Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,843-JAC

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA
IN THE INTEREST OF
D.R.B.

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Appealed from the
Fifth Judicial District Court
Parish of Richland, Louisiana
Trial Court No. J-2018-25

Honorable Clay Hamilton, Judge

* * * * *

TAMMY D. WEAVER	Counsel for Appellant-Mother
LOUISIANA DEPARTMENT OF CHILDREN & FAMILY SERVICES By: Keesha Bordelon Courtney Franklin	Counsel for Appellee
LEGAL AID OF NORTH LOUISIANA By: Elizabeth Brown	Counsel for D.R.B.
DOUGLAS BUSARI	Counsel for Father
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Before MOORE, COX, and STEPHENS, JJ.

MOORE, J.

Four months after taking custody of a five-week-old infant boy who had sustained unexplained and life-threatening physical injuries including complex skull fractures, subdural hematoma, and broken bones, the Department of Children and Family Services filed a petition for involuntary termination of the parental rights of the parents, S.C. and J.B. Following trial, the court rendered judgment terminating the parental rights of both parents and certifying the infant, D.R.B., for adoption. The mother appeals this judgment alleging three assignments of error. For the following reasons, we affirm.

FACTS

On March 15, 2018, the Department of Children and Family Services ("DCFS") was notified of a Level 1 (highest priority) situation involving a 5-week-old infant, D.R.B., who resided in Richland Parish with his parents, J.B. and S.C. The child had suffered a complex skull fracture, subdural hematoma, retinal bleeding in both eyes, fractured ribs, epiphyseal fractures in both lower legs, and broken ankles. D.R.B. was initially taken to his pediatrician, Dr. Margot Eason, who, upon examination, summoned an ambulance to take him to the Emergency Room at St. Francis Medical Center in Monroe. There, due to the severity of D.R.B.'s injuries, the hospital attempted to transport D.R.B. by Air Evac to Shreveport, but ultimately the infant was transported by ambulance to the LSU/University Health in Shreveport.

The case was assigned to DCFS investigator Gabriel Payne. Because Level 1 cases require immediate action, Ms. Payne contacted a social worker

at University Health to interview the parents at the hospital at 4:00 p.m. on March 15, 2018. Ms. Payne testified that the interviewer characterized the parents as "not forthcoming" and had to persuade them not to "elope" with D.R.B. due to their fear of the DCFS. The parents' account of D.R.B.'s injuries was that the child hurt his head when he rolled off his "boppy pillow" that was on the floor. Because the explanation given for the child's injuries was not plausible given their severity, DCFS took custody of the child by instanter order on March 19, 2018.

Ms. Payne informed J.B. and S.C. of the DCFS custody decision while they were at the hospital on March 19, 2018. Ms. Payne testified that S.C. put her hands to her face and said, "I did it," "I did it." Upon hearing this, Ms. Payne said, "Excuse me?," after which, S.C. said, "No, I didn't do anything to him. I didn't do anything to him." At trial, S.C. denied that she made these statements.

At a continued custody hearing on March 22, 2018, the parents stipulated that D.R.B. was a child in need of care ("CINC") without admitting fault. The court ordered that the child remain in the custody of the state, and he was subsequently placed in a foster home of a relative of S.C. The court continued DCFS custody of the child at the CINC adjudication hearing on June 28, 2018, and adopted the proposed case plans.

Subsequently, on July 23, 2018, DCFS filed a termination of parental rights proceeding ("TPR"). The parents objected that the TPR began during an ongoing CINC proceeding, alleging that the petition was premature because they were not permitted to complete their case plans. S.C.'s counsel filed a motion to dismiss the petition, and J.B.'s counsel filed an exception of prematurity. Arguments were heard on October 25, 2018, after which the

court denied the motion and exception and set the TPR trial for November 19, 2018.

At the two-day trial, DCFS put on four witnesses. The child welfare investigator, Gabriel Payne, testified regarding her knowledge of the DCFS proceeding regarding D.R.B. Two expert witnesses, Dr. Jennifer Olson Rodriquez, a board-certified pediatrician and expert in child abuse, and Dr. William Byrd, an ophthalmologist, each testified regarding the extent of D.R.B.'s injuries and their non-accidental nature. Debra Jordan, the actual case worker, testified regarding her observations and the degree of implementation of the case plans.

The parents, S.C. and J.B., each testified at trial. S.C. testified that on the morning of Saturday, March 10, 2018, after being up all night with the child, she asked the father, J.B., to watch D.R.B. while she took a short nap. She left the child with J.B. in the living room. Later that morning, J.B. came into the bedroom and told her that D.R.B. kicked himself off the pillow and hit the left side of his head on the floor. She said the baby appeared to be okay. At some point later in the day, S.C. testified, she took the child to the Affinity Walk-In Clinic because D.R.B. was having "tummy issues." She testified the nurse at the clinic attributed the child's colicky behavior to the fact that S.C. was feeding him formula rather than breast milk due to medications she was taking. Not until the following Wednesday, March 14, did she become concerned after she saw that D.R.B.'s leg was "twitching."

On that day, she had an appointment with a gynecologist in Shreveport at 12:30 p.m. The family (J.B., S.C., and D.R.B.) travelled to Shreveport that morning, along with, L.B., J.B.'s four-year-old son with whom he shared custody with his estranged wife. They went to Long John

Silver's to eat and then drove to her appointment. J.B. and the children waited in the vehicle two hours while she saw the gynecologist. After that, they went to the Shreveport Aquarium and then to Bass Pro Shop in Bossier City. While preparing to enter the latter store, D.R.B. began projectile vomiting and S.C. noticed that his leg was twitching. She testified that she used her cell phone to video record the twitching, and sent it to her cousin, who she said was a nurse practitioner. She said her cousin told her that it was probably just muscle spasms and to monitor it. When they returned home, the child continued to projectile vomit after being fed. The child also exhibited two or more episodes of "twitching." On Thursday morning she took D.R.B. to his pediatrician, Dr. Eason. After examining the child, Dr. Eason had an ambulance take him to the ER at St. Francis Medical Center in Monroe. When the St. Francis ER physicians examined the child and noted the fractured skull, they decided he needed to go to University Health/LSU in Shreveport. According to S.C., they wanted to airlift the child to Shreveport, but due to weather, D.R.B. was taken by ambulance to Shreveport.

Several character witnesses for S.C. and J.B. testified, after which the defense rested.

On behalf of D.R.B., the CASA (Court Appointed Special Advocates) supervisor for the Fifth Judicial District, Paige Hemphill, gave a statement in which she recommended that termination of parental rights of both parents was in the best interest of D.R.B. She testified that in her opinion S.C. (and J.B.) was grossly negligent in failing to obtain medical care for the infant for several days, considering the injuries that he sustained. She noted that neither parent seemed concerned or worked with investigators to find out

what happened to the child. Given these facts, she said that CASA recommended that it was in the best interest of D.R.B. to terminate the parental rights and place D.R.B. in a permanent and stable home.

After trial concluded, the court rendered its judgment with reasons, finding that the state had proved the required statutory elements for termination of parental rights by clear and convincing evidence and that it was in the best interest of D.R.B. to terminate S.C. and J.B's parental rights and free D.R.B. for adoption.

This appeal by S.C. followed.

DISCUSSION

A parent has a constitutionally protected liberty interest in establishing and maintaining a meaningful relationship with his or her children. *State in the Interest of A.C.*, 93-1125 (La. 1/27/94), 643 So. 2d 719, *cert. denied*, 515 U.S. 1128, 115 S. Ct. 2291, 132 L. Ed. 2d 292 (1995); *State ex rel. B.H. v. A.H.*, 42,864, (La. App. 2 Cir. 10/24/07), 968 So. 2d 881. This parental interest includes the "companionship, care, custody, and management of his or her children." *Id.* at 726 (quoting *Lassiter v. Department of Social Svcs*., 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981)). Congruent with the parental interest, the state has a legitimate interest in limiting or terminating parental rights under certain conditions. *State in the Interest of A.C., supra*; *State ex rel. B.H. v. A.H., supra*. The fundamental purpose of involuntary termination proceedings is to provide the greatest possible protection to a child whose parents are unwilling or unable to provide adequate care for his physical, emotional, and mental health needs and adequate rearing by providing an expeditious judicial process for the termination of all parental rights and responsibilities

and to achieve permanency and stability for the child. *State ex rel. J.A.*, 1999-2905 (La. 1/12/00), 752 So. 2d 806.

When the state seeks to terminate parental rights, it bears the burden of establishing each element of a ground for termination of parental rights under La. Ch. C. art. 1015 by clear and convincing evidence. La. Ch. C. art. 1035; *State ex rel. B.H. v. A.H., supra*; *State ex rel. S.C.M.*, 43,441 (La. App. 2 Cir. 6/4/08), 986 So. 2d 875. This heightened burden of proof requires the state to show not only that the existence of the fact sought to be established is more probable than not, but that the fact is highly probable or more certain. *State ex rel. B.H. v. A.H., supra; Hines v. Williams*, 567 So. 2d 1139 (La. App. 2 Cir.), *writ denied*, 571 So. 2d 653 (1990). Failure of the state to prove any of the statutory elements for termination of parental rights is a failure of the state to meet its burden of proof and termination of parental rights cannot be ordered. *State in Interest of JML*, 540 So. 2d 124 (La. App. 3 Cir. 1989).

Although there are various grounds for termination of parental rights set forth in La. Ch. C. art. 1015, only one ground need be established. *State ex rel. SNW v. Mitchell*, 2001-2128 (La. 11/28/01), 800 So. 2d 809. Once a ground for termination has been established, the judge may terminate parental rights if the termination is in the best interest of the child. La. Ch. C. art. 1039. The trial court's factual findings, including the finding that a parent is unfit, and there is no reasonable expectation of reformation, will not be set aside in the absence of manifest error. *State ex rel. B.H. v. A.H., supra*; *State, ex rel. D.L.F. v. Phillips*, 34,645 (La. App. 2 Cir. 4/4/01), 785 So. 2d 155.

In this appeal, S.C. filed a three-part assignment of error alleging that the trial court erred in its judgment terminating her parental rights. In Part A of the assignment, S.C. contends that the trial court erred by rendering a judgment terminating her parental rights under La. Ch. C. art. 1015(4)(i). Subsection 4(i) of the article states that grounds for termination include:

> (4) Misconduct of the parent toward this child or any other child of the parent or any other child 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:
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> ***
>
> (i) Abuse or neglect which is chronic, life threatening, or results in gravely disabling physical or psychological injury of disfigurement.

S.C. argues that the state did not prove by clear and convincing evidence that she was culpable of misconduct toward the child which constituted extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency and which resulted in the child being subjected to abuse or neglect which is chronic, life threatening, or results in physical or psychological injury or disfigurement. Although S.C. concedes that the injuries the child suffered are severe and horrendous, she argues that the state produced no evidence that connected her as causing those injuries or having knowledge of how they occurred to meet the "clear and convincing evidence" standard of proof required by La. Ch. C. art. 1035.

The trial court gave lengthy and detailed oral reasons for judgment which, based on our review of the record, is well supported. The court found that the injuries that D.R.B. suffered were life threatening as evidenced, in part, by the need for immediate emergency transport to

LSU/University Health in Shreveport. S.C. and J.B. were not forthcoming about what happened and wanted to leave the hospital with D.R.B. against medical advice – the latter point which the court found to be significant. S.C.'s testimony that the father, J.B., told her in a cell phone call that he caused D.R.B.'s injuries ("I beat the hell out of him, ha, ha, ha")[1] was disturbing, but not corroborated. However, it was corroborated that J.B. told S.C. he hated her and D.R.B. and wished they would die. He also shot up S.C.'s car in anger, leaving seven bullet holes.

The medical testimony reviewed by the court was compelling. Dr. Rodriquez testified that the severity of the skull fracture was the worst she had ever seen in her 19 years of dealing with child abuse cases and cranial fractures. She said the cranium was fractured around its entire circumference, and on one side, it was shattered like a cracked, boiled egg. The child had a subdural hematoma, retinal hemorrhaging in both eyes, fractured ribs, including a partially healed fractured rib that D.R.B. had apparently suffered prior to the instant trauma, epiphyseal (growth plate) fractures in both lower legs and two broken ankles. Additionally, Dr. Rodriquez spoke with other medical personnel who had examined the child, and she reviewed the child's X-rays and lab reports, and physically examined the child herself. She said the fractures of the tibias in both legs were likely caused by pulling or vigorous stretching of the child's limbs. The injuries occurred within the last few days while the child was solely in the care of S.C. and J.B. Based on her medical knowledge in the context of

[1] We note that J.B. denied making this statement to her after he had shot S.C.'s car seven times during an argument where she was attempting to leave their home. S.C. testified that his friend, Nicholas Lowery, heard J.B.'s statement on a 3-way call, but Lowery denied at trial that he ever heard J.B. say that he harmed D.R.B.

her long experience with child abuse cases, she concluded that the injuries were clearly non-accidental. She ruled out the account given by J.B. and S.C. that D.R.B. kicked himself off a boppy pillow, as it simply could not explain the severe injuries he suffered. She testified that some of the injuries were consistent with "shaken baby syndrome."

Similarly, the court was impressed by Dr. Byrd's testimony concerning the type of trauma that likely caused D.R.B.'s bilateral retinal hemorrhages. Dr. Byrd testified that the hemorrhages in all four quadrants of both eyes could not have been caused by the seizures, nor by a low fall as the parents maintained. He said the hemorrhages were more than likely caused by an acceleration/deceleration type trauma – a severe back-and-forth movement. The court noted that Dr. Byrd said that these injuries could very well cause delayed developmental issues in the future.

After the defense witnesses testified, CASA supervisor Hemphill testified on behalf of D.R.B., strongly recommending termination of the parental rights of both parents and freeing D.R.B. for adoption in the best interest of the child. Ms. Hemphill argued that S.C. and J.B. were grossly negligent by failing to obtain medical attention immediately for the injuries D.R.B. sustained, instead waiting a few days. She also noted that S.C. seemed uninterested or uncooperative in finding out what or who caused the injuries to the child. Given the rather unstable situation of the parents, she explained that it was in the best interest of the child to free him for adoption in a stable and permanent home.

Pastor John Wesley Jones testified as a character witness for S.C. as her counselor. The court noted that his testimony revealed that he had hardly any contact with S.C. other than seeing her in church and was not in a

position to give any testimony relevant to the injuries to the child. Deputy Frankie Marble testified to an uncontested and established fact that J.B. shot S.C.'s car in an incident shortly after DCFS took custody of D.R.B.

Importantly, the court found that S.C.'s testimony about her relationship with J.B. in which she stated that they were basically very happy, and there were no problems and issues between them was not credible. This testimony was readily impeached under cross-examination that revealed that there were indeed issues, arguments, concern for the child's safety, her leaving the house, and text messages from J.B. displaying his pent-up anger. The court found that these inconsistencies indicated that S.C.'s testimony on direct examination was disingenuous.

After reviewing the expert and lay testimony, the court concluded that the state had proven by clear and convincing evidence that the injuries D.R.B. suffered were life threatening and included the possibility of delayed-development issues for D.R.B. Since the evidence presented showed that only the mother and father provided care for the child during the 3-or-4 day period when the injuries occurred prior to seeking medical care, it found that both parents were grossly negligent in either directly causing the injuries or in allowing one or the other parent to cause the injuries to the child. The court found that the medical testimony proved that the injuries were non-accidental and that the parents offered essentially no explanation for the injuries other than their own misconduct or gross negligence.

The court further found that termination of the parental rights would be in the best interest of the child, especially that since the child was only five weeks old when DCFS took custody, and there had not been sufficient time for bonding with the mother or father.

On appeal, S.C. argues that the state failed to prove by clear and convincing evidence that she was culpable of misconduct toward D.R.B. which constituted extreme abuse, cruel and inhuman treatment, or grossly negligent behavior below a reasonable standard of human decency and which resulted in the child being subjected to abuse or neglect which is chronic, life-threatening, or results in physical or psychological injury or disfigurement.

S.C. admits, and the trial court found, that the injuries D.R.B. suffered were life threatening in nature and may result in future developmental problems for the child. There is absolutely no credible argument or evidence that these injuries were accidental, given their severity and scope along with the strong testimony of Dr. Rodriguez and Dr. Byrd that they were non-accidental. Accordingly, the acts or omissions that led to these injuries must have been caused by intentional abuse or grossly negligent behavior. Since the only people providing care to D.R.B. when he sustained these injuries were S.C. and J.B., we agree with the trial court that S.C. was culpable either as the direct cause of the injuries or culpable by what appears to be her willful ignorance of what caused them. Furthermore, we agree with the testimony of CASA supervisor recommending termination of parental rights to be in the best interest of D.R.B.

This assignment is without merit.

In Part B of her assignment of error S.C. alleges the trial court erred by allowing the state to file a termination of parental rights proceeding under La. Ch. C. art. 1015(4)(i) without first, under La. Ch. C. art. 672.1 (CINC), showing that efforts to reunify the parent and child were not required.

After review, we find this claim has no merit under La. Ch. C. art. 672.1, which states:

> **Reunification Efforts Determination**:
>
> 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*.
>
> (Emphasis supplied).

DCFS argues that the statute is permissive in that "the department *may* file a motion for a judicial determination that efforts to reunify the parent and child are not required." It contends that there is no statute that prevents DCFS from filing a petition for termination at any time.

We conclude that DCFS has taken the steps necessary to meet the requirements for changing the goal from reunification to termination, under Paragraph C (1) of the statute, by filing a petition alleging the behavior described in Art. 1015(4)(i). When the trial court ruled on the motion to dismiss on an exception of prematurity, it stated that DCFS may well fail to carry its burden under Art. 1015 to prove the grounds for termination of parental rights. In that event, as noted by the court, the case would have continued as a CINC proceeding.

In her final assignment, Part C, S.C. argues that the trial court erred by not remanding the case for further CINC proceedings to allow the parents to work a case plan.

S.C. argues that if the case were remanded for CINC proceedings, psychological examinations, competency tests, etc., may provide answers to what actually happened to D.R.B. to cause the injuries he sustained. However, as DCFS argues, S.C.'s case plan included psychological or mental health assessments and counseling which S.C. did not wish to comply with. She picked an uncertified pastor as her counselor, but only visited him one time for counseling. At trial, the pastor did not really know anything about S.C.'s history with J.B. He knew her only from attending church functions over the years.

This assignment is without merit inasmuch as DCFS has the discretion to file a petition for termination in lieu of or during a CINC procedure when the facts and circumstances warrant such action. It is clear from this record that DCFS petitioned for termination after several months of frustration in its efforts to learn the cause of D.R.B.'s injuries. S.C. (and J.B.) were not forthcoming with an answer or assistance, and S.C. did not show any effort to find the truth in the face of overwhelming evidence that the story she gave could not account for the injuries D.R.B. suffered. This unwillingness or apathy, coupled with the other facts of this case, obviously led to the petition for TPR. We find no error.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court terminating the parental rights of S.C. and certifying the child, D.R.B. for adoption. Costs are to be paid by S.C.

AFFIRMED.