

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CJ 0404

STATE OF LOUISIANA IN THE INTEREST OF E.F. JR.

*J.E.K.
by J.T.P.*
A.2.B.
T.M.H.
DATE OF JUDGMENT: JUN 10 2011

ON APPEAL FROM THE SLIDELL CITY COURT
NO. 10JS3691, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE JAMES "JIM" LAMZ, JUDGE

Ebony Cavalier
Baton Rouge, Louisiana

Counsel for Appellant
SJ

P. Anne Thompson
Covington, Louisiana

Counsel for Appellee
Department of Children and
Family Services

Nan Bousfield
Slidell, Louisiana

Counsel for Child
EF, Jr.

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

KUHN, J.

Appellant, SJ, the mother of the minor child, EF,¹ appeals the trial court's judgment terminating her rights as to the child and freeing him for adoption.² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 10, 2009, SJ presented with her injured five-month-old baby, EF, at Slidell Memorial Hospital. The child was transferred to Children's Hospital for treatment. An orthopedic surgeon determined that a skeletal scan showed a right femur fracture and multiple rib fractures. A radiologist explained that the femur fracture was a spiral fracture, which meant the leg had been twisted when it was broken. The rib fractures varied from more recent to as much as two weeks old. The radiologist stated that the manner of fractures to the ribs was as a result of having been squeezed and indicated that the femur and rib fractures had not occurred at the same time.

SJ stated to personnel at both hospitals that she did know how the child's leg had been broken. After having received a report from the hospital, a Department of Children and Family Services (DCFS)³ representative spoke with SJ at Children's

¹ The child's name is EF, Jr. His father, EF, Sr., was also a party to this proceeding, and his parental rights were terminated. An appeal filed on behalf by EF, Sr. was voluntarily dismissed after it was lodged in this court. Thus, the termination of the parental rights of EF, Sr. to the child is a final judgment. Since the father's participation in this appeal is minimal, for ease, we refer to the child as "EF," and references to EF, Sr. are simply as the "father" or "biological father."

² The initials of the child and his parents are used to protect the identity of the minor child. U.R.C.A., Rules 5-1, 5-2.

³ *See* La. R.S. 36:471, creating the department; and La. Acts 2010, No. 877, § 3, directing the Louisiana Law Institute 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.

Hospital. SJ stated that she did not know how the leg had broken. She explained that she woke up that morning, and changed and fed EF. She returned to bed for awhile and then got up to brush her teeth. She heard EF crying and went to see what was wrong with the infant. When she touched his right leg, EF screamed. SJ immediately took him to the hospital.

SJ told the DCFS representative that other people lived with her and the infant, including her boyfriend, whom she identified as "Jessie Hulbert." She also identified the child's biological father but was not able to provide any contact information on him.

On April 11, 2009, DCFS requested and was granted an instanter order to take custody of EF. A case plan for services was approved by the trial court in Child in Need of Care proceedings, and SJ was ordered to comply with the plan, which had the initial goal of reunification. By judgment signed on May 4, 2010, the trial court determined that inadequate progress had been made toward "alleviating or mitigating the cause necessitating placement in foster care and that reunification is impossible," and thus, the plan for permanent placement of EF changed to "Adoption."

On July 10, 2010, DCFS initiated this termination of parental rights proceeding, seeking to free EF for adoption. After a hearing on November 18, 2010, the trial court issued a judgment terminating the parental rights of SJ and freeing EF for adoption. SJ appealed.

LAW AND ANALYSIS

Title X of the Louisiana Children's Code governs the involuntary termination of parental rights. The permanent termination of the legal relationship existing between natural parents and children is one of the most drastic actions the State can take against its citizens. *State ex rel. A.T.*, 2006-0501, p. 4 (La. 7/6/06), 936 So.2d 79, 82. But the primary concern of the courts and the State remains to determine and insure the best interest of the child, which includes termination of parental rights if justifiable statutory grounds exist and are proven by the State. *Id.* As a result, the legislature has imposed strict procedural and evidentiary requirements that must be met before parental rights can be terminated. *State, in Interest of GA*, 1994-2227, p. 5 (La. App. 1st Cir. 7/27/95), 664 So.2d 106, 110.

Article 1015 provides the statutory grounds by which a court may involuntarily terminate the rights and privileges of parents. Relevant to this case, parental rights may be terminated on the following grounds:

(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: ...

(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. ...

(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.

In 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. La. Ch.C. art. 1035A; *State ex rel. A.T.*, 2006-0501 at p. 5, 936 So.2d at 82. The State need establish only one ground, but the court must also find that the termination is in the best interest of the child. *State ex rel. T.R.*, 2009-2203, p. 5 (La. App. 1st Cir. 5/13/10), 38 So.3d 1152, 1156, *writs denied*, 2010-1371 (La. 6/30/10), 39 So.3d 583 and 2010-1388 (La. 6/30/10), 39 So.3d 584.

Additionally, an appellate court reviews a trial court's findings as to whether parental rights should be terminated according to the manifest error standard. *State ex rel. T.R.*, 2009-2203 at p. 4, 38 So.3d at 1155. Under the manifest error standard of review, an appellate court may not reverse a fact finder's determinations unless it finds from the record that a reasonable factual basis does not exist for the findings and that the record establishes the findings are manifestly erroneous or clearly wrong. *See Stobart v. State, Through Dep't of Transp. and Dev.*, 617 So.2d 880, 882 (La. 1993); *State, In Interest of GA*, 1994-2227 at p. 4, 664 So.2d at 110.

The record supports the trial court's termination of SJ's parental rights under Article 1015(4)(b), because she failed to contribute to the child's care and support for a period exceeding six consecutive months. While SJ requests that on review this court focus on her improved behavior after the petition was filed, Article 1015(4)(b) expressly states the evaluation of her conduct is "[a]s of the time the petition is filed." Thus, the trial court correctly focused on her actions as of July 9, 2010, the date the petition was filed.

The record shows that SJ had not provided any meaningful support, food, shelter, clothing, or medical care from the time the child entered DCFS custody on

April 11, 2009 through June 3, 2010, a period in excess of six consecutive months. Although she obtained employment in January 2010, it was not until June 4, 2010, SJ made her first court-ordered child support payment of \$25. Subsequently, between July and November 2010, SJ made only four of the five required \$25 payments. Thus, despite earnings of \$11,448 since January 2010, SJ had contributed a total of \$125 for the care of EF.

SJ explained that after her child was taken in April 2009, she lost her apartment and all her possessions; therefore, she had to recover from losing everything. She suggested that while the child was placed in foster care with her sister, SJ provided food, clothes, diapers, and wipes when her sister requested unbeknownst to DCFS. SJ's Covington-based DCFS caseworker confirmed that during twelve of thirty-six scheduled visits that SJ participated in between April 2009 and March 2010, SJ provided her child with snacks, baby food, and formula. SJ does not contend that she had provided her child with shelter, clothing, or medical care at any time between April 2009 and July 2010.

This clear and convincing evidence supports the trial court's conclusion that SJ abandoned EF by placing him in the physical custody of a nonparent or DCFS under circumstances that demonstrated an intention to permanently avoid parental responsibility. The evidence established that SJ failed to provide significant contributions to the child's care and support for a period of approximately thirteen consecutive months, which is well in excess of the amount of time required under Article 1015(4)(b). The trial court correctly noted that snacks and formula on twelve occasions did not constitute a meaningful contribution. And the trial court was free to disbelieve SJ's testimony of having provided additional support when

requested by her sister; or that even if she had so provided, those limited contributions were not significant. As such, the trial court's factual findings relative to SJ's abandonment of EF are not manifestly erroneous or clearly wrong. *See Stobart*, 617 So.2d at 882.

Although the DCFS need only prove one statutory ground for termination of parental rights, we will nonetheless address the DCFS's second ground for termination pursuant to La. Ch.C. Art. 1015(5). The trial court concluded that DCFS had proven by clear and convincing evidence that more than one year had elapsed since EF was removed from SJ's custody pursuant to a court order, there had been no substantial parental compliance with the case plan, and there is no reasonable expectation of significant improvement in SJ's condition or conduct in the near future, considering EF's age and his need for a safe, stable, and permanent home. SJ urges the trial court erred because the evidence shows she has demonstrated significant improvement in complying with her case plan subsequent to the time the petition for termination of her parental rights was filed.

SJ testified that between July and September 2009, she was incarcerated on charges of cruelty to a juvenile that had been filed against her as a result of EF's broken leg; and that after she was released, she had a transportation problem that limited her ability to attend the scheduled visitation sessions with her child. Thus, she only saw EF twelve of the thirty-six scheduled visits.

SJ explained that after she was released from incarceration, she contacted a place in Baton Rouge that offered her an opportunity to "better" herself and to find work. When she relocated to Baton Rouge, although it was haphazard, SJ testified that she advised her Covington-based caseworker that she did not know the exact

date but that some time in November 2009, she would be moving to Baton Rouge. In March 2010, SJ's case was transferred and she began maintaining communications with a caseworker based in East Baton Rouge Parish. The record indicates that in January 2010, SJ began consistently working and receiving a paycheck; and that in August 2010, she moved into her own apartment, albeit in somewhat crowded conditions, but nevertheless in compliance with some of the requirements of the case plan.

But other factors weigh against SJ. SJ admitted that she lied about the identity of her boyfriend to the hospital, DCFS, and the trial court, in an apparent attempt to protect the biological father who was wanted by authorities on unrelated criminal charges. Ultimately, EF's biological father admitted that he was the person who caused harm to the five-month-old infant. According to him, SJ was in the bathroom brushing her teeth. He explained that the bathroom and bedroom were all "one big room," and that he was in the bed when EF woke up "like he do early in the morning." EF's father said that he was not completely awake when his baby started to make "baby noise" and kick. According to EF's father, while he was yet lying down, he held the infant to give him some attention and "picked him up and tried to move him from one end to the other end of the bed to the middle of the bed. Not noticing – his legs always was crossed up.... I guess I wasn't careful enough I put him down too hard. His legs was crossed up and that's how his leg got broke." SJ denied having any knowledge that EF's father had caused the injury until she was incarcerated.

Importantly, SJ was required under the case plan to provide an explanation for her child's injuries that was consistent with the forensic evidence and to implement plans to protect the child from further abuse. As the trial court noted,

While [the Covington-based caseworker] testified that [SJ] acknowledged that she should have known that her child was seriously injured, the explanation [SJ] provided for how those injuries may have occurred are inconsistent with the forensic evidence. [SJ] stated the injuries could have occurred either when the child had fallen from the bed or when she pulled his legs up to change his diaper. ...

None of the explanations provided by the biological parents account for the multiple rib fractures that the child sustained, and which were in various stages of healing at the time the child was brought into the hospital. In addition, the Court does not believe the parents' explanation as to the child's femur fracture. The statements minimize any responsibility on the parents' part and are plainly unbelievable. In addition, the parents had little credibility. ... In addition to their criminal history both parents lied to authorities after taking an oath in this Court regarding the identity of [the biological father]. The parents in this matter are significantly more interested in protecting [the biological father] than [they are in] their seriously injured five-month old infant.

Insofar as SJ's plans to protect the child from further abuse, she stated that she would keep the child away from his biological father unless ordered differently by the court. She added that EF would not be alone with any men without her supervision.

In the written rationale, the trial court acknowledged the improvements that SJ had made toward complying with the case plan since July 2010, but pointed out that this attempt came over a year after the child had been in DCFS's custody. The trial court's finding that the progress SJ has made does not constitute "substantial compliance" as required under Article 1015(5) is not manifestly erroneous. Although she had been able to maintain employment for about eleven months by the time of the hearing, the evidence established that she applied about one percent of

her earnings toward the care of EF. She had secured a safe place to live, but the conditions are crowded. And SJ admitted there is neither a room nor a bed for EF in her apartment, although she stated she would get him a bed and have him share a room with another occupant if he were to live with her. At the time of the hearing, she had only lived there three months, which is less than the six months she was required under the case plan.

Most important to the trial court was SJ's failure to provide an explanation for her child's injuries that was consistent with the forensic evidence even nineteen months after she had lost custody of him. The trial court was within its province to weigh heavily both the testimony of EF's biological father indicating the close proximity of SJ to EF when the infant was hurt and SJ's subsequent decision to lie to the authorities of the whereabouts of EF's biological father at the time the injury occurred. Likewise, the trial court statement that SJ's plan to protect EF from future harm was "both unrealistic and inadequate" was a factual conclusion it was permitted to make in light of the evidence in the record.

Weighing both the limited duration SJ complied with the various requirements of the case plan and her failure to provide either a reasonable explanation for the child's injuries or a reasonable plan to protect EF from future harm, the trial court correctly concluded that DCFS proved by clear and convincing evidence that there had been no substantial parental compliance with the case plan, and there is no reasonable expectation of significant improvement. Thus, the trial court did not err in finding termination of SJ's parental rights to EF on the additional basis of Article 1015(5).

In addition to finding grounds for the termination of SJ's parental rights to EF under Article 1015(4)(b) and (5) had been established by the clear and convincing evidence, the trial court concluded that it was in the best interest of EF that SJ's parental rights be terminated. This determination is not manifestly erroneous either.

The evidence established that EF has bonded to his foster mother. His CASA representative stated that placement with his foster mother provides him a loving permanent home with a family that he identifies as his family based on her observations. The trial court also relied heavily on the opinion of a clinical psychologist who assessed the relationship of the child and his foster family. The psychologist noted that while the child's multiple placements in such a brief period of time placed him at risk for never bonding securely to a caregiver, the child has bonded to his foster mother, the only person who has "willingly, appropriately and unconditionally met the child's needs to date." Relying on the psychologist's opinion that "moving the child would be an immense loss for [EF] as his foster mother is his psychological caregiver and he is distressed when separated from her," the trial court concluded that the child's best interests are served by living outside his biological mother's house. Mindful that reasonable evaluations of credibility and reasonable inferences of fact are for the trier of fact, *see Stobart*, 617 So.2d at 882, we find a reasonable factual basis exists for the trial court's conclusion that termination of SJ's parental rights is in the best interest of the child.

Accordingly, we find no error in the trial court's conclusion terminating SJ's parental rights to EF. DCFS proved by clear and convincing evidence statutory grounds for termination under Article 1015(4)(b) and (5), and that termination is in the child's best interest.

CONCLUSION

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against SJ.

AFFIRMED.