NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CJ 0645

STATE OF LOUISIANA IN THE INTEREST OF L. H.

Judgment rendered: SEP 10 2010

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number: 7161 JJ
The Honorable William J. Crain, Judge Presiding

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L. H.

BEFORE: KUHN, PETTIGREW, JJ., AND KLINE, J., *pro tempore*[1]

KUHN, J CONCURS

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

M.K.F. appeals a judgment that disapproves reunification with her daughter, L.H., as a goal for L.H.'s permanent placement. For the following reasons, we affirm the judgment.

PERTINENT FACTS AND PROCEDURAL HISTORY

The Department of Social Services/Office of Community Services (OCS) took L.H. into custody in 2005, when L.H. was 10 years old. L.H. remains in OCS's custody in foster care. She has been in the same foster care placement since February 2007.

This matter came before the juvenile court in September 2009 for periodic case review and annual permanency review pursuant to La. Ch.C. art. 692 and La. Ch.C. arts. 701 – 711. The case plan OCS updated in September 2009 had recommended a goal of reunification for L.H. with M.K.F. After the hearing, however, the trial court entered judgment finding that reunification was not the most appropriate plan for L.H. and finding that L.H.'s placement in foster care was safe, appropriate, and the least restrictive placement for her. The trial court ordered that OCS's case plan not be approved, finding that it was not in L.H.'s best interest. The trial court, accordingly, ordered OCS to develop a new "case plan that more appropriately and adequately reflects the special needs and interest of the child as more fully set out in the Reasons for Judgment … ." The trial court denied M.K.F.'s motion for new trial.

M.K.F. now appeals the trial court judgment, asserting five assignments of error:

1. The trial court erred by refusing to approve the [OCS's] March 24, 2009[2] Case Plan of Reunification;

2. The trial court erred by disregarding the mental health professionals' recommendations for reunification of L.H. and her mother;

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[2] In its written reasons, the trial court relied on an updated report dated in September 2009 in making its rulings. The September case plan called for reunification with M.K.F. as the goal for L.H.

3. The trial court erred by refusing to approve the March 24, 2009 OCS Case Plan, which comported with the individual and family therapists' recommendations, when that trial court had only become involved with the case at that late date, as the court itself acknowledged: "Although the case has an extremely long history, this is this Court's ***first involvement***." (emphasis added);

4. The trial court erred by utilizing the same law clerk who had worked on the instant case with the previously-recused Judge Green, thus relying upon staff's knowledge and opinions about the mother based upon the previous judge's biases;

5. The trial court erred by failing to uphold Louisiana law's paramount constitutional protection for parents and their children to maintain their relationships. *In re J.M.P.*, 528 So. 2d 1002, 1015 (La. 1988) ("The high value placed on family autonomy reflects a consensus that the natural parent-child relationship should be disturbed only if necessary to protect the child from physical or psychological harm.")

DISCUSSION

Factual Findings

In her first three and her fifth assignments of error, M.K.F. argues that the trial court erred in failing to approve OCS's case plan in disregard of the recommendations of mental health professionals and of individual and family therapists. We conclude that the trial court was not clearly wrong in disapproving the case plan of reunification and ordering OCS to develop a more appropriate plan.

Louisiana Children's Code article 700A gives the trial court two options at the conclusion of a case review hearing. It may approve OCS's case plan. Or, it may "[f]ind that the case plan is not appropriate, in whole or in part, based on the evidence presented at the contradictory hearing and order the department to revise the case plan accordingly." This article, thus, clearly imposes on the trial court a duty to make a factual finding regarding the appropriateness of the case plan, irrespective of the position of OCS or of the parties.

Here, the trial court gave extensive written reasons explaining why it found reunification contrary to L.H.'s best interest at the time of the review. The trial

court found that L.H. had been and remained in a loving foster-care placement since 2007, that she was progressing in school, and that L.H. did not want to return to her mother's custody. The trial court noted that the proposed case plan recommended a thirty-day trial placement of L.H. with her mother. The trial court, however, decided that it should consider L.H.'s interests and desires, given her history, the lack of expeditious permanent placement for her, and her current stability. The trial court acknowledged an "emotional disconnect" between L.H. and her mother. The trial court also suspected "ulterior motives" in M.K.F.'s attempt to seek reunification with her daughter. It found M.K.F. to be dishonest in denying contact with L.H.'s abuser. It further found her to be neither credible nor sincere. The trial court, accordingly, found that the OCS plan of reunification was "not the most appropriate plan for L.H. at this time."

Specifically regarding L.H., the trial court found that she "has unique needs that must be met in a loving, caring and supportive environment for her to thrive. She has diminished mental capacity which requires understanding, nurturing, unconditional love and thoughtful supervision." Regarding L.H.'s current placement, the trial court stated, "The Court does not believe that removing L.H. from her present environment as provided for in the OCS care plan is appropriate. L.H. should not have to leave the school which is starting to mainstream her into standard classes. She should not have to leave the friends and surrogate family that have provided her with love and support under incredibly difficult circumstances." The trial court then found that an emergency caretaker was not appropriate given the circumstances of L.H.'s special needs.

An appellate court cannot set aside a juvenile court's findings of fact unless those findings are clearly wrong. **In re A.J.F.**, 00-0948, p. 25 (La. 6/30/00), 764 So.2d 47, 61. Here, the trial court's factual findings are not clearly wrong and are supported by the record. Further, where the fact finder is presented with two

permissible views of the evidence, the fact finder's choice between them is not clearly wrong. **Id.** The trial court is not required to give any extra credence to the testimony of experts. It is well settled in Louisiana that the fact finder is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. The fact finder may accept or reject in whole or in part the opinion expressed by an expert. **Harris v. State ex rel. Dept. of Transp. and Development**, 07-1566, p. 25 (La.App. 1 Cir. 11/10/08), 997 So.2d 849, 866, *writ denied*, 08-2886 (La. 2/6/09), 999 So.2d 785. The effect and weight to be given expert testimony is within the trial court's broad discretion. **Morgan v. State Farm Fire and Cas. Co., Inc.**, 07-0334, p. 8 (La.App. 1 Cir. 11/2/07), 978 So.2d 941, 946.

In her fifth assignment of error, M.K.F. suggests that the trial court failed to respect her rights as a natural parent to a relationship with L.H. It is the best interest of the child, however, and not M.K.F.'s interest, that controls her placement. La. Ch.C. art. 702C requires the trial court to "determine the permanent plan for the child that is most appropriate and in the best interest of the child." While reunification is the highest priority, Art. 702 recognizes that other placements may be found appropriate.

Here, the trial court reasonably determined that reunification was not in L.H.'s best interest under existing circumstances and ordered OCS to develop a new case plan.[3] And as M.K.F. acknowledges in her brief, termination of her parental rights is not currently a risk. The trial court's judgment does not preclude a continuing and meaningful relationship between M.K.F. and L.H., who will

[3] By argument of counsel as alleged in brief, circumstances have changed such that the best interest of the child may be affected. To reiterate, this court determines whether the trial court committed manifest error in making its rulings, and we have found none from the record. We observe that under La. Ch.C. art. 714, M.K.F. or other named parties may move the trial court to modify a judgment of disposition and that under La. Ch.C art. 716, the trial court may modify the disposition "if the court finds that the conditions and circumstances justify the modification." This court has no jurisdiction to consider new evidence not contained in the record.

require OCS assistance toward independent living when she reaches the age of sixteen in a few months hence. *See* La. Ch.C. art. 702J.

Accordingly, we conclude that M.K.F.'s first three and fifth assignments of error lack merit.

Use of Same Law Clerk

M.K.F. argues in her fourth assignment of error that the trial court's judgment should be reversed because the trial court utilized the same law clerk as a judge who had been previously recused from this matter. She argues that reliance on such a staff person "creates the very appearance of impropriety ... that the Judicial Canon prohibiting it serves to prevent." She asserts a violation of Canon 2 of the Code of Judicial Conduct, which requires that a judge shall avoid impropriety and the appearance of impropriety in all activities.

She first raised this argument in her motion for new trial,[4] which the trial court denied. In her motion for new trial, M.K.F. stated that while she did not question the law clerk's propriety, she did challenge the appearance of impropriety, as follows: "While undersigned counsel makes absolutely no suggestion that [the law clerk] acted improperly in any way whatsoever, and in fact, holds [the law clerk] in high regard, her mere prior and lengthy involvement in this matter, as attorney for [the recused judge], presents at a minimum a perception of bias against [M.K.F.]." She cites no law or jurisprudence establishing that utilization of court staff *per se* raises the appearance of judicial impropriety, and we can find none.

We disagree with M.K.F. that utilization of a common law clerk (if it happened; there is no evidence in the record to support the assertion), gives rise to an appearance of judicial impropriety. Further, while M.K.F. appears to suggest that the law clerk acted as personal attorney for the recused judge during the

[4] We observe that once judgment was entered, it was too late for M.K.F. to file a motion to recuse the trial judge. La. C.C.P. art. 154 provides that a motion for recusal of a trial judge is to be made before trial of the matter or at least before judgment. A motion for recusal filed together with a motion for new trial is, therefore, untimely and should be dismissed. *See* **Bergeron v. Illinois Cent. Gulf R. Co.**, 402 So.2d 184, 186 (La.App. 1 Cir. 1981).

recusal proceeding, no evidence in the record supports this conjecture. Without evidence of actual bias resulting from utilization of a common law clerk, we conclude that M.K.F. has failed to establish any bias on the part of the trial court. This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed to M.K.F.

AFFIRMED