NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CJ 2378

STATE OF LOUISIANA IN THE INTEREST OF A.M., L.M., AND M.M.

Judgment Rendered: March 23, 2012

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Appealed from The Juvenile Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 9946

The Honorable Pamela Taylor Johnson, Judge Presiding

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Leslie L. Lacy Baton Rouge, Louisiana	Counsel for Plaintiffs/Appellants A.M., L.M., and M.M.
Peter T. Dudley Baton Rouge, Louisiana	Counsel for Defendant/Appellee S.M.
Sean Q. Bray Baton Rouge, Louisiana	Counsel for Defendant/Appellee C.M.
Alyson R. McCord Baton Rouge, Louisiana	Counsel for Defendant/Appellee Louisiana Department of Children and Family Services

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BEFORE: GAIDRY, McDONALD, AND HUGHES JJ.

EJG - GAIDRY, J - CONCURS WITH REASONS

JMM - McDONALD, J. CONCURS AND WILL ASSIGN REASONS

HUGHES, J.

This is an appeal of a trial court judgment dismissing a petition for the termination of parental rights, which had been filed on behalf of the minor children. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In August of 2006 the minor children, M.M. and L.M., were removed from the custody of the parents, S.M. (the mother) and C.M. (the father), following the death of the children's half-sister, M.C.M. (C.M.'s daughter), who was found unresponsive in her bed, in the home of S.M. and C.M., and died later that night in the hospital. M.M., who was born on January 8, 2005, was approximately 19 months and L.M., who was born on March 27, 2006, was approximately 4 months when they were removed from their parents' custody and came into the custody of the Louisiana Department of Children and Family Services[1] ("the Department"), by order of the Juvenile Court for East Baton Rouge Parish ("Juvenile Court"). The children were subsequently placed in a foster home.

During an investigation by the Baton Rouge Police Department ("BRPD") into the injury and subsequent death of M.C.M., S.M. and C.M. reported to the police that on the night M.C.M. was found injured, they had awakened to see a "shadow," which they believed was an intruder, in the hall outside their room. C.M. had fired a handgun in the direction of the

[1] The Louisiana Department of Children and Family Services was created by the legislature in 2010, replacing the Department of Social Services. Also, the Office of Community Services became the Office of Children and Family Services. See 2010 La. Acts, No. 877, amending LSA-R.S.36:3, 36:4, 36:8, 36:9, 36:471, 36:472, 36:473, 36:474, 36:475, 36:475.1, 36:477, and repealing former LSA-R.S. 36:474(E) and 36:476. Section 3 of Act 877 further provided:

> The Louisiana State Law Institute is hereby directed to change all references to the "Department of Social Services" to the "Department of Children and Family Services" and all references to either the "office of community services" or "the office of family support" to the "office of children and family services" throughout the Louisiana Revised Statutes of 1950.

intruder and into M.C.M.'s room. C.M. reported that he either heard or saw the intruder climbing out of M.C.M.'s room through a window.

It was also discovered during the investigation that S.M. and C.M. had filed, in the fourteen month period prior to M.C.M.'s death, multiple insurance claims arising out of: one apartment fire, two separate automobile fires, and a workers' compensation eligible injury allegedly sustained by C.M. Suspicious of possible insurance fraud, the BRPD enlisted the assistance of the Louisiana State Police in the investigation.

In August of 2008, both S.M. and C.M. were arrested and charged with aggravated arson, arson with intent to defraud, and insurance fraud; C.M. was additionally charged with workers' compensation insurance fraud. Pursuant to a plea bargain with respect to these charges, S.M. and C.M. either pled guilty or *nolo contendere*. S.M. received a five-year sentence and with credit for time served, the balance of her sentence was suspended, and she was released on probation. C.M. received a six-year sentence and was remanded to prison to serve his sentence.

Since, following the death of M.C.M., S.M. had given birth to a third child, A.M., on May 20, 2007, of whom she had retained physical custody, upon S.M.'s arrest in August of 2008, the Department obtained the custody of A.M. and she was placed with the foster mother of her siblings, M.M. and L.M. A.M. was approximately 15 months old when she came into foster care.

In May of 2011, the State obtained a grand jury indictment against both S.M. and C.M., charging them with the first degree murder of M.C.M.[2] They were arrested on these charges, bond was denied, and they were both

[2] No evidence was introduced that disclosed the exact cause of M.C.M.'s death.

in jail awaiting trial at the time the instant matter was heard by the Juvenile Court.

According to Steve Danielson, the assistant district attorney prosecuting the M.C.M. murder case who testified before the Juvenile Court, because the State intended to seek the death penalty in the murder case against S.M. and C.M., the pre-trial process would be lengthy, and it was not anticipated that the murder trial would occur until the Spring of 2013 or 2014. Although Mr. Danielson acknowledged to the Juvenile Court that it was *possible*, due to a pre-trial motion or some other action, that the murder charges against either or both S.M. or C.M. could be dismissed prior to trial, resulting in their release, he did not anticipate any such eventuality occurring.

While S.M. had made efforts toward and had actually made progress with respect to the "case plan" established by the Department, which was a prerequisite to getting her children returned to her custody, S.M. made no further progress on the case plan after her May 2011 arrest. Since C.M. was incarcerated the entire time the children were in the Department's custody and he was hospitalized for illness much of that time, he did not work a case plan.

On May 23, 2011 the Mental Health Advocacy Service, Child Advocacy Program ("MHAS/CAP"), filed the instant action in the Juvenile Court, on behalf of M.M., L.M., and A.M., seeking to have the parental rights of S.M. and C.M. terminated, pursuant to the Louisiana Children's Code Article 1004.[3] In particular, the MHAS/CAP asserted in the petition for termination of parental rights that termination was warranted under LSA-

[3] Louisiana Children's Code Article 1004(B) authorizes counsel appointed for the children to file a petition for the termination of parental rights "if the petition alleges a ground authorized by Article 1015(4), (5), or (6)" and if no petition has been filed by the district attorney or the Department with eighteen months of the date of the children's adjudication as children in need of care.

Ch.C. art. 1015(3)[4] (because S.M. and C.M. had been indicted on May 11, 2011 for the murder of the children's half-sister, M.C.M.) and under LSA-Ch.C. art. 1015(5)[5] (because S.M. failed to acknowledge that her children were removed from her custody for a valid cause and because S.M. and C.M. had failed to: secure safe and stable housing for the children, maintain employment so as to financially provide for the children, complete psychiatric evaluations as required by their case plans, and provide the Department with the name of a suitable person for placement of the children). Additionally, it was alleged that S.M. and C.M. had engaged in a "pattern of participation in illegal activity and continue to commit offenses for which they are incarcerated" without any likelihood of reformation in the near future. It was further alleged that the children had been in the care of the Department in excess of eighteen months, and it was in the children's best interest that the parents' rights be terminated and that the children be certified free and eligible for adoption by their foster mother, Stacy Turner, who was willing to adopt them.

Following a termination hearing on September 12, 2011,[6] the Juvenile Court denied the relief sought and dismissed the petition for termination.

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[4] Louisiana Children's Code Article 1015(3) provides a basis for termination of parental rights when the "[m]isconduct" of a parent toward a child in his household "constitutes extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency," including but not limited to murder.

[5] Louisiana Children's Code Article 1015(5) provides a basis for termination of parental rights when 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 there is no reasonable expectation of significant improvement in the near future.

[6] By the time of the September 12, 2011 termination hearing, A.M. was four years old, L.M. was five years old, and M.M. was six years old. By that time, A.M. had been in foster care three years, and M.M. and A.M. had been in foster care five years.

The court gave oral reasons for its decision, stating that the MHAS/CAP failed to prove misconduct by the parents toward M.C.M., since, though the parents had been indicted for M.C.M.'s murder, "indictment is not tantamount to conviction." The court stated that since the parents had not yet been tried and convicted on the charges, no basis for termination under LSA-Ch.C. art. 1015(3) was proven. Further, the trial court found that a basis for termination under under LSA-Ch.C. art. 1015(5) was not shown because the evidence established there had been substantial compliance with the case plan by S.M., and though a case plan was developed for C.M., it had never been implemented by the agency. The trial court also noted that there was a possible ground for termination under LSA-Ch.C. art. 1015(6)[7] under the facts alleged, but there was insufficient evidence presented to exclude the viability of the placement of the children offered by S.M., i.e. with her aunt (although the Department's decision against placement of the children with S.M.'s aunt was based on the size of the aunt's house and the number of people already living in the house, the court did not think the testimony sufficiently explained the factors underlying the Department's conclusion about the suitability of the home); nor was it established that the parents were incarcerated pursuant to a conviction (since they were in jail awaiting a trial that had not yet taken place).

An appeal was filed on the children's behalf, by MHAS/CAP, of the trial court judgment dismissing the petition for termination, which asserted that the trial court erred: (1) in refusing to allow the proffer of an affidavit prepared by the Department in conjunction with the instanter order of custody obtained from the Juvenile Court duty judge in August, 2006, which

[7] Louisiana Children's Code Article 1015(6) provides a basis for termination of parental rights when the parents have been "convicted and sentenced to a period of incarceration" and have failed "to provide a reasonable plan" for the care of their children.

removed M.M. and L.M. from the custody of their parents; (2) in failing to take judicial notice of its own "child in need of care record;" (3) in failing to certify as an expert witness a social worker who had previously been certified in the Juvenile Court; (4) in finding that S.M. had substantially complied with her case plan; (5) in finding that the case plan developed for C.M. had never been implemented; and (6) in concluding that the burden of proof required pursuant to LSA-Ch.C. art. 1015 had not been met.

LAW AND ANALYSIS

Admissibility of Affidavit

In the first and second assignments of error, it is contended that the trial court erred in failing to allow into evidence or take judicial notice of an affidavit filed in conjunction with a prior child in need of care proceeding, forming the basis for removing the children from their parents' custody, and that the trial court erred in refusing to allow the proffer of the affidavit.

During the termination hearing in this case, the Department's "Program Operations Manager," Linda Carter, testified that M.M and L.M. first came into the Department's custody in August of 2006 through the issuance of an instanter order of custody issued by Juvenile Court Judge Kathleen Richey, on the basis of verbal information provided by a Department investigator, Mary Manchester, who had thereafter filed a written affidavit with the Juvenile Court. During the course of Ms. Carter's testimony, plaintiffs' counsel sought to introduce the affidavit of Ms. Manchester, who did not testify at the termination hearing. Upon the objection of opposing counsel to the admissibility of the affidavit on the basis of hearsay, plaintiffs' counsel argued to the court that the affidavit was admissible to establish the children's placement in the Department's custody. Opposing counsel then stipulated to the fact that the children came

into the Department's custody on August 30, 2006. Thereafter, plaintiffs' counsel offered Ms. Manchester's affidavit into evidence for the purpose of establishing the cause for the children being taken into the Department's custody. Again, opposing counsel objected, arguing that since Ms. Manchester stated in her affidavit what she was told by a police officer, it constituted double hearsay. The trial court denied admission of the affidavit, and plaintiffs' counsel attempted to proffer the affidavit, but the court told counsel she could "do that at a later time."[8]

Louisiana Children's Code Article 105 provides, in pertinent part, that "[e]xcept as otherwise specially provided by this Code, the rules of evidence applicable to juvenile adjudication hearings in nondelinquency proceedings are those provisions of the Louisiana Code of Evidence applicable to civil cases." Further LSA-Ch.C. art. 1035 (A) provides: "The petitioner bears the burden of establishing each element of a ground for termination of parental rights by clear and convincing evidence."

Because of the application of the Code of Evidence and the standard of proof imposed on a termination of parental rights hearing, we cannot say the trial court erred in refusing to admit the affidavit of Mary Manchester into evidence, on the basis of hearsay. See LSA-C.E. art. 802. Even if a public records exception had been established in accordance with LSA-C.E.

[8] Despite the trial judge's direction that plaintiffs' counsel could proffer the affidavit at a "later time," there is no indication in the record that counsel *later* attempted to do so (though she had made three attempts to lay a foundation for and obtain the admission of the exhibit *prior* to the court's ruling); nevertheless, because of our ruling upholding the exclusion of the affidavit, we find it unnecessary to further address the proffer issue.

art. 803,[9] the trial court may have excluded the testimony for other well-grounded reasons, i.e., if the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, pursuant to LSA-C.E. art. 403. Furthermore, the cause of the children being taken into the Department's custody was established through the testimony of Linda Carter. Therefore, we find no error in the trial court's ruling on this issue.

Certification of Witness as an Expert

In the third assignment of error, it is asserted that the trial court erred in failing to certify the children's social worker, Dr. Rhonda Norwood, as an expert in the field of Infant Mental Health, when Dr. Norwood had previously been accepted as an expert in the Juvenile Court, but in another case.

Prior to asking the trial court to admit Dr. Norwood as an expert, plaintiffs' counsel elicited the following information from the witness: Dr. Norwood identified herself and her business address in Baton Rouge; she

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[9] But see LSA-C.E. art. 803(8), particularly Paragraph (8)(b), stating:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
>
> (8) Public records and reports.
>
> (a) Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth:
>
> (i) Its regularly conducted and regularly recorded activities;
>
> (ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report; or
>
> (iii) Factual findings resulting from an investigation made pursuant to authority granted by law. Factual findings are conclusions of fact reached by a governmental agency and may be based upon information furnished to it by persons other than agents and employees of that agency.
>
> (b) ***Except as specifically provided otherwise by legislation, the following are excluded from this exception to the hearsay rule***:
>
> (i) Investigative reports by police and other law enforcement personnel.
>
> (ii) ***Investigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party***.
>
> (iii) Factual findings offered by the prosecution in a criminal case.
>
> (iv) ***Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences***.

(Emphasis added.)

stated that she had received a Ph.D. in Social Work from LSU and that thereafter she had completed a one-year fellowship at Tulane, specializing in Infant Mental Health; Dr. Norwood also stated that she had been working in her field since 2001, she has published several peer-reviewed articles, and she has made many "presentations" in the field of social work; she also stated that she had previously been accepted as an expert in the Juvenile Court. After this testimony, plaintiffs' counsel tendered the witness as an expert in Infant Mental Health. The trial judge did not accept Dr. Norwood as an expert, but the reason given was unable to be transcribed and was recorded as follows: "No . . . . You have to (unintelligible) the doctor... At this point, I do not accept that [sic] as an expert in Infant Mental Health." Plaintiffs' counsel did not object to the trial court's ruling or make any further attempt to qualify the witness as an expert, stating only: "All right your honor, thank you." Thereafter, plaintiffs' counsel questioned Dr. Norwood as a fact witness, based on her assessment and therapeutic counseling sessions with S.M. and her children.

At the outset we note that plaintiffs' counsel failed to comply with LSA-C.E. art. 103 when the trial court refused to accept Dr. Norwood as an expert witness. Louisiana Code of Evidence Article 103 provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel." It is incumbent upon the party who contends that his evidence was improperly excluded to make a proffer, and if he fails to do so, he cannot contend such exclusion was erroneous. **Goza v. Parish of West Baton Rouge**, 2008-0086, p. 11 (La. App. 1 Cir. 5/5/09), 21 So.3d 320, 331, writ denied, 2009-2146 (La. 12/11/09), 23 So.3d 919, cert.

denied sub nom. **Louisiana v. Goza**, ___ U.S. ___, 130 S.Ct. 3277, 176 L.Ed.2d 1184 (2010); **Hurts v. Woodis**, 95-2166, p. 12 (La. App. 1 Cir. 6/28/96), 676 So.2d 1166, 1175; **Williams v. Exxon Corporation**, 541 So.2d 910, 912-13 (La. App. 1 Cir.), writ denied, 542 So.2d 1379 (La. 1989). See also LSA-C.C.P. art. 1636, which provides:

> A. When the court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence.
>
> B. At the request of any party, the court may allow any excluded evidence to be offered, subject to cross-examination: on the record during a recess or such other time as the court shall designate; or by deposition taken before a person authorized by Article 1434 within thirty days subsequent to the exclusion of any such evidence or the completion of the trial or hearing, whichever is later. When the record is completed during a recess or other designated time, or by deposition, there will be no necessity for the requesting party to make a statement setting forth the nature of the evidence.
>
> C. In all cases, the court shall state the reason for its ruling as to the inadmissibility of the evidence. This ruling shall be reviewable on appeal without the necessity of further formality.
>
> D. If the court permits a party to make a complete record of the evidence held inadmissible, it shall allow any other party the opportunity to make a record in the same manner of any evidence bearing upon the evidence held to be inadmissible.

Because plaintiffs/apppellants failed to proffer the substance of the expert testimony that would have been submitted into evidence had Dr. Norwood been admitted as an expert, the exclusion of the expert testimony at issue cannot be assigned as error on appeal. See **Goza v. Parish of West Baton Rouge**, 2008-0086 at p. 12, 21 So.3d at 331; **Hurts v. Woodis**, 95-2166 at p. 12, 676 So.2d at 1175; **Williams v. Exxon Corporation**, 541 So.2d at 913.

Basis for Termination of Parental Rights

In the fourth, fifth, and sixth assignments of error, it is asserted that

the trial court erred in failing to terminate the parental rights in this case (by contending the court erred in finding: that S.M. had substantially complied with her case plan, that a case plan developed for C.M. had never been implemented, and that the burden of proof required pursuant to LSA-Ch.C. art. 1015 had not been met).

Article 1001 of the Louisiana Children's Code, Title X, entitled "Judicial Certification of Children for Adoption," provides that the purpose of this title 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.[10] In all proceedings, the primary concern is to secure the best interest of the child if a ground justifying termination of parental rights is proved. Termination 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. The procedural provisions of LSA-Ch.C. art. 1001 et seq. are construed liberally, and the proceedings shall be conducted expeditiously to avoid delays in resolving the status of the parent and in achieving permanency for children. See LSA-Ch.C. art. 1001 et seq. However, we also note that LSA-Ch.C. art. 101 provides as follows:

> The people of Louisiana recognize the family as the most fundamental unit of human society; that preserving families is essential to a free society; that the relationship between parent and child is preeminent in establishing and maintaining the well-being of the child; that parents have the responsibility for providing the basic necessities of life as well as love and affection to their children; that parents have the paramount right

[10] The "termination of parental rights" is defined as the permanent elimination by court order of all rights and duties between parents and their child, except the child's continuing right to inherit from them. LSA-Ch.C. art. 1001, 1991 Revision Comment (a).

> to raise their children in accordance with their own values and traditions; that parents should make the decisions regarding where and with whom the child shall reside, the educational, moral, ethical, and religious training of the child, the medical, psychiatric, surgical, and preventive health care of the child, and the discipline of the child; that children owe to their parents respect, obedience, and affection; that the role of the state in the family is limited and should only be asserted when there is a serious threat to the family, the parents, or the child; and that extraordinary procedures established by law are meant to be used only when required by necessity and then with due respect for the rights of the parents, the children, and the institution of the family.

It is a well-settled principle that the "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." Reiterating this principle, the Louisiana Supreme Court has remarked that this liberty interest is "perhaps the oldest of the fundamental liberty interests." A corollary principle is that in considering whether to terminate parental rights, a court must delicately balance the natural parent's fundamental right and the child's right to a permanent home. **State ex rel. SNW v. Mitchell**, 2001-2128, p. 8 (La. 11/28/01), 800 So.2d 809, 814-15 (citing **Santosky v. Kramer**, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599, 606 (1982) and **Troxel v. Granville**, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 56 (2000)).

In removing a child from his parents, the following considerations, set forth in LSA-Ch.C. art. 682(A), are obligatory:

> The court shall not remove a child from the custody of his parents unless his welfare cannot, in the opinion of the court, be adequately safeguarded without such removal. Except as

> otherwise provided in Article 672.1,[11] in support of any such disposition removing a child from the parental home, the court shall determine whether the department has made reasonable efforts to prevent or eliminate the need for removal of the child from his home and, after removal, to reunify the parent and child or to finalize the child's placement in an alternative safe and permanent home in accordance with the child's permanent plan including, if appropriate, through an interstate placement. The child's health and safety shall be the paramount concern in the court's consideration of removal. The department shall have the burden of demonstrating reasonable efforts.

As stated in Article 682, when a child is removed from the custody of his parents, the Department must demonstrate that "reasonable efforts" have been made to "prevent or eliminate" the need for that removal, and, after a child has been removed from the custody of his parents, the Department must demonstrate that it has made "reasonable efforts" to "reunify" the parent and the child. Further, LSA-Ch.C. art. 675(B) requires that a case plan include, in addition to other items: "[a] plan for assuring . . . that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate the safe return of the child to his own home or other permanent placement," and "[d]ocumentation

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[11] Louisiana Children's Code Article 672.1 provides, in part:

> A. At any time in a child in need of care proceeding when a child is in the custody of the department, the department may file a motion for a judicial determination that efforts to reunify the parent and child are not required.
>
> B. The department shall have the burden of demonstrating by clear and convincing evidence that reunification efforts are not required, considering the health and safety of the child and the child's need for permanency.
>
> C. Efforts to reunify the parent and child are not required if a court of competent jurisdiction has determined that:
>
> (1) The parent has subjected the child to egregious conduct or conditions, including but not limited to any of the grounds for certification for adoption pursuant to Article 1015.
>
> (2) The parent has committed murder or manslaughter of another child of the parent or has aided or abetted, attempted, conspired, or solicited to commit such a murder or manslaughter.
>
> (3) The parent has committed a felony that results in serious bodily injury to the child or another child of the parent.
>
> (4) The parental rights of the parent to a sibling have been terminated involuntarily.
>
> D. If the court determines that reunification efforts are not required, it shall document that determination by written findings of fact. A permanency hearing, which considers in-state and out-of-state permanent placement options for the child, may be conducted immediately and shall be conducted within thirty days after the determination.

of the efforts the agency is making to safely return the child home or to finalize the child's placement in an alternative safe and permanent home."[12]

"Reasonable efforts" comprehend the exercise of ordinary diligence and care by state caseworkers and supervisors and shall assume the availability of a reasonable program of services to children and their families. LSA-Ch.C. art. 603(23). In order to constitute "reasonable efforts," the Department must at least direct parents toward appropriate agencies that may be able to assist them in meeting their responsibilities with respect to their dependent children and/or in removing the impediments to reunification with their children. See **State ex rel. A.T.**, 2006-0501, p. 11 n. 8 (La. 7/6/06), 936 So.2d 79, 86 n. 8. A goal of terminating parental rights and placing a child for adoption is improper where the Department has failed to make reasonable efforts to reunite the child with his parents. **State ex rel. A.T.**, 2006-0501 at p. 10, 936 So.2d at 85.

In the instant case, the trial court found as a matter of fact that S.M. had made substantial progress toward the case plan established for her toward reunification with her children, until she was charged and arrested for the murder of her step-daughter, M.C.M., and that although a case plan was formulated for C.M., no steps were taken by the Department to implement the plan. An appellate court reviews a trial court's factual findings as to whether parental rights should be terminated according to the manifest error standard. **State ex rel. H.A.S.**, 2010-1529, p. 11 (La. 11/30/10), 52 So.3d 852, 859; **State ex rel. K.G. and T.G.**, 2002-2886, p. 4 (La. 3/18/03), 841 So.2d 759, 762.

[12] The Department has a burden of demonstrating by clear and convincing evidence that reunification efforts are not required, in accordance with LSA-Ch.C. art. 672.1(B).

We find no manifest error in the trial court's factual findings in this case. During the time that S.M. was not incarcerated, she completed almost all of the tasks set for her by the Department; she visited with the children, attended counseling sessions, obtained employment, offered several alternatives to foster care by giving the names of several family members and friends she thought could care for her children (though these suggestions did not work out), and attended parenting classes. With respect to C.M., the Department's "Child Welfare Specialist," Deatra London, testified that she visited C.M. in jail twice, that he was blind, and that he had to be escorted to his seat by a deputy. She stated that C.M. visited with his children at the courthouse when he was there for two scheduled court hearings. Ms. London did not indicate in her testimony that any services were provided to C.M. or that any attempt was made to arrange visitation for the children with him at the prison. Ms. London stated that "they didn't let the [Department's] worker come in the infirmary and they wouldn't let the kids come in there." However, there was no evidence that C.M. was always hospitalized while in prison, and, to the contrary, the testimony indicated that he attended at least two hearings at the Juvenile Court and that Ms. London was able to visit him twice at the prison. The only explanation given with respect to the Department's failure to implement C.M.'s case plan was that he was incarcerated and that he was ill a great deal of the time that he was in prison. However, the reasonableness of the failure of the Department to provide any services to C.M. was not demonstrated at the hearing.[13] Therefore, we

[13] It should be noted that LSA-Ch.C. art. 1036(E) states: "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." See also **State ex rel. J.T.**, 46,174, pp. 6-7 (La. App. 2 Cir. 3/2/11), 58 So.3d 1015, 1020 (wherein the Department appealed the failure of the trial court to terminate the parental rights of a father who was serving a prison sentence and had not completed any part of his case plan; the appellate court found no manifest error in the trial judge's ruling, declining to terminate the father's parental rights, "so that he may be afforded an opportunity to complete a case plan . . . once he is released from prison").

conclude there was a reasonable basis in the record for the trial court's factual findings, and we cannot say these findings were manifestly erroneous.

In termination proceedings, courts must carefully balance the two private interests of the child and the parents. While the parents have a natural, fundamental liberty interest in the continuing companionship, care, custody and management of their children, 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. In balancing these interests, the courts of this state have consistently found the interest of the child to be paramount over that of the parent. **State ex rel. G.J.L.**, 2000-3278, p. 6 (La. 6/29/01), 791 So.2d 80, 85. However, great care and caution must be exercised in these proceedings, because the permanent termination of the legal relationship existing between children and their biological parents is one of the most severe and drastic actions a state can take against its citizens. **Id.** at p. 7, 791 So.2d at 85. See also **State ex rel. J.M.**, 2002-2089, p. 8 (La. 1/28/03), 837 So.2d 1247, 1252.

Louisiana Children's Code Article 1015 provides the specific statutory grounds by which a court may involuntarily terminate the rights and privileges of parents. In order to terminate rights, the court must find that the plaintiff has established at least one of those statutory grounds by clear and convincing evidence. Even upon finding that the plaintiff has met its evidentiary burden, a court still should not terminate parental rights unless it determines that to do so is in the child's best interest. **State ex rel. G.J.L.**, 2000-3278 at p. 7, 791 So.2d at 86.

Article 1015 provides:

The grounds for termination of parental rights are:

(1) Conviction of murder of the child's other parent.

(2) Unjustified intentional killing of the child's other parent.

(3) Misconduct of the parent toward this child or any other child of the parent or any other child in his household 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:

(a) Murder.

(b) Unjustified intentional killing.

(c) Aggravated incest.

(d) Rape.

(e) Sodomy.

(f) Torture.

(g) Starvation.

(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.

(j) Abuse or neglect after the child is returned to the parent's care and custody while under department supervision, when the child had previously been removed for his safety from the parent pursuant to a disposition judgment in a child in need of care proceeding.

(k) The parent's parental rights to one or more of the child's siblings have been terminated due to neglect or abuse and prior attempts to rehabilitate the parent have been unsuccessful.

(l) Sexual abuse, which shall include, but is not limited to acts which are prohibited by R.S. 14: 43.1, 43.2, 80, 81, 81.1, 81.2, 89 and 89.1.

(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:

(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.

(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.

(7) The relinquishment of an infant pursuant to Chapter 13 of Title XI of this Code.

(8) The commission of a felony rape by the natural parent which resulted in the conception of the child.

The petition for termination filed in this case alleges bases for termination of parental rights under LSA-Ch.C. art. 1015(3) and (5). And, although not specifically referenced in the petition filed herein, the trial court recognized that the facts alleged in the petition could have provided a basis for termination under LSA-Ch.C. art. 1015(6), though the court found the burden of proof under Paragraph (6) had not been met.

With respect to the application of LSA-Ch.C. art. 1015(3), a basis for termination of parental rights is provided when the "[m]isconduct" of a parent toward a child in his household "constitutes extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency," including but not limited to murder. The petition asserted that S.M. and C.M. had been indicted on May 11, 2011 for

the murder of the children's half-sister, M.C.M. However, because LSA-Ch.C. art. 1004(B) only authorizes counsel appointed for the children to file a petition for the termination of parental rights "if the petition alleges a ground authorized by Article 1015(4), (5), or (6),"[14] and then only if no petition has been filed by the district attorney or the Department with eighteen months of the date of the children's adjudication as children in need of care, we must conclude that no right of action is provided to the children's counsel to petition for termination of parental rights under LSA-Ch.C. art. 1015(3). Therefore, this court recognizes, *ex proprio motu*, that the petition fails to state a right of action under LSA-Ch.C. art. 1004(B), as to LSA-Ch.C. art. 1015(3), pursuant to this court's authority, as stated in LSA-C.C.P. art. 927(B).[15]

As for termination of parental rights under LSA-Ch.C. art. 1015(5), this paragraph provides a basis for termination of parental rights when 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 the case plan put in place by the Department and approved by the trial court, and there is no reasonable expectation of significant improvement in the near future. In this case, the trial court found as a matter of fact that S.M. had substantially complied with her case plan and that the case plan pertaining to C.M. had never been implemented by the Department. Because proof of the lack of substantial compliance, by the

[14] Louisiana Children's Code Article 1004(B) provides in full: "Counsel appointed for the child pursuant to Article 607 may petition for the termination of parental rights of the parent of the child if the petition alleges a ground authorized by Article 1015(4), (5), or (6) and, although eighteen months have elapsed since the date of the child's adjudication as a child in need of care, no petition has been filed by the district attorney or the department."

[15] Louisiana Code of Civil Procedure Article 927(B) states, in pertinent part: "The . . . failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit . . . may be noticed by either the trial or appellate court on its own motion."

parent, with a case plan, when the case plan has been implemented by the Department, is a crucial element of the cause of action for termination of parental rights under LSA-Ch.C. art. 1015(5), which the plaintiffs/appellants failed to establish, we cannot say that the trial court erred in finding that the plaintiffs/appellants failed to bear their burden of proof as to LSA-Ch.C. art. 1015(5).

With respect to LSA-Ch.C. art. 1015(6), a basis for termination of parental rights is available when a parent has been "convicted and sentenced to a period of incarceration" and has failed "to provide a reasonable plan" for the care of their children. At the conclusion of the termination hearing in this case, the trial judge found that it had not been established that the parents herein had been convicted of a crime or that the placement suggested by S.M. for her children (i.e. that they live with S.M.'s aunt) had been proven to be inadequate.[16] In order to meet the requirements of LSA-Ch.C. art. 1015(6), it must be shown that the parents have been both convicted and incarcerated. In this case, S.M. and C.M. had not been convicted for the crime with which they were charged at the time of the termination hearing in the instant matter; therefore, parental rights cannot be terminated pursuant to LSA-Ch.C. art. 1015(6).

As the plaintiffs/appellants failed in their burden to establish each and every element of the asserted grounds for termination of parental rights by clear and convincing evidence, as required by LSA-Ch.C. art. 1035(A), we must affirm the trial court's denial of termination of parental rights in this case.

[16] We do not address the suitability of S.M.'s aunt's home as a placement for the children because we find the first element of LSA-Ch.C. art. 1015(6) (conviction of the parents) was not proven.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is affirmed. Each party is to bear its own costs of this appeal.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CJ 2378

STATE OF LOUISIANA IN THE INTEREST OF

A.M., L.M., AND M.M.

GAIDRY, J., concurring.

Although I agree with the decision reached herein, affirming the trial court's dismissal of MHAS/CAP's petition, on behalf of the children, for the termination of parental rights, I believe that the facts of this case cry out for the State to take some action on behalf of these children. For this reason, I respectfully concur.

STATE OF LOUISIANA

COURT OF APPEAL

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NUMBER 2011 CJ 2378

APR - 3 2012

STATE OF LOUISIANA IN THE INTEREST OF

A.M., L.M., AND M.M.

McDONALD, J., concurring:

I agree with the decision and, particularly, with the sentiments expressed by Judge Gaidry in his concurrence. It is hard to imagine a case in which the children deserve more to be removed from such parents and placed for adoption. The trial judge was legally constrained to rule as she did, and we are constrained to affirm as well. The evidence failed to prove any of the provisions found in LSA-Ch.C. art. 1015(3), (4), (5), or (6). However, the criteria are different if the district attorney were to come forward and take action on behalf of the state.