STATE OF LOUISIANA IN THE INTEREST OF C.E.K.	*	**NO. 2017-CA-0409**
	*	
		COURT OF APPEAL
	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. 2016-284-05-TR-A, SECTION "A"
Honorable Ernestine S. Gray, Judge
* * * * * *
Judge Daniel L. Dysart
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew Woods, Judge Tiffany G. Chase)

Cindy H. Williams
ATTORNEY AT LAW
111 Veterans Blvd., Suite 804
Metairie, LA 70005
COUNSEL FOR APPELLANT

Jeffrey M. Hoffman
Robert C. Lowe
LOWE, STEIN, HOFFMAN, ALLWEISS & HAUVER, LLP
701 Poydras Street, Suite 3600
New Orleans, LA 70139-7735
COUNSEL FOR APPELLEE

VACATED AND REVERSED

DECEMBER 21, 2017

This is an appeal of a juvenile court judgment terminating the parental rights of Jesse Kaptein ("Mr. Kaptein"), the father of C.E.K.[1] The judgment at issue in this appeal was rendered during the pendency of a separate appeal involving Mr. Kaptein and Heather Roper Kaptein ("Ms. Kaptein), his former spouse and the mother of C.E.K., which arose from a divorce and child custody proceeding.[2] In that case, *Kaptein v. Kaptein*, 16-1249 (La. App. 4 Cir. 6/14/17), 221 So.3d 231, 232 ("*Kaptein I*"), *writ denied*, 17-1421 (La. 10/9/17), --- So.3d ----, 2017 WL 4546565, this Court affirmed a judgment of the Civil District Court which granted sole custody of C.E.K. to Ms. Kaptein, but reversed that part of the judgment which kept in place a prior judgment suspending Mr. Kaptein's ability to engage in FaceTime visitation with C.E.K.[3]

In this current appeal of the judgment terminating Mr. Kaptein's parental rights, we consider two primary issues: (1) whether Ms. Kaptein, as C.E.K.'s mother, was a proper party to pursue the termination of Mr. Kaptein's parental rights, and (2) whether those rights were properly terminated by the juvenile court.[4]

[1] As is our practice and in accordance with Rules 5-1 and 5-2 of the Uniform Rules-Courts of Appeal, we use the child's initials in this opinion in order to protect the child's privacy.
[2] While we would ordinarily use the initials of the child's parents in a termination of parental rights case, because our decision in this case is interconnected with this Court's decision of *Kaptein v. Kaptein*, a case which was not sealed and in which the parents' names are readily available, the use of the parents' initials in this case would be pointless.
[3] In *Kaptein I*, we also reversed the trial court's "finding that reasonable visitation is not in the best interest of the child," thereby "reinstat[ing] Mr. Kaptein's rights to FaceTime with C.E.K." *Kaptein I*, 16-1249, p. 13, 221 So.3d at 239.
[4] Mr. Kaptein frames the issues as (1) whether one parent has a right of action to pursue the termination of the other parent's parental rights; (2) whether Ms. Kaptein proved that Mr. Kaptein abandoned C.E.K.; and (3) whether it was in C.E.K.'s best interest for Mr. Kaptein's parental rights to be terminated.

We note, too, that Mr. Kaptein briefed the issue of whether the juvenile court had jurisdiction over this matter because of the pending custody case (*Kaptein* I), and whether the matter should have been heard in the custody case. He argues that the juvenile court erred in denying his exceptions of lack of subject matter jurisdiction and lis pendens because of the pending custody case. While Mr. Kaptein did not list this as an issue or an assignment of error, our jurisprudence indicates that "an appellate court has the authority to consider an issue [on appeal and of record]

For the reasons that follow, we find that, under the circumstances of this case, the juvenile court erred in granting leave of court, *ex parte*, by which Ms. Kaptein's attorneys were permitted to seek the termination of Mr. Kaptein's parental rights; and we further find that the juvenile court erred in its determination that Mr. Kaptein's parental rights should be terminated.

FACTS AND PROCEDURAL BACKGROUND

This matter commenced with the October 7, 2016 filing of a Motion for Leave of Court to File Termination of Parental Rights, filed by Ms. Kaptein, which requested that the juvenile court "appoint, designate and authorize her attorneys of record, Robert C. Lowe and Jeffrey M. Hoffman, as private counsel," to file an attached Petition for Termination of Parental Rights (hereafter, "Petition") seeking to terminate Mr. Kaptein's parental rights. The motion for leave was granted *ex parte* by the juvenile court on October 11, 2016.[5]

In the Petition, Ms. Kaptein alleged that the basis for the termination of Mr. Kaptein's parental rights was his abandonment of C.E.K. In particular, Ms. Kaptein alleged the following "factual allegations which constitute grounds necessary for termination of [Mr. Kaptein's] parental rights due to abandonment":

- By judgment dated May 15, 2017, Ms. Kaptein was awarded sole interim custody of C.E.K., pending a custody evaluation; the judgment further awarded Ms. Kaptein $5,000.00 per month in child support (however, Mr. Kaptein "had only provided . . . 8.75% of his total support obligation);

even when there is no assignment of error." *J.R.A. Inc. v. Essex Ins. Co.*, 10-0797, p. 12 (La. App. 4 Cir. 5/27/11), 72 So.3d 862, 870. As La. Ch.C. art. 303 (1)(5) provides that the juvenile courts have exclusive jurisdiction over involuntary terminations of parental rights, the juvenile court properly denied the exceptions of lack of subject matter jurisdiction and lis pendens.

[5] Ms. Kaptein takes the position in her appellate brief that, had Mr. Kaptein sought to challenge the juvenile court's order granting the motion for leave, he should have filed a "Motion for Reconsideration or a supervisory writ with this Court." We disagree. Mr. Kaptein properly challenged Ms. Kaptein's capacity to have brought the action by filing a peremptory exception of no right of action, discussed *infra*.

- The last time Mr. Kaptein had "visited with and/or was physically present with C.E.K." was on September 13, 2015 (or for a period greater than "six (6) consecutive months");

- By judgment dated December 9, 2015, the trial court ordered Mr. Kaptein to provide an address, phone number and email address so that he could receive and accept service of process but Mr. Kaptein failed to do so;

- A nine month custody evaluation was issued by Dr. Dahlia Bauer, Ph.D., on December 15, 2015, which concluded that C.E.K. should remain in Ms. Kaptein's sole custody (with security measures for Mr. Kaptein's visitation to prevent his removing C.E.K. from the country), that Mr. Kaptein should "participate in an assessment and treatment regarding his sexual behaviors and relationship issues, including a comprehensive sexual addiction evaluation (which Mr. Kaptein had failed to do);

- By judgment dated July 1, 2016, Ms. Kaptein was awarded sole custody of C.E.K.[6]

Ms. Kaptein based her claim that Mr. Kaptein demonstrated an intent to permanently avoid parental responsibility under La. Ch.C. art. 1015(4)(a),(b), and (c)(we note that, as of an August 1, 2016 amendment to the article, subpart (4) was redesignated as subpart (5); *See* footnote 9, *infra*) on the following specific allegations:

- Mr. Kaptein failed to disclose his address or residence, despite being ordered by the trial court to do so;

- Mr. Kaptein failed to provide significant contributions to C.E.K.'s care and support for any period of six consecutive months, having paid "only 8.75% of his Court ordered support obligation"; refused to return to the United States to visit C.E.K. since September 15, 2015 "leaving 100% of the child care and rearing to" Ms. Kaptein;

- Mr. Kaptein failed to maintain significant contact with C.E.K., having not visited with her since September 13, 2015 (despite having no restrictions on visitation until the trial court revoked his supervised visitation on July 1, 2016) which led to the suspension of his FaceTime visitation rights.[7]

[6] This July 1, 2016 judgment was at issue in *Kaptein I*.
[7] As previously noted, this Court reversed the trial court's suspension of Mr. Kaptein's FaceTime visitation with C.E.K. in *Kaptein I*.

At the time that the Petition was filed in October, 2016, Mr. Kaptein was represented in connection with *Kaptein I* by his counsel in the current matter, Ms. Williams and an appeal had been taken of the July 1, 2016 judgment at issue in *Kaptein I*. Nevertheless, counsel for Ms. Kaptein requested that a curator ad hoc be appointed to represent Mr. Kaptein in the termination proceedings in juvenile court, on the basis that his whereabouts were unknown and as such, "service on [Mr. Kaptein] cannot be made." On October 13, 2016, Catrice Johnson Reid was appointed as Mr. Kaptein's curator ad hoc.[8] The termination proceedings were scheduled for November 29, 2016.

Ms. Williams then enrolled as counsel for Mr. Kaptein on December 7, 2016, and filed an opposition to the Petition, denying that Mr. Kaptein had abandoned C.E.K. and denying that he had exhibited an intent to permanently abandon her. Mr. Kaptein then filed several exceptions (no cause of action, no right of action, lack of subject matter jurisdiction and lis pendens) to Ms. Kaptein's Petition and sought to have the Petition dismissed. A hearing on the exceptions was held and by judgment dated February 7, 2017, the exceptions were dismissed.

An adjudication hearing on Ms. Kaptein's Petition was held on March 8, 2017 and, by judgment dated April 3, 2017, the juvenile court granted the Petition and terminated Mr. Kaptein's parental rights.

Mr. Kaptein timely appealed this judgment.

DISCUSSION

Exception of no right of action

[8] By Order dated November 16, 2016, the juvenile court allowed Jerry Settle to serve as Mr. Kaptein's ad hoc curator for "the absent parent."

Before considering the merits of the juvenile court's judgment terminating the parental rights of Mr. Kaptein, we first address Mr. Kaptein's contention that the juvenile court erred in finding that Ms. Kaptein had a private right of action to pursue the termination of Mr. Kaptein's parental right and thus, improperly allowed the Petition to be filed *ex parte*.[9] The juvenile court, in its February 7, 2017 judgment dismissed, rather than denied, all of Mr. Kaptein's exceptions, including the exception of no right of action. We treat the "dismissal" of the exception as a denial and note that an "exception of no right of action is peremptory and can be brought up at any time, including on appeal." *Kelly v. Smith*, 13-0280 (La. App. 4 Cir. 2/26/14), 134 So.3d 644, 650-51, *writ denied*, 14-0822 (La. 6/20/14), 141 So.3d 809.

In *Zeigler*, this Court reiterated the well-settled rules regarding a peremptory exception of no right of action:

> . . . "[P]eremptory exceptions raising the objection of no right of action are reviewed *de novo* on appeal as they involve questions of law." *Fortier v. Hughes*, 2009-0180, p. 2 (La. App. 4 Cir. 6/17/09), 15 So.3d 1185, 1186. "The exception of no right of action tests whether the plaintiff has a real and actual interest in the action." *Weber v. Metro. Cmty. Hospice Found., Inc*., 2013-0182, p. 4 (La.App. 4 Cir. 12/18/13), 131 So.3d 371, 374, citing La. C.C.P. art. 927(5). The function of the exception is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the lawsuit. *Louisiana Paddlewheels v.*

[9] Mr. Kaptein's appellate brief contains two recitations of the issues in this case. In one, he asserts that Ms. Kaptein has no "*right* of action" to pursue the termination of Mr. Kaptein's rights, while in the other, he asserts that she has no "private *cause* of action." (Emphasis added). His argument, though, is entitled: "Heather Roper Kaptein has No Right of Action to File a Petition to Terminate Parental Rights Against her Former Husband . . . ."

An exception of no cause of action "is designed to test the legal sufficiency of a petition by determining whether a party is afforded a remedy in law based on the facts alleged in the pleading," whereas "[t]he exception of no right of action tests whether the plaintiff has a real and actual interest in the action." *Zeigler v. Housing Authority of New Orleans*, 15-0626, p. 4 (La. App. 4 Cir. 3/23/16), 192 So.3d 175, 178. (Internal citations omitted). The two exceptions are not interchangeable and in this case, it is Ms. Kaptein's right of action that is at issue.

> *Louisiana Riverboat Gaming Com'n*, 94-2015, p. 4 (La.11/30/94), 646 So.2d 885, 888. "The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation." *Indus. Companies, Inc. v. Durbin*, 02-0665, p. 12 (La. 1/28/03), 837 So.2d 1207, 1216.

Id., 15-0626, pp. 4-5, 192 So.3d at 178. An "exception of no right of action presents a question of law; thus, . . . appellate review of that exception is *de novo* . . . ." *N. Clark, L.L.C. v. Chisesi*, 16-0599, p. 6 (La. App. 4 Cir. 12/7/16), 206 So.3d 1013, 1017 (citation omitted).

Ms. Kaptein filed the Petition in this matter under the alleged authority of La. Ch.C. art. 1004 F, which provides as follows:

> By special appointment for a particular case, the court or the district attorney may designate private counsel authorized to petition for the termination of parental rights of the parent of the child on the ground of abandonment authorized by Article 1015(5).[10]

When the Louisiana Children's Code was enacted in 1991, and became effective on January 1, 1992, Article 1004 allowed a petition for the termination of parental rights to be filed only by either "[t]he district attorney or the department when a child has been placed in its custody for at least eighteen months" or "[t]he court on its own motion." The 1991 Official Comments recognized that, with respect to the "authority of others":

> Under prior law, a private individual had no authority to file a termination of parental rights petition. R.S. 13:1601. However, an abandonment action could be initiated by affidavit by a "private individual" or by a private "residential child-caring institution lawfully

[10] Abandonment, as a ground for the termination of parental rights, was originally found in subpart (4) of La. Ch.C. art. 1015. In a 2016 amendment, subpart (4) was redesignated as subpart (5).

> exercising physical custody of the child at issue" with leave of court. R.S. 9:403(B)(1) and (2).[11]

There have been several revisions to Article 1004 over the years. In the 1997 revision, subpart F was added to Article 1004. The official comments of 1997 indicate that the newly enacted "[p]aragraph F clarifies the fact that the court, as well as the district attorney, may authorize private counsel to initiate a termination case based on the ground of abandonment." Official Comment (g).[12]

Since subpart F was enacted in 1997 and authorizes the court or the district attorney to designate private counsel to seek the termination of parental rights, only a scant number of cases have addressed the question of who is a proper party to institute such an action. Mr. Kaptein relies on the Second Circuit case of *In re T.E.R.*, 43,145, p. 1 (La. App. 2 Cir. 3/19/08), 979 So.2d 663, 664, which dealt with the question of "whether an attorney representing the mother may be

[11] Indeed, as the Louisiana Supreme Court noted in *State in Interest of K.C.C.*, 15-1429, p. 7 (La. 1/27/16), 188 So.3d 144, 148 "[i]n 1948, the Louisiana legislature first recognized termination of parental rights, but limited it to 'abandoned' children," and in enacting former La. R.S. 9:403, "initially authorized only a state agency or an officer of the court to initiate the action by affidavit before the juvenile court." (Footnotes omitted). In 1984, former La. R.S. 9:403 was amended "to permit, with the court's approval, a private individual or a residential child-caring institution lawfully exercising physical custody to file the abandonment action." *Id.*, 15-1429, pp. 8-9), 188 So.3d at 149.

[12] As the *K.C.C.* court noted, this amendment may have been in response to the case of *In the Interest of D.G.C.*, 96-1093, p. 11 (La. App. 4 Cir. 2/26/97), 690 So.2d 237, 242, in which this Court reviewed the development of the Children's Code and the laws which preceded it and found that:

> The failure [of Article 1004] to specify that a private individual has authority to institute termination proceedings, and under what circumstances, cannot be considered accidental. We conclude that Article 1004, as presently written, represents an intentional legislative determination that State action, through the district attorney or the Department, is required to terminate a parent's right to the care and custody of his or her child. We hold that the present proceeding was improperly filed [by a non-parent custodian] and cannot be maintained as a private action.

Other cases had also held that, under the previous version of Article 1004, no private right of action existed for the termination of parental rights. *See*, *e.g.*, *In Interest of Young*, 461 So. 2d 636, 637 (La. App. 1 Cir. 1984); *State in Interest of Bartee*, 446 So. 2d 512, 513 (La. App. 4 Cir. 1984).

appointed by [ex parte order of] the trial court to bring an action to terminate the father's parental rights . . . to . . . two minor children." In that case, the father of the children filed a peremptory exception of no right of action on the basis that "no private action exists for one parent to seek termination of the other parent's parental rights." *Id*., p. 3, 979 So.2d at 665.

The Second Circuit, after reviewing the history of Article 1004, recognized that, while "the language in La. Ch. C. art. 1004(F) permitting appointment of private counsel to bring termination actions based upon abandonment does not prohibit the appointment of one of the parent's counsel to seek termination of the other parent's parental rights," it neither "authorize[s] such an appointment." *Id*., p. 9, 979 So.2d at 668. It then held:

> We observe that permitting a mother to seek termination of the father's parental rights even indirectly through appointment of her counsel as special prosecutor amounts to giving the mother the right to prosecute that action. The best interests of a parent seeking termination may not be the same as the best interests of the children. To permit the appointment of the lawyer representing one parent who wants to terminate the parental rights of the other parent creates an unnecessary and potentially serious conflict of interest.
>
> Because termination of parental rights is recognized as one of the most drastic actions a state can take against a citizen, we rely on previous interpretations of the laws on termination stating there is no private right of action to terminate another parent's parental rights, and there are no circumstances under which one parent may file a petition to terminate the parental rights of another parent. Absent a clear indication from the Louisiana Legislature that one parent may seek to revoke the parental rights of the other parent by appointment of the revoking parent's personal attorney, we decline to do so.

Id., 43,145, pp. 9-10, 979 So.2d at 668.

In re T.E.R was discussed more recently in *State in Interest of K.C.C.*, a case upon which Ms. Kaptein heavily relies. In that case, the unmarried mother of a child gave custody of the child to an unrelated couple who intended to adopt her, and executed a power of attorney granting the couple all parental rights until the child reached the age of eighteen. A year later, the couple filed a petition to terminate the rights of the child's parents. When that petition was met with exceptions of no right of action and no cause of action by the child's mother, the couple's attorney filed a motion for leave to file a petition for the termination of parental rights, which the juvenile court granted. At the same time, the juvenile court denied the mother's exceptions.

In addressing the rights of the couple's attorney to bring the action to terminate the parents' rights, the *K.C.C.* Court reviewed the history of the statutes allowing the termination of parental rights, culminating in the enactment of the Louisiana Children's Code and ultimately, Article 1004 F. It noted that Article 1004 is found within Title X of the Code, entitled "Judicial Certification of Children for Adoption" which expressly provides that its purpose is to:

> … protect children whose parents are unwilling or unable to provide safety and care adequate to meet their physical, emotional, and mental health needs, by providing a judicial process for the termination of all parental rights and responsibilities and for the certification of the child for adoption.

La. Ch.C. art. 1001. The Article further explains that "[i]n all proceedings, the primary concern is to secure the best interest of the child if a ground justifying termination of parental rights is proved." *Id*. Thus, "[t]ermination of parental rights is to be considered the first step toward permanent placement of the child in a safe and suitable home, and if at all possible, to achieve the child's adoption." *Id*.

The *K.C.C.* Court then found as follows:

> This history, culminating in the legislature granting the juvenile court the specific power to authorize private counsel to initiate a termination of parental rights proceeding on the ground of abandonment, convinces us that the legislature has intentionally broadened the classes of persons who may bring a termination of parental rights action.

Id., 15-1429, p. 15, 188 So.3d at 152-53. The Court recognized cases, including *In re T.E.R.*, which have declined, for various reasons, to allow the appointment of private counsel representing one parent to seek the termination of the other parent's parental rights. The Court ultimately noted that, although cognizant of the juvenile court's concerns in the case (i.e., "balancing the rights of the parents and the best interest of the child when the petitioner seeking termination may have interests averse to reunification of the family"), the matter is best left "to the discretion of the juvenile courts to determine whether to authorize private counsel, by special appointment in a particular case, to petition for the termination of parental rights." *Id*., 15-1429, p. 16, 188 So.3d at 153-54.

In this matter, a review of the transcript of the adjudication hearing reflects that the juvenile court, in addressing the issue of whether it could proceed in the matter given that there was a pending appeal of the custody issue, initially indicated that there was no authority for a "private termination against one parent against the other [sic]." Counsel for Ms. Kaptein then provided the court with a copy of the *K.C.C.* case, at which time, the juvenile court judge stated:

> . . . so I read it and I had made a rule and I think it's consistent with the rule made before . . . I brought it up because I thought I perhaps made an error now I'm saying I didn't.

Our interpretation of the juvenile court judge's statement is that the court understood the *K.C.C.* case to automatically authorize the appointment of a parent's counsel to seek the termination of the other parent's parental rights. To the contrary, the *K.C.C.* case provides the juvenile court with discretion for such an appointment. The record does not contain a copy of the transcript from the hearing on the exception of no right of action and thus, there is no indication as to the juvenile court's reasons for denying the exception. Nor does the transcript from the adjudication hearing reflect that the juvenile court heard argument or gave consideration to the circumstances of the case in exercising its discretion in designating Ms. Kaptein's counsel as private counsel to petition for the termination of Mr. Kaptein's parental rights. While, under *K.C.C ,* the juvenile court has discretion in this regard, we note that "deference should be accorded to the trial court's decision, even if that decision is of less than ideal clarity, if the trial court's path may be reasonably discerned, such as when its findings, reasons and exercise of discretion are necessarily and clearly implied by the record." *Leal v. Dubois*, 00-1285, p. 4 (La. 10/13/00), 769 So.2d 1182, 1185. Here, the record does not support a reasoned exercise of discretion by the juvenile court under the circumstances of this case. Nor is the juvenile court's exercise of discretion "necessarily and clearly implied by the record." We therefore set aside the juvenile court's *ex parte* order authorizing Ms. Kaptein's attorneys to file the Petition.

We now turn to the issue of whether the juvenile court's ruling terminating Mr. Kaptein's rights is supported by the record. As discussed herein, even if the juvenile court had properly exercised its discretion in authorizing Ms. Kaptein's attorneys to file the Petition, the record does not show that Mr. Kaptein

demonstrated an intent to abandon C.E.K., nor that it was in C.E.K.'s best interest that Mr. Kaptein's parental rights were terminated.

Merits of termination of Mr. Kaptein's parental rights

In terminating Mr. Kaptein's parental rights, the juvenile court judgment expressly found as follows:

> 1) … the father's conduct … demonstrates an intention to permanently avoid parental responsibility by failing to provide significant contributions to the child's care and support and by failing to have significant contact with the child by visiting or communicating with her for a period of six months;
>
> 2) It is in the best interest of C.E.K. that the abandonment is **granted**. Mr. Jesse Kaptein has not provided for the mental and physical health needs of his child; the need for unconditional love, supportive caregivers, safe and secure surroundings, adequate guidance and discipline, nor a healthy living environment. He is a stranger to her based on the mother's uncontroverted testimony that the child never asks about him or discusses him or asks where her father is. (Emphasis in the original).

No reasons for judgment were issued and there was no request for written reasons for judgment. We note that, on appeal, we review the "trial court's findings as to whether parental rights should be terminated according to the manifest error standard." *State in Interest of D.B.*, 16-0694, p. 3 (La. App. 4 Cir. 12/8/16), 206 So.3d 1021, 1024. (Citation omitted). After our review of the record, we find that the juvenile court erred in terminating Mr. Kaptein's parental rights on the grounds of abandonment.

Under La. Ch.C. art. 1015(5), abandonment of a child may be grounds for the termination of parental rights. A showing must be made that the parent left the child:

> . . . under circumstances demonstrating an intention to permanently avoid parental responsibility by any of the following:
>
> > (a) For a period of at least four months as of the time of the hearing, despite a diligent search, the whereabouts of the child's parent continue to be unknown.
> >
> > (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 him or communicating with him for any period of six consecutive months.

La. Ch.C. art. 1015(5). We note that, under our well-settled jurisprudence, only one of the elements under Article 1015(5) is required for the termination of parental rights. *See State ex rel. A.T.*, 06-0501, p. 5 (La. 7/6/06), 936 So. 2d 79, 82 ("[i]n order to terminate parental rights, the court must find that the State has established at least one of the statutory grounds by clear and convincing evidence"). We also note that "the abandonment statutes must be strictly construed ... the evidence must clearly show a manifestation of an intent to permanently avoid all parental responsibility and all reasonable doubt should be resolved against such a conclusion because a decree of termination parental rights is in derogation of the natural rights of parents." *State in the Interest of Foret*, 398 So. 2d 78, 81 (La. App. 4 Cir. 1981). *See also*, *In re A.D.H.*, 01-0107, p. 5 (La. App. 3 Cir. 5/2/01), 784 So.2d 854, 858, ("the termination of parental rights is a severe action which requires an onerous burden of proof"). Indeed, the "permanent termination of the parent-child legal relationship is one of the most drastic actions the State can take against its citizens." *State in Interest of C.A.C.*,

11-1315, p. 7 (La. App. 4 Cir. 2/1/12), 85 So.3d 142, 146. Accordingly, in determining whether parental rights should be involuntarily terminated, our jurisprudence has developed a two-pronged test:

> First, the State must prove by clear and convincing evidence the existence of at least one of the statutory grounds for termination under La. Ch. C. art. 1015. Second, after the ground for termination is found, the trial court must determine whether the termination is in the child's best interests.

State in Interest of A.S., 17-0028, p. 9 (La. App. 4 Cir. 5/10/17), 220 So.3d 179, 186, *writ denied*, 2017-1134 (La. 9/6/17), 224 So.3d 989.[13] *See also*, *State in Interest of C.A.C.*, 11-1315, p. 8, 85 So.3d at 147.

Mr. Kaptein devotes a significant portion of his argument concerning the juvenile court's finding that he abandoned C.E.K. to the issue of whether his whereabouts were proven to have been unknown for four months prior to the termination hearing under Article 1015 (5)(a). We need not address this issue as the juvenile court's judgment was not based on this particular factor. Rather, the juvenile court's finding that Mr. Kaptein had abandoned C.E.K. was based on the other two possible grounds for abandonment under Article 1015 (5) - subparts (b) and (c).

With respect to the juvenile court's finding of abandonment based upon his "fail[ure] to provide significant contributions to the child's care and support," Ms. Kaptein testified that Mr. Kaptein has made monthly payments averaging $1735 per month. She also testified that, in the six months prior to the termination

[13] The overwhelming majority of termination of parental rights cases involves a department of the State seeking to terminate parental rights and/or cases involving adoption. While the *A.S.* case involved a proceeding initiated by the Louisiana Department of Child and Family Services, we know of no reason why the two-prong test would not apply equally to cases in which the proceeding was instituted by special appointment by the court pursuant to La. Ch.C. art. 1004.

hearing, he contributed "[l]ess than three thousand dollars" for C.E.K.'s "care." According to Ms. Kaptein, Mr. Kaptein is about "eighty thousand" dollars in arrears in child support, for which she has filed a rule for contempt.

In *Kaptein I*, this Court noted that Mr. Kaptein was to pay $5,000 per month in child support to Ms. Kaptein. *See Kaptein I*, 16-1249, p. 2, 221 So.3d at 232-33. On November 9, 2015, the parties stipulated to an amount representing the retroactive amount of child support in arrears, and the court issued an order with the intent of bringing Mr. Kaptein current on his child support obligations. *See Kaptein I*, 16-1249, p. 2, 221 So.3d at 233. A contempt hearing was thereafter held, and Mr. Kaptein was ordered to make various payments towards the arrearage. *Id*., p. 3, 221 So.3d at 233.

While we recognize that Mr. Kaptein has not fully complied with his child support obligations, we cannot say that the record demonstrates that Mr. Kaptein "failed to provide significant contributions to [C.E.K.'s] care and support for any period of six consecutive months" such that the circumstances demonstrate "an intention to permanently avoid parental responsibility" as required by Article 1015 (5)(b).

There are few cases which have addressed the issue of whether termination of parental rights is warranted when a parent has failed to pay the full amount of child support ordered by another court's judgment outside the context of the contemplated adoption of the child. This Court has recognized the "fundamental liberty interest in [natural parents'] care, custody, and management of their child," and that interest "'does not evaporate simply because they have not been model parents.'" *State in Interest of C.A.C.*, 11-1315, p. 7, 85 So.3d at 146, quoting *State ex rel. SNW v. Mitchell*, 01-2128, p. 8 (La.11/28/01), 800 So.2d 809, 814. *See*

also, *State in Interest of T.J.,* 48,612, p. 11 (La. App. 2 Cir. 9/11/13), 124 So.3d 484, 492 ("termination is an unusually strong remedy in response to poor parenting").

Courts which have terminated parental rights based on the failure of a parent "to provide significant contributions to the child's care and support for any period of six consecutive months" have found a complete absence of any contributions to the child's care. For example, in *State ex rel. C.M.O.*, 04-1780 (La. App. 4 Cir. 4/13/05), 901 So.2d 1168, a father's parental rights were terminated based on his failure to provide *any* financial support for his children for a six month period. The Court rejected his contention that his incarceration prevented him from making such contributions, noting that his "responsibility to support his children, however, was not suspended upon his incarceration." *Id*, 04-1780, p. 4, 901 So.2d at 1171. See also, *State In Interest of T. D.*, 16-708 (La. App. 5 Cir. 5/31/17), 221 So.3d 290, 296-97, (termination of both parents' parental rights warranted where the mother "admitted that she had not seen her son and had not paid any sums of money for his care" and the father "also admitted that he had not seen his son or made significant contributions toward his care;" he had paid nothing for two years and in an eight year period had paid only $69.63); *State in Interest of M.C.*, 16-69, p. 10 (La. App. 3 Cir. 6/1/16), 194 So. 3d 1235, 1242, *writ denied*, 16-1273 (La. 9/6/16), 205 So. 3d 918 (where mother had means of financially supporting her children but made no contributions and while she had purchased items for them which she never gave to them because she was "saving them for when she regained custody," termination of her parental rights was proper); *State in Interest of T.J.,* 48,612 (La. App. 2 Cir. 9/11/13), 124 So.3d 484, 489 (where father provided no contributions to the children, even though he was incarcerated, termination of

parental rights was proper); *Cf*, *State ex rel. A.L.D.*, 09-0820, p. 11 (La. App. 3 Cir. 11/4/09), 21 So.3d 1109, 1116 (where mother "minimally complied with [the care and support] obligation . . . Article 1005(4)(b) [could not] be used as a basis for the termination of [her] parental rights.").

In the instant case, Mr. Kaptein has made regular contributions for the care of C.E.K. While he has not fully complied with his court-ordered support obligations, we do not believe his failure to do so manifests an intent to "permanently avoid parental responsibility" as is contemplated by Article 1015 (5)(b). Nor do we find that there is "clear and convincing evidence" of such intent in the record. We therefore find that the juvenile court erred in terminating Mr. Kaptein's parental rights based in Article 1015 (5)(b). Mr. Kaptein's failure to pay child support and the issue of any arrearages is more properly addressed in the proceeding pending in Civil District Court.

We likewise find that the juvenile court erred in finding that Mr. Kaptein failed to have "significant contact with the child by visiting or communicating with her for a period of six months," thus warranting a termination of his parental rights under Article 1015 (5)(c). We are aware of the many cases in which parental rights have been terminated based on a parent's failure to have contact with a child for more than six months.[14] However, in this case, it is clear that Mr. Kaptein's inability to maintain contact with C.E.K. was not attributable to him but rather to orders of the trial court in the matter pending in Civil District Court culminating in the *Kaptein I* decision of this Court. More particularly, in the divorce/custody

[14] *See*, *e.g.*, *State in Interest of M.C.*, 16-69 (La. App. 3 Cir. 6/1/16), 194 So.3d 1235, 1237, *writ denied*, 16-1273 (La. 9/6/16), 205 So.3d 918; *State in Interest of T.J.*, 48,612 (La. App. 2 Cir. 9/11/13), 124 So.3d 484; *State ex rel. A.T.C.*, 06-562 (La. App. 5 Cir. 11/28/06), 947 So.2d 71; *State in Interest of L.D.*, 47,226 (La. App. 2 Cir. 4/11/12), 92 So.3d 454; *State ex rel. T.M.H.*, 99-433 (La. App. 5 Cir. 11/30/99), 748 So.2d 1216, 1217.

proceeding, the trial court, well aware that Mr. Kaptein "does not live or work in the United States" and would not "be in the country for an extended period of time," issued a judgment on February 4, 2016 suspending Mr. Kaptein's "rights to visitation through FaceTime pending further orders. . . ." *Kaptein I*, 16-1249, pp. 2-3, 221 So.3d at 233. The trial court thereafter issued a judgment on July 16, 2016, in which it "maintained its previous order suspending Mr. Kaptein's FaceTime visitation" and finding that "reasonable visitation with Mr. Kaptein is not in the best interest of the child." *Id*., 16-1249, p. 4, 221 So.3d at 234.

In *Kaptein I*, we found that "the record evidences the fact that Mr. Kaptein and C.E.K. were enjoying their FaceTime visitation up until the February 4, 2016 order," suspending this visitation. *Id*., 16-1249, p. 12, 221 So.3d at 239. It is clear from *Kaptein I* that Mr. Kaptein was prohibited from any meaningful contact with his daughter, through FaceTime visitation. It is equally clear that, when Ms. Kaptein filed her Petition on October 6, 2016, Ms. Kaptein was fully aware that the court order prevented Mr. Kaptein from communicating with C.E.K. through FaceTime. Under these circumstances, it is disingenuous for Ms. Kaptein to argue that she proved at trial "that Mr. Kaptein has not visited or had contact with [C.E.K.] 'for any period of six consecutive months' prior to her filing the Petition . . ."

A legal procedural process for parental termination would certainly be created by prohibiting a parent from meaningful visitation with his child and then basing the termination of his parental rights on his lack of communication with that child. We do not countenance such a scenario and we find that the juvenile court erred in finding that Mr. Kaptein failed to communicate with C.E.K. for a six month period.[15]

Finally, we turn to the issue of whether the juvenile court erred in finding that it is in C.E.K.'s best interest to have Mr. Kaptein's parental rights terminated. As our jurisprudence indicates, "after the [statutory] ground for termination is found, the trial court must determine whether the termination is in the child's best interests." *State in Interest of T.M.P.*, 13-1006, p. 25 (La. App. 4 Cir. 10/23/13), 126 So.3d 741, 756, quoting *State in Interest of C.A.C.*, 11-1315, p. 8, 83 So.3d at 147. *See also*, *State ex rel. L.B. v. G.B.B.,* 02-1715, p. 5 (La. 12/4/02), 831 So.2d 918, 922 ("only after a finding that at least one of the enumerated grounds set forth in La. Ch. Code Art. 1015 is satisfied, the trial court must determine whether the termination is in the best interest of the child."). As we have already determined that no grounds exist for the termination of Mr. Kaptein's parental rights, we need not reach the issue of whether that termination would be in C.E.K.'s best interest.

CONCLUSION

For the reasons set forth herein, we find that the juvenile court erred in granting, *ex parte*, the motion for leave which authorized Ms. Kaptein's attorneys to file a petition to terminate Mr. Kaptein's parental rights. We further find that the juvenile court erred in terminating those rights. Accordingly, we set aside the order granting the motion for leave and we reverse the juvenile court's judgment terminating Mr. Kaptein's parental rights.

[15] Ms. Kaptein argues that, while his FaceTime visitation was suspended, nothing prevented him from traveling to Louisiana to visit with her. We find no merit in this argument. First, in *Kaptein I*, the trial court found that reasonable visitation was not in C.E.K.'s best interest. A reasonable construction of this finding is that Mr. Kaptein would not have been able to visit with her in person. Second, Article 1015 (5)(b) requires a showing that the parent "has failed to maintain significant contact with the child by visiting him **or** communicating with him." (Emphasis added). The use of the term "or" clearly signifies that contact with the child need not be through in-person visitation. Indeed, incarcerated parents, in order to avoid a finding that they have abandoned their children, must show contact with their children; in many cases, in-person visitation is not possible. The requirement of in-person visitation could have the unintended consequence of the termination of parental rights merely as a result of being incarcerated for a period of six months.

VACATED AND REVERSED