

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CJ 1147

STATE OF LOUISIANA IN THE INTEREST OF A.D.

Judgment Rendered: MAR 19 2014

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On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
No. 2009-J-016465

Honorable Charles L. Porter, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

J.P. Pettigrew, J. Concurs

McCLENDON, J.

A mother appeals a judgment that terminated her parental rights to her minor child A.D.¹ For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 14, 2009, the Department of Children and Family Services (“the Department”) received “a report of alleged bone fracture, medical neglect, minor head/facial injuries and lack of adequate supervision” concerning three minor children, C.F. (born 12/3/2004), M.F. (born 10/7/2006), and A.D. (born 2/26/2009), who were in the custody and care of A.G.D. and M.D. All three children are the biological children of the father M.D. A.G.D. is the biological mother of A.D. and the stepmother of C.F. and M.F.

On December 15, 2009, the Department removed the three minor children from the custody and care of A.G.D. and M.D. On December 18, 2009, the State of Louisiana filed a Petition for Children in Need of Care on grounds of neglect by M.D. and A.G.D. (hereinafter sometimes referred to as “the father” and “the mother,” respectively, for purposes of clarity). In an affidavit, Zagorka Curry, a social worker for the Department responsible for investigating reports of child abuse, attested:

[M.F.] has a fracture on her right arm that has calcified proving the fracture is a few weeks old. [The father and the mother] state they only noticed the swelling to [M.F.’s] arm on Sunday and the Sheriff[’s] Department advised them to bring [M.F.] to the hospital. [M.F.] has multiple bruises on her face and body at different stages of healing. [C.F.] has a bruise on his left eye and a cut directly above the eye. [The parents] stated [C.F.] ran into a dishwasher the day before Thanksgiving [two weeks prior to the investigation].

On January 13, 2010, the children were adjudicated “in need of care.”

The father and mother were each charged with three counts of cruelty to juveniles. The father plead guilty to one count of cruelty to a juvenile and, in connection with a plea agreement, was required to testify against the mother in the criminal proceedings.

¹ In this opinion, the initials of the parents, stepparent, and minor children are used to protect and maintain the privacy of those involved in these proceedings.

In 2011, the mother went to trial on three counts of cruelty to juveniles. She was convicted of one count, acquitted on the other two, and sentenced to imprisonment. The mother was released from prison in December 2011, and she soon thereafter began cooperating with the Department in an attempt to reunify with her biological child, A.D. A.D. has remained in the Department's custody since December 15, 2009.²

At the time the mother was released, the Department's goal was to terminate her parental rights and allow A.D. to be adopted. However, the Department changed the goal to reunification when the mother began cooperating with the Department following her release from prison.

On September 18, 2012, a "Petition for Termination of Parental Rights and Certification of Adoption" was filed on behalf of A.D. by her court-appointed attorney. In the petition, it was alleged that termination of the mother's parental rights was warranted under LSA-Ch.C. art. 1015(3)(h), due to the mother's misconduct towards another child in the household; under LSA-Ch.C. art. 1015(4)(b), for the mother's nonpayment of support for a period of six consecutive months; and under LSA-Ch.C. art. 1015(5), for the mother's failure to substantially comply with the Department's case plan for services. In the petition, it was noted that neither the District Attorney nor the Department had filed a petition seeking to terminate the mother's parental rights.

At the scheduled termination hearing, an assistant district attorney "on behalf of the District Attorney's Office" sought to enroll "as co-counsel in the Petition for Termination of Parental [R]ights." The motion was granted without objection. At the hearing, the parties also stipulated that the mother had been found guilty of one count of cruelty to a juvenile regarding M.F. "having to do with instances on or about December 14th, 2009."

Following the termination hearing, the trial court concluded that the child and district attorney had met their burden of proof, by clear and convincing

² The father and mother no longer reside together, and C.F. and M.F. are now living with their biological mother in Missouri.

evidence, under LSA-Ch.C. arts. 1015(3), 1015(4), and 1015(5), thereby warranting termination of the mother's parental rights. In a judgment signed November 27, 2012, the trial court terminated the parental rights of the parents and ordered that A.D. was free and eligible for adoption.

The mother has appealed, asserting that the counsel appointed for the child lacked standing to bring a termination proceeding under LSA-Ch.C. art. 1015(3)(h). The mother asserts that even if counsel appointed for the child had standing, the child's counsel failed to prove, by clear and convincing evidence, that the mother was convicted of a felony that resulted in serious bodily injury under LSA-Ch.C. art. 1015(3)(h). The mother further asserts that the child's counsel failed to prove, by clear and convincing evidence, that she had not provided significant contributions to the child's care and support for a period of six consecutive months (LSA-Ch.C. art. 1015(4)(b)) and that she had not substantially complied with the case plan for services (LSA-Ch.C. art. 1015(5)).

DISCUSSION

In every involuntary termination of parental rights case, there are two private interests involved: those of the parents and those of the child. **State ex rel. H.A.B.**, 10-1111 (La. 10/19/10), 49 So.3d 345, 366. On the one hand, parents have a natural, fundamental liberty interest to the continuing companionship, care, custody and management of their children. **Id.** This "commanding" liberty interest, which is "far more precious than any property right," does not "evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." **Id.** (quoting **Santosky v. Kramer**, 455 U.S. 745, 758-59, 102 S.Ct. 1388, 1395-97, 71 L.Ed.2d 599 (1982)). On the other hand, however, 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 as "[t]here is little that can be as detrimental to

a child's sound development as uncertainty over [where] he is to remain." **Id.** (citing **Lehman v. Lycoming County Children's Servs. Agency**, 458 U.S. 502, 513-14, 102 S.Ct. 3231, 3238, 73 L.Ed.2d 928 (1982)). While a parent's interests "undeniably warrant deference and, absent a powerful countervailing interest, protection," **Lassiter v. Department of Soc. Servs.**, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160-61, 68 L.Ed.2d 640 (1981), that deference and protection should always bow to the child's countervailing interests, which our courts have deemed to be superior and paramount. **State ex rel. H.A.B.**, 49 So.3d at 366.

Title X of the Louisiana Children's Code governs the involuntary termination of parental rights. Louisiana Children's Code article 1015 provides the statutory grounds on which a court may involuntarily terminate the rights and privileges of parents. The petitioner need establish only one ground under Louisiana Children's Code article 1015, but the judge must also find that the termination is in the best interest of the child. LSA-Ch.C. art. 1039. See **State in Interest of ML**, 95-0045 (La. 9/5/95), 660 So.2d 830, 832. Additionally, in order to sever the parental bond, the petitioner bears the burden of proving the elements of one of the enumerated grounds for termination by clear and convincing evidence. LSA-Ch.C. art. 1035(A). Whether termination of parental rights is warranted is a question of fact, and a district court's factual determinations will not be set aside in the absence of manifest error. **State ex rel. H.A.B.**, 49 So.3d at 368.

The mother notes that LSA-Ch.C. art. 1004 specifically limits the grounds for termination that may be urged by counsel appointed for the child to those grounds set forth in LSA-Ch.C. arts. 1015(4), (5), and (6). LSA-Ch.C. art. 1004(B). As such, the mother submits that the child's attorney could not seek termination under LSA-Ch.C. art. 1015(3)(h).

Although the mother urges on appeal that the child's attorney had no right to bring an action based on any grounds in LSA-Ch.C. art. 1015(3), the mother never lodged an objection to the attorney's right to bring the action prior to or at the termination hearing. Also, while we recognize that the exception of

no right of action can be raised at any stage of the proceeding in accordance with LSA-C.C.P. art. 927, any purported defect in the authority of the child's attorney to bring this action was cured when the district attorney was joined as a party to the termination proceeding.

More specifically, the district attorney may petition the court to terminate parental rights under any ground authorized by LSA-Ch.C. art. 1015, including under LSA-Ch.C. art. 1015(3). LSA-Ch.C. art. 1004(C). There was no objection to the district attorney joining the litigation, and the district attorney played an active role in the hearing, including cross examining witnesses and arguing for termination. Under these circumstances, we conclude that the grounds for termination under LSA-Ch.C. art. 1015(3) were properly before the court.

Louisiana Children's Code article 1015(3), in pertinent part, provides that parental rights may be terminated for:

Misconduct of the parent toward this child or any other child of the parent or any other child which constitutes extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency, including but not limited to the conviction, commission, aiding or abetting, attempting, conspiring, or soliciting to commit any of the following:

(h) A felony that has resulted in serious bodily injury.

(i) Abuse or neglect which is chronic, life threatening, or results in gravely disabling physical or psychological injury or disfigurement.

Louisiana Children's Code article 1003 contains definitions of terms used in Article 1015, and provides, in part:

(1) "Abuse" means any of the following acts which seriously endanger the physical, mental, or emotional health and safety of the child:

(a) The infliction or attempted infliction, or, as a result of inadequate supervision, the allowance or toleration of the infliction or attempted infliction of physical or mental injury upon the child by a parent or any other person.

(10) "Neglect" means the refusal or failure of a parent or caretaker to supply the child with necessary food, clothing, shelter, care,

treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child's physical, mental, or emotional health and safety is substantially threatened or impaired. ...

The mother avers that the trial court concluded that grounds for termination existed under LSA-Ch.C. art. 1015(3)(h) merely because she had been convicted of cruelty to a juvenile. The mother contends, however, that while it was stipulated that she had been convicted of the felony of cruelty to a juvenile, there was no additional showing, by clear and convincing evidence, that the felony resulted "in serious bodily injury" to M.F., as required by subsection (h).³ Moreover, the mother submits that notwithstanding the felony conviction, there is simply no evidence introduced at trial to prove that she committed the level of "vile" behavior contemplated by LSA-Ch.C. art. 1015(3).

Under LSA-Ch.C. art. 1015(3), the district attorney is required to prove by clear and convincing evidence that the parent engaged in "misconduct" that constituted "extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency[.]" Although a basis for termination, the district attorney was not limited by LSA-Ch.C. art. 1015(3)(h) and was not required to prove that the mother was convicted of a felony involving serious bodily injury.

At the termination hearing, Zagorka Curry affirmed the attestations in her affidavit. Ms. Curry also testified that in addition to M.F.'s broken right arm, bruising to her face and body, and swollen nose, M.F. also had patches of her hair missing. She indicated that she learned that the injuries to M.F. were not accidental. Ms. Curry testified that there was no indication that A.D. was injured or had been mistreated, but the Department was concerned about the safety of A.D., given the injuries to the other children.

At the termination hearing, the mother admitted that she did whip the two stepchildren, either using her hand or with a belt. She testified that she may

³ The mother contends that she was convicted of cruelty to a juvenile because she failed to timely seek medical treatment for M.F. She asserts that the failure to seek medical treatment did not result in serious bodily injury to M.F. See LSA-R.S. 14:93(A)(1).

have left marks, but indicated that she never violently punched them or intentionally tried to hurt them. She also testified that she had put the stepchildren in timeout, took things away, and placed them on their knees. She acknowledged that her prior parenting was not appropriate, and asserts that she has learned the appropriate ways to discipline through parenting and anger management classes.

The father testified that when the two stepchildren, C.F. and M.F., were in the mother's care, she disciplined them "with force." He indicated that C.F. and M.F. "had a lot of tears," and at one point M.F. "did have blood on her behind." He testified that M.F.'s arm was broken because the mother pushed M.F. onto the floor because M.F. was not doing what she was told. He explained that, on two separate occasions, he saw the mother kick and hit M.F.

The father also testified that the mother had M.F. hold cans of food in her hands with her arms outstretched when M.F. was on her knees. If both cans fell, M.F. "got whipped again." The father indicated that the children would be placed on their knees for a "very long period of time. Like hours."

The father recalled an incident where the mother placed M.F. on her knees on a vent, which left slashes and lacerations on both of M.F.'s knees. The father also indicated that, on a separate occasion, the mother placed M.F. in a cold bathtub after she had "used the bathroom on herself."

Donna Gardner, the CASA volunteer assigned to this case, testified that C.F. told her that the mother would punish him by having him kneel in the corner with heavy shoes in his hands. C.F. would have to hold the shoes above his head and whenever he would lower his hands after a while, the mother would go "pow, pow, pow." When Ms. Gardner asked C.F. how he got the black eye, C.F. responded that his mother "pow, pow, pow." Ms. Gardner testified that M.F. indicated that the mother had made her kneel and tied a broomstick behind her head with her arms over it and M.F. fell and broke her arm.

Dr. Henry Lagarde, a clinical psychologist who evaluated the mother, testified that the mother "had admitted to an Agency worker about physical

abuse of other children in her care, circumstances leading to the abuse of the step-children and that she had left marks on the step-children.” Dr. Lagarde indicated that the mother admitted that she used “corporal punishment” on the two stepchildren. The mother did not provide explanations for the bruising all over the stomach and the back and the legs of the stepchildren. Dr. Lagarde indicated that the mother told him that “the charges about bruising former step-children were dropped, except for having been found guilty of one charge of not taking the child to a doctor regarding her broken arm.”

We recognize that the Department’s goal was reunification and that Dr. Lagarde felt “relatively comfortable” if A.D. was returned to her mother. Nevertheless, following our review of the testimony, along with the evidence in the record documenting the extensive injuries sustained by C.F. and M.F., we conclude that the district attorney met his burden, by clear and convincing evidence, to establish grounds for termination under LSA-Ch.C. art. 1015(3).⁴ Moreover, while there is no evidence that the mother ever abused or mistreated A.D., the plain language of LSA-Ch.C. art. 1015(3) clearly provides that misconduct towards any child in the household can result in the termination of parental rights toward all children in the household. See State ex rel. M.S., 99-2190 (La.App. 4 Cir. 6/23/00), 768 So.2d 628, 633. Having found no error in the trial court’s termination of the mother’s parental rights under LSA-Ch.C. article 1015(3), we need not address the grounds under LSA-Ch.C. arts. 1015(4) and (5).

CONCLUSION

For the foregoing reasons, the judgment of the trial court terminating A.G.D.’s parental rights to A.D. is affirmed. Costs of this appeal are assessed to the mother, A.G.D.

AFFIRMED.

⁴ We likewise find no error in the trial court’s conclusion that termination was in the best interest of the child, given the testimony in the record provided by Dr. Michael S. Blue.