

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CJ 0261

**THE STATE OF LOUISIANA IN THE INTEREST OF
A.R., J.R., AND S.R.**

Judgment Rendered: June 6, 2008

**Appealed from the
21st Judicial District Court
Juvenile Division
In and for the Parish of Tangipahoa, Louisiana
Case No. J-15008**

The Honorable Salvadore T. Mule, Judge Ad Hoc Presiding

**Sherry Watters
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Services**

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**Counsel for Appellee
D.A.R.**

BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

This appeal is from the denial of a petition to terminate a mother's parental rights to her three children. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

DAR, who is mildly retarded and functionally illiterate, is the mother of AR, JR, and SR. AR's biological father is unknown, and SM is the father of JR and SR. On August 15, 2005, an instant order was issued placing AR, JR, and SR in the temporary custody of the State of Louisiana through the Department of Social Services, Office of Community Services (DSS/OCS) due to allegations of neglect and sexual abuse. On August 16, 2005, after a Continued Custody Hearing, the court found that reasonable grounds existed to believe that the children were in need of care and that continued custody was necessary for their safety and protection. All three children were adjudicated in need of care and placed in the custody of DSS/OCS on November 10, 2005. A February 3, 2006 case review judgment found that inadequate progress had been made towards alleviating or mitigating the causes necessitating the children's placement in foster care and that reunification was impossible at that time. The judgment also approved a case plan, and ordered that the children remain in the custody of DSS/OCS. On August 11, 2006, the court made the same findings and ordered a permanent plan of adoption for all three children. On December 4, 2006, the State filed a petition to terminate the parental rights of DAR, SM, and the unknown biological father of AR, and seeking certification for adoption of AR, SR, and JR. On May 1, 2007 and August 15, 2007, the court again found that inadequate progress had been made toward alleviating or mitigating the causes necessitating placement in foster care and that reunification was impossible at that time, approved a case plan, ordered that the

children remain in DSS/OCS's custody, and approved a permanent plan of adoption for all three children.

A trial was held on the petition to terminate the parental rights of DAR, SM, and the unknown biological father of AR. One issue at the trial was whether DAR was capable of complying with or even understanding her case plan as written due to her mental deficiencies. The State attempted to call DAR as a witness, but her counsel objected, and the trial court ruled that she did not have to take the stand. After the trial, SM's parental rights were terminated as to SR and JR, and the unknown biological father's parental rights were terminated as to AR. DAR's parental rights were not terminated because the court found that the State had failed to prove its case by clear and convincing evidence. The children were ordered to remain in the custody of DSS/OCS, and the court ordered that a new case plan be developed that would be appropriate for DAR.

DSS/OCS appealed the denial of its petition to terminate DAR's parental rights, asserting the following trial court errors:

1. The trial court erred in finding that the parents had a blanket Fifth Amendment privilege which prevented DSS from calling them as witnesses and prevented DSS from meeting its burden of proof.

2. The trial court committed manifest error in refusing to terminate DAR's parental rights, where there was clear and convincing evidence of grounds for termination under LA RS 1015(5), that the mother did not complete her case plan or make the significant improvements necessary for the safe return of her children.

3. The trial court erred in failing to find that DSS proved abandonment grounds for termination under LA RS 1015 (4), where the mother made no effort to get work or income of any kind and paid no child support.

DISCUSSION

At the trial of this matter, the State attempted to call DAR to testify. Her attorney objected to DAR being called by the State, and the court made the following ruling:

You want to question her on cross-examination, because she is not your witness. And I don't think that you can do that in these proceedings. Her attorney has the right to advise her client that she doesn't have to testify. And as I stated earlier and for the record, this is a civil proceeding with consequences far greater than any criminal proceeding. There is nothing – there is no power more awesome than a judge has in any court than to terminate parental rights. And the burden of proof is on the State, and I don't think that the State can use the parties under cross-examination to prove the State's case. And for that reason, I'm ruling that the mother and father do not have to testify at this time. . . . [DAR] doesn't even have to say she's invoking the Fifth Amendment. She just doesn't have to testify under cross-examination, and that's what you're attempting to do, to question both of these parties under cross-examination. They are not your witnesses.

The federal and state constitutions guarantee the privilege against self-incrimination. Although a witness may invoke the Fifth Amendment privilege against self-incrimination in a civil proceeding, the Fifth Amendment does not forbid an adverse inference against the party witness who refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed. 2d 810 (1976). While an accused in a criminal prosecution has a privilege not to be called or sworn as a witness at the State's instance, any witness except such an accused has no such broad exemption. A witness in a civil proceeding must submit to be called and sworn and to answer all questions except incriminating ones. The proper procedure is for the court to permit the witness to be called on cross-examination and to invoke the privilege after each question is asked so that the court may rule as to whether the particular question is incriminating. *Louisiana Livestock Sanitary Board v. Pickett*, 323 So.2d 521, 524 (1975); *Lamartiniere v. Department*

of Employment Security, 372 So.2d 690, 694 n. 3 (La.App. 1 Cir.), writ denied, 375 So.2d 945 (La. 1979).

The trial court in this matter erred in refusing to allow the State to call DAR as a witness on cross-examination. Although the potential consequences of this proceeding are severe, the fact remains that this is a civil, not criminal, proceeding. While DAR could certainly have invoked the Fifth Amendment privilege as to any incriminating questions asked, the State was entitled to ask her any non-incriminating questions it had, including whether or not she understood the requirements of her case plan, which was at issue in this case. Because the State is entitled to call DAR as a witness and ask any non-incriminating questions it has, the trial court judgment denying the State's petition to terminate DAR's parental rights must be reversed and this matter remanded so that further proceedings in accordance with this opinion can be held. This finding pretermits our consideration of the State's remaining two assignments of error.

DECREE

The judgment of the court denying the State's petition to terminate DAR's parental rights is reversed, and this matter is remanded for further proceedings in accordance with this opinion. Costs of this appeal are assessed to DAR.

REVERSED AND REMANDED.