in this confidential proceeding. The initials of the minors are used in accordance with LSA-R.S. 46:1844(W)(3).

PARRO, J.

The father of a minor child adjudicated in need of care appeals the judgment of the juvenile court,[2] which terminated his parental rights to the child and further determined that it was in the best interest of the minor child that she be freed for adoption. For the reasons that follow, we affirm the judgment of the juvenile court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A.S.[3] and C.P. are the parents of the minor child, L.S., who was born on April 19, 2011. On July 15, 2011, the State of Louisiana, through the Department of Children and Family Services (DCFS), obtained an oral instanter order removing L.S. and her siblings, R.S. and D.S., from the custody of their parents and placing them in the custody of DCFS, based on allegations of neglect by their mother. Specifically, DCFS received a report alleging that A.S. had sold her food stamps and that the minor children were begging for food. In addition, the report alleged that the home in which the children lived with A.S. did not have water or gas. According to the report, A.S. would leave the children alone while she went to get drugs, which she would often take in front of the children, calling them "candy for her nerves." In one instance, A.S. had apparently passed out in the home, and her nine-year-old daughter had to call an aunt for assistance, because she was unable to revive her mother. The children, including L.S., were maintained in the custody of DCFS pursuant to a judgment of continued custody signed by the juvenile court on July 21, 2011, and they were adjudicated in need of care pursuant to a judgment rendered and signed by the juvenile court on September 27, 2011.

When L.S. was taken into DCFS custody on July 15, 2011, C.P., the father, was

---

[2] The Thibodaux City Court exercises original juvenile jurisdiction for its territorial jurisdiction pursuant to LSA-Ch.C. art. 302(4). As a court exercising juvenile jurisdiction, it has exclusive original jurisdiction, in conformity with any special rules prescribed by law, over any child alleged to be in need of care and the parents of any such child. LSA-Ch.C. art. 604.

[3] A.S. is also the mother of R.S. and D.S., the two other children involved in this matter. C.P. is not the biological father of these children; therefore, the parental rights to these children are not at issue on appeal. In addition, the record reveals that A.S. was the mother of two other children, who had been raised by other family members since the time of their births, and that A.S. got pregnant with a sixth child during the pendency of these proceedings. These children are not involved in these proceedings; therefore, the parental rights to these children are not at issue on appeal.

not living with her and A.S.,[4] because he was living in Houston with his current girlfriend, who was then pregnant. On July 22, 2011, after having returned from Houston, C.P. turned himself in to authorities on an outstanding warrant for his arrest. He testified that he was eventually convicted of simple burglary of an inhabited dwelling and sentenced to five years of imprisonment. C.P. testified that he did not know for certain that L.S. was in DCFS custody until he was already in jail.

A case plan was developed for the parents and approved by the juvenile court, which was designed to remove the need for the children to remain in DCFS custody. In the initial case plan, the permanent plan for the children, including L.S., was stated as reunification with their mother, with a secondary goal of adoption. Pursuant to the case plan, C.P., the father, was required to identify all family members who may serve as caregivers, mentors, or as a support system for L.S. He was further required to support L.S. while she was in foster care by paying $25 per month to DCFS, and he was expected to attend scheduled visitations with L.S while she was in foster care. However, after the parents allegedly had failed to comply with all aspects of the case plan, the goal for the children was changed to adoption.

On October 16, 2012, DCFS filed a petition for termination of the parental rights of A.S., the mother, and C.P., the father, as to L.S.[5] After a hearing, the juvenile court found that A.S. had failed to substantially comply with her case plan and that there was no reasonable expectation of significant improvement in her condition or conduct in the near future. See LSA-Ch.C. art. 1015(5). With regard to C.P., the father, the juvenile court found that DCFS had proven by clear and convincing evidence that C.P. had been convicted of a crime and sentenced to a five-year prison sentence and that it was, therefore, presumed that C.P. was unable to care for L.S. for an extended period of time. See LSA-Ch.C. arts. 1015(6) and 1036(E). The juvenile court further found that

[4] A.S. was not living with any of the fathers of her children at the time they were taken into DCFS custody. The whereabouts of the father of R.S. were never determined, and although the father of D.S. was contacted during these proceedings, he never made any effort to appear and provide for his child.

[5] The petition also sought to terminate the parental rights of the proper parties as to R.S. and D.S.

C.P. had failed to rebut this presumption. After finding that it was in the best interest of L.S. that she be freed for adoption, the juvenile court terminated the parental rights of A.S. and C.P. It is from this judgment that C.P. has appealed.[6]

DISCUSSION

Title X of the Louisiana Children's Code governs the judicial certification of children for adoption. The grounds for involuntary termination of parental rights, as applicable to this matter, are found in LSA-Ch.C. art. 1015, as follows:

> (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 with 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 the department 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.
>
> (6) The child is in the custody of the department pursuant to a court order or placement by the parent; the parent has been convicted and sentenced to a period of incarceration of such duration that the parent will not be able to care for the child for an extended period of time, considering the child's age and his need for a safe, stable, and permanent home; and despite notice by the department, the parent has refused or failed to provide a reasonable plan for the appropriate care of the child other than foster care.

In order to terminate parental rights, the petitioner must prove each element of one of the enumerated grounds by clear and convincing evidence. See LSA-Ch.C. art. 1035(A). The method of proving parental misconduct under LSA-Ch.C. art. 1015(5) is

[6] A.S. has not appealed the judgment with regard to the parental rights of any of her children. Moreover, the biological fathers of R.S. and D.S. have not appealed the judgment.

found in LSA-Ch.C. art. 1036(C) and (D), which provide:

> C. Under Article 1015(5), lack of parental compliance with a case plan may be evidenced by one or more of the following:
>
> (1) The parent's failure to attend court-approved scheduled visitations with the child.
>
> (2) The parent's failure to communicate with the child.
>
> (3) The parent's failure to keep the department apprised of the parent's whereabouts and significant changes affecting the parent's ability to comply with the case plan for services.
>
> (4) The parent's failure to contribute to the costs of the child's foster care, if ordered to do so by the court when approving the case plan.
>
> (5) The parent's repeated failure to comply with the required program of treatment and rehabilitation services provided in the case plan.
>
> (6) The parent's lack of substantial improvement in redressing the problems preventing reunification.
>
> (7) The persistence of conditions that led to removal or similar potentially harmful conditions.
>
> D. Under Article 1015(5), lack of any reasonable expectation of significant improvement in the parent's conduct in the near future may be evidenced by one or more of the following:
>
> (1) Any physical or mental illness, mental deficiency, substance abuse, or chemical dependency that renders the parent unable or incapable of exercising parental responsibilities without exposing the child to a substantial risk of serious harm, based upon expert opinion or based upon an established pattern of behavior.
>
> (2) A pattern of repeated incarceration of the parent that has rendered the parent unable to care for the immediate and continuing physical or emotional needs of the child for extended periods of time.
>
> (3) Any other condition or conduct that reasonably indicates that the parent is unable or unwilling to provide an adequate permanent home for the child, based upon expert opinion or based upon an established pattern of behavior.

In addition, LSA-Ch.C. art. 1036(E) provides:

> Under 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, although the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of his parental rights.

In the petition for termination of parental rights, DCFS alleged that C.P.'s

parental rights should be terminated because he had abandoned L.S. by "leaving her under circumstances demonstrating an intention to permanently avoid responsibility by her placement in the physical custody of a nonparent or the department, and/or leaving her under circumstances demonstrating an intention to permanently avoid responsibility[.]" Specifically, DCFS alleged that C.P. had failed to have any significant contact with L.S. for a period in excess of six consecutive months, from July 15, 2011, to the date of the filing of the petition, October 16, 2012.

In its reasons for judgment, the juvenile court found that DCFS had proven the elements of LSA-Ch.C. art. 1015(6), in that C.P. had been convicted of a crime and sentenced to a period of incarceration of such duration that he would not be able to care for L.S. for an extended period of time, considering her age and her need for a safe, stable, and permanent home.[7] The court further determined that, despite notice by DCFS, C.P. had failed to provide a reasonable plan for the appropriate care of the child other than foster care.[8] On appeal, C.P. challenges the juvenile court's finding that he had failed to provide a reasonable plan for the appropriate care of the child other than foster care, contending that DCFS failed to meet its burden of proof by clear and convincing evidence.

It is well-settled that an appellate court cannot set aside a juvenile court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. In re A.J.F., 00-0948 (La. 6/30/00), 764 So.2d 47, 61. Pursuant to this standard, the two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the juvenile court; and 2) whether the record further establishes that the finding is not manifestly erroneous. See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual

[7] See also LSA-Ch.C. art. 1036(E).

[8] DCFS did not allege LSA-Ch.C. art. 1015(6) as a ground for termination of C.P.'s parental rights; however, the evidence necessary to prove this ground was introduced at trial without objection.

basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, Through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092. Even though an appellate court may feel its own evaluations and inferences are as reasonable as the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989).

Proof by clear and convincing evidence requires a party to persuade the trier of fact that the fact or causation sought to be proved is highly probable, i.e., much more probable than its non-existence. Chatelain v. State, Through Dep't of Transp. and Dev., 586 So.2d 1373, 1378 (La. 1991). This burden of proof is an intermediate one between the burden of proof by a preponderance of the evidence and the burden of proof beyond a reasonable doubt. Louisiana State Bar Ass'n v. Edwins, 329 So.2d 437, 442 (La. 1976). Proof by clear and convincing evidence requires more than a "preponderance" of the evidence, the traditional measure of persuasion, but less than "beyond a reasonable doubt," the stringent criminal standard. Succession of Bartie, 472 So.2d 578, 582 (La. 1985); Succession of Lyons, 452 So.2d 1161, 1165 (La. 1984).

At trial, C.P. testified that he had only lived with L.S. for approximately one or two months of her life. He further testified that he had been in jail for all but a few months of his life since 2006, when he was a juvenile. According to his testimony, C.P. was in Ray Burns Correctional Facility from 2006 until March 20, 2010. At the time of his release, he was nineteen years old. Shortly thereafter, he met A.S.

C.P. returned to jail from September to December 2010, because he shot out the tires of a truck belonging to A.S. When he was released, he returned to the residence in which he had lived with A.S. However, his return to the residence caused A.S. to be evicted. According to C.P., the landlady had warned A.S. that she did not want C.P.

over there because they argued too much. Apparently, A.S. had been told that, if C.P. came back to the residence, A.S. would have to leave. Despite being aware of these warnings, C.P. returned to the residence, and A.S. was evicted. Eventually, A.S. obtained a new residence, and he moved in with her and L.S.[9] for about a month before he left for Houston with his new, pregnant girlfriend. He then returned from Houston and turned himself in to authorities on an outstanding warrant for his arrest. He testified that he was eventually convicted of simple burglary of an inhabited dwelling and sentenced to five years imprisonment. At the time of trial, he was still in prison on this conviction.

While C.P. was in prison, he was visited by Fatima Griffin, the DCFS child welfare specialist assigned to this case. According to Ms. Griffin, C.P. had not provided financial assistance for his child, despite being required to do so as part of the case plan.[10] C.P. told Ms. Griffin that his mother could take care of L.S. while he was in prison, and he provided Ms. Griffin with his mother's contact information. Ms. Griffin testified that she tried to contact C.P.'s mother by telephone on three occasions, leaving messages asking that she return her calls. Nevertheless, C.P.'s mother never returned any of the phone calls. Ms. Griffin acknowledged that she never attempted to visit C.P.'s mother or send her a letter at her home address; however, in July 2012, Ms. Griffin, who was aware that C.P. was in constant contact with his mother, told C.P. that she had been unable to reach his mother by telephone. C.P. indicated that he did not know what was going on. Nevertheless, Ms. Griffin never heard from any member of C.P.'s family regarding the care of L.S.

C.P. testified that he was in constant contact with his mother and that he talked to her approximately every other day. Despite this constant contact, he only asked his mother whether the agency had contacted her one time, and he never followed up to

[9] L.S. was born on April 19, 2011. Based on the testimony in the record, this is the only time C.P. actually lived in the same residence with L.S.

[10] Ms. Griffin further testified that C.P. had not visited with his child from July 15, 2011, through July 2012, as required by the case plan. However, it is clear that he was in prison for all but one week of that time, and no one brought the child to visit him during that time period.

see what was happening with regard to the living arrangements for his child. He testified that he assumed his mother would have told him if DCFS had contacted her. He further testified that he never told her to contact DCFS, because he assumed that, if DCFS needed her, they would have contacted her.[11]

C.P. contends on appeal that DCFS failed to prove, by clear and convincing evidence, that his mother was not an appropriate placement for the child. C.P. argues that DCFS should have made more of an effort to contact his mother or visit her house to determine the appropriateness of the home for placement of the child. However, a review of the record demonstrates that DCFS attempted to contact C.P.'s mother and that she never returned any of their calls. Furthermore, C.P. was aware that his mother had not been in contact with DCFS, and despite his constant communication with her, he never managed to get his mother to contact DCFS, nor did he ever provide any contact information for any other person who might have been an appropriate placement for the child while he was in prison. Therefore, it is clear that the record demonstrates by clear and convincing evidence that C.P. failed to provide a reasonable plan for the appropriate care of the child other than foster care.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the juvenile court. All costs of this appeal are assessed to C.P.

AFFIRMED.

[11] C.P. later contradicted himself with this testimony and stated that his mother made no effort to contact DCFS, even though he had told her to do so.