

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2014 CJ 0158**

**STATE OF LOUISIANA  
IN THE INTEREST OF A.H. AND K.H.**

**Judgment Rendered: JUN 06 2014**

**Appealed from the  
Twenty-Second (22<sup>nd</sup>) Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Docket Number 8993JJ**

**Honorable William J. Burris, Judge Presiding**

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**BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.**

*WJN*  
*JEW*  
*NJ*

## **WHIPPLE, C.J.**

This matter is before us on appeal by defendant, D.H, from a judgment adjudicating his two minor children in need of care, pursuant to Title VI of the Louisiana Children's Code. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

D.H. and A.N.H. were married on or about July 13, 2006.<sup>1</sup> During this marriage two children were born, K.H., on September 5, 2006, and A.H., on July 22, 2010.<sup>2</sup> D.H. and A.N.H. first separated in April of 2011, when A.N.H. moved out of the matrimonial home with the two children and began residing with another man. Around October of 2011, A.N.H. and the children returned to D.H.'s home until February of 2012, when A.N.H. again moved out of D.H.'s home and began residing with a man named "Stick" and his two male roommates. The older child, K.H., stayed with her mother at Stick's residence and the younger child, A.H., continued to reside primarily with her father, D.H.

On July 13, 2012, A.N.H. filed a petition for a protective order on behalf of her children against D.H., alleging that D.H. had physically abused K.H. and that K.H. had disclosed to her that D.H. sexually abused her. The protective order on behalf of the children was granted; however, the district court in those proceedings later vacated the temporary order and awarded temporary custody to D.H. with four hours of supervised visitation per week granted to A.N.H.

Based on the allegations of sexual abuse, the Louisiana Department of Children and Family Services (hereinafter "the Department") began investigating the home environment of the children. The children were placed into the Department's care on or about July 30, 2012, purportedly on the basis of a "verbal

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<sup>1</sup>Pursuant to the Uniform Rules-Court of Appeal, Rules 5-1(a) and 5-2, the initials of the parties are used in this opinion to protect and maintain the privacy of the minor children.

<sup>2</sup> D.H. is not K.H.'s biological father; however, he is recognized as her legal father as he married A.N.H. when she was pregnant for K.H. and he is listed on K.H.'s birth certificate as the father. See LSA-C.C. art. 195.

hold order” from the Slidell City Court. However, on October 18, 2012, the city court judge who presided over those proceedings terminated the Department’s custody of the children and returned the children to the care of their mother.

Approximately two weeks later, A.N.H. agreed that the younger child could return to D.H.’s home, while the older child would continue to reside with her. Moreover, according to the mother, on or about December 30, after K.H. had visited with D.H. and the paternal grandparents, K.H. disclosed to her that the allegations of sexual abuse by D.H. were not true and that she said these things because she wanted to be with her mother. K.H. continued to visit with D.H., but according to the mother and the paternal grandmother, these visits were supervised.

The events giving rise to the instant proceedings commenced on January 14, 2013, when the mother brought K.H. to the emergency room at Oschner Northshore Hospital with complaints that K.H. had not slept in three days, had assaulted her, and was having delusions and possibly visual hallucinations. At that time, the social worker at the hospital was contacted, and she informed the treating physician that K.H. had been placed in the Department’s custody in the past and that she would be filing another case with the Department. K.H. was then transferred from the emergency room to River Oaks Hospital, a psychiatric hospital.

On January 18, 2013, the Department sought and obtained an instanter order for K.H., placing K.H. in the custody of the Department. The affidavit in support of the instanter order alleged: that K.H.’s drug screen at the hospital emergency room was positive for benzodiazepines, a class of drugs that she was not prescribed; that during a home visit, the mother appeared under the influence of drugs; and that there were safety concerns about the condition of the home.<sup>3</sup> The

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<sup>3</sup>Further testing showed (and the parties stipulated) that the positive finding for benzodiazepines on the initial screen was actually a false positive.

affidavit further stated that although the father was willing for the child to live with him, the Department could not approve this placement due to “having previously validated sexual abuse allegations against him.”

In March of 2013, the Department, through the district attorney’s office, amended the child in need of care petition for K.H. to add allegations of sexual abuse by the father, D.H. The Department also initiated child in need of care proceedings for the younger child, A.H. The affidavit in support of the instant order for A.H. stated, in pertinent part, that since K.H.’s return to the Department’s custody, she has continued to state that D.H. touched her privates and her disclosures indicate that her younger sister, A.H., was also a victim of sexual abuse.

An adjudication hearing was conducted on July 12, 2013, wherein the Department was represented by the office of the district attorney, the father by counsel of his choosing, and the mother by the public defender’s office. Following the adjudication hearing, the trial court found that both children were in need of care. A disposition hearing was conducted on August 15, 2013, wherein the trial court found that the children should remain in the custody of the Department, specifically together in a foster home, with the goal of reunification. The father, D.H., then filed the instant appeal, seeking review of the judgment of adjudication and the judgment of disposition.

On appeal, D.H. asserts: (1) the trial court was clearly wrong in finding by clear and convincing evidence that the minor children were in need of care as a result of D.H. committing an act which would constitute a crime to both K.H. and A.H.<sup>4</sup>; and (2) the trial court was clearly wrong in ordering at the disposition

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<sup>4</sup>In addition to finding that D.H. had committed an act which would constitute a crime against both K.H. and A.H., the trial court further found that A.N.H. had failed to adequately supervise the children, particularly in light of K.H.’s disclosure to her about the sexual abuse, which was also a basis for the trial court’s adjudication that both children were in need of care. However, D.H. has not assigned error to that finding of the trial court. Moreover, while A.N.H.

hearing that the children remain in the custody of the State.

## DISCUSSION

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...." LSA-Ch.C. art. 601. Furthermore, the health, safety, and best interest of the child shall be the paramount concern in all proceedings under Title VI. Id.

Allegations that a child is in need of care must assert one or more of the following grounds:

- (1) The child is the victim of abuse perpetrated, aided, or tolerated by the parent or caretaker ...;
- (2) The child is a victim of neglect;
- (3) The child is without necessary food, clothing, shelter, medical care, or supervision ...;
- (4) As a result of a criminal prosecution, the parent has been convicted of a crime against the child who is the subject of this proceeding, or against another child of the parent, and the parent is now unable to retain custody or control or the child's welfare is otherwise endangered if left within the parent's custody or control;
- (5) The conduct of the parent, either as principal or accessory, constitutes a crime against the child or against any other child; or
- (6) The child is a victim of human trafficking or trafficking of children for sexual purposes.

LSA-Ch.C. art. 606A. The definition of abuse includes "the involvement of the child in any sexual act with a parent or any other person, or the aiding or toleration by the parent or the caretaker of the child's sexual involvement with any other person or of the child's involvement in pornographic displays, or any other involvement of a child in sexual activity constituting a crime under the laws of this state." LSA-Ch.C. art. 603(1)(c).

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has filed with this court an "Original Appellant Brief" wherein she lists as an assignment of error the trial court's finding that the children were in need of care based on her neglect in failing to supervise the children, she did not appeal the trial court's judgment or file an answer to the appeal. Thus, any challenge to the trial court's judgment on this basis is not properly before us on appeal. See Bryant v. City of Baton Rouge, 615 So. 2d 884, 889-890 (La. App. 1st Cir. 1992), writs denied, 616 So. 2d 708 (La. 1993).

The Department must prove the allegations of a child in need of care petition by a **preponderance** of the evidence. LSA-Ch.C. art. 665; State ex rel. F.C., 2013-1353, (La. App. 1st Cir. 12/27/13) (unpublished opinion). Moreover, it is not the Department's duty to prove its case beyond a reasonable doubt, by clear and convincing evidence, or to disprove every hypothesis of innocence. State ex rel. L.B., 2008-1539 (La. 7/17/08), 986 So. 2d 62, 64, State ex. rel. J.K. 33,878 (La. App. 2nd Cir. 6/23/00), 764 So. 2d 287, 291-92, writ denied, 2000-2637 (La. 10/6/00), 771 So. 2d 83.

At the adjudication hearing in this matter, the trial judge interviewed K.H. in chambers and heard the testimony of an investigator for the Department, two social workers who testified on behalf of the Department, and the mother, father, and paternal grandmother.<sup>5</sup> K.H. first described how she was sexually abused by D.H.; however, she later told the judge that she “made the story-up.” Her fragility and confusion is apparent from reading the transcript of this interview, and the trial court correctly concluded that her testimony alone would not suffice.

Ms. Lisa Tadlock, a licensed social worker, testified that she interviewed K.H. during several sessions at the request of the Department. In her testimony, Ms. Tadlock described in detail the sexually inappropriate conduct of D.H., as reported to her by K.H. She further testified that K.H. stated that her father had abused her and touched her with his “four inch flea,” which K.H. later identified as his “private part.” During Ms. Tadlock's interview with K.H., K.H. also stated that D.H. had hurt her younger sister, A.H., with this “four inch flea.” Notably, Ms. Tadlock testified that in her opinion, it is common for a child to recant allegations of sexual abuse, as K.H. did in this matter.

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<sup>5</sup>The court also received documentary evidence, including pertinent medical records, drawings by K.H., photographs taken by the Department and the parties, and records from the prior judicial proceedings involving the children and their parents.

Ms. Kathy Minor, a social worker at River Oaks Hospital, worked with K.H. during both of her hospitalizations, and also testified.<sup>6</sup> Ms. Minor described at length the hypersexual behavior exhibited by K.H. while at the hospital, stating that this type of behavior is an indication of sexual abuse. Ms. Minor further testified that K.H. described to her specific acts of sexual abuse, which Minor described in detail during her testimony. Ms. Minor further testified that while K.H. was making progress at the hospital, her need to be reunited with her younger sister was “overwhelming.”

In their testimony, the father, mother, and paternal grandmother each denied the accusations of sexual abuse and denied witnessing any hypersexual behavior by K.H., as described by Ms. Minor in her testimony. However, the mother acknowledged that she has a history of mental illness, including anxiety, bi-polar disorder, and depression. She further acknowledged that her three older children live out-of-state with adopted families, with whom they were placed after they were removed from her home. The father adamantly denied the allegations of sexual abuse and described the mother as recently making great endeavors to improve her parenting skills. Thus, the father claimed that the younger child would be safe in his care and the older child would be safe in her mother’s care, but acknowledged that he had not considered the possibility of the younger child being placed in the mother’s home. The paternal grandmother testified that she was involved with the children on a daily basis; that she had witnessed K.H. apologizing to D.H. for saying he sexually abused her because it was not true; and that she would like to be considered first for placement upon K.H.’s discharge from the hospital.

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<sup>6</sup>As previously discussed, K.H. was admitted to River Oaks on January 19, 2013, after her mother brought her to the hospital emergency room for aggressive behavior and possible delusions. During the course of this litigation, K.H. was again admitted to River Oaks while in the custody of the Department and residing with foster parents. We are unable to determine from the record the date of this subsequent admission to the hospital. However, K.H. remained in the hospital at the time of the adjudication hearing.

After hearing and considering the witnesses' testimony, the trial judge adjudicated the children in need of care, stating, in pertinent part, as follows:

As it relates to the sexual allegation against the father, the burden of proof with the Child in Need or Care proceeding is by clear and convincing evidence instead of more probably than not than the normal allegations [sic] of a Child in Need of Care proceeding.<sup>[7]</sup>

Quite frankly, after I heard the testimony of K.H. in chambers, I certainly hadn't gotten to that standard. In fact, there was a recantation in effect after she had testified to it happening.

Then the testimony of the - - Ms. Minor and the behaviors that have been going on in both the first and now especially in the second hospitalization, I have absolutely no doubt in my mind that there's been sexual abuse.

And by clear and convincing evidence I find, that he has committed an act which would constitute a crime to both the child and the sibling.

As a reviewing court, we are mindful that where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. Guillory v. Lee, 09-0075 (La. 6/26/09) 16 So. 3d 1104, 1116-17. Moreover, as a court of review, we are obligated to accept the findings of fact of the trial court 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.

Unlike this court, the trial court was able to personally see K.H. and to evaluate her demeanor and truthfulness, as well as that of the other witnesses. The testimony presented by the Department and the parents materially conflicted and the trial court obviously had to make a credibility determination, ultimately choosing, after considering all of the evidence and the testimony, to believe the Department's witnesses over the parents. After carefully considering the record

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<sup>7</sup>The trial court's use of a higher burden of proof than required by law is harmless error herein. See Wooley v. Lucksinger, 2009-0571 (La. 4/1/11), 61 So. 3d 507, 608.



before us, we are unable to say that the trial court was clearly wrong-manifestly erroneous in making these determinations, which are amply supported in the record, or in concluding that the Department had met its burden of proof herein. Accordingly, we must affirm the judgment of trial court adjudicating the minor children in need of care.

D.H. also contests the judgment of the disposition hearing insofar as it ordered that the children remain in the custody of the Department. The record reflects that the trial court would have placed the children in the paternal grandparents' home, but that this was not a suitable placement at the time of the disposition hearing because D.H. was residing in the paternal grandparents' home. The Department agreed that it would reconsider placement with the paternal grandparents once D.H. left their home. Accordingly, on the record before us, we find no abuse of discretion in the trial court's placement, given the circumstances of the parties at the time of the disposition hearing.

In so concluding, we emphasize that the proceeding before us on review is an adjudication of children in need of care, not a termination of parental rights. The termination of parental rights requires a higher burden of proof, that of clear and convincing evidence. LSA-Ch.C. art. 1035. Further, the Children's Code requires frequent review and allows the court on its own motion, or the motion of the parents or child, to modify the custody arrangement<sup>8</sup> to ensure that the children are in the least restrictive placement environment and in the best environment for their health, safety and overall best interest. Accordingly, we find no merit to the father's arguments.

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<sup>8</sup>While we are unable to determine if there have been any subsequent changes to the custodial arrangement for the children, the trial court specifically acknowledged review.

## **CONCLUSION**

For the above and foregoing reasons, the August 5, 2013 judgment of the trial court, adjudicating the minor children, K.H. and A.H, in need of care, and the September 9, 2013 disposition judgment of the trial court are hereby affirmed. Costs of this appeal are assessed against D.H.

**AFFIRMED.**