

STATE OF LOUISIANA IN THE INTEREST
OF S. U. C., W. U. C., D. U. C.

NO. 15-CA-644

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

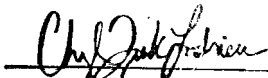
ON APPEAL FROM THE JEFFERSON PARISH JUVENILE COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 14-CC-15, DIVISION "A"
HONORABLE NANCY AMATO KONRAD,
JUDGE PRO TEMPORE PRESIDING

January 28, 2016

COURT OF APPEAL
FIFTH CIRCUIT

FILED JAN 28 2016

MARC E. JOHNSON
JUDGE


CLERK
Cheryl Quirk Lambert

Panel composed of Judges Susan M. Chehardy,
Marc E. Johnson, and Hans J. Liljeberg

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AFFIRMED

2/29
SMC
[Signature]

Plaintiff/Appellant, the State of Louisiana, Department of Children and Family Services, Bureau of General Counsel (hereinafter referred to as “the Department”), appeals the judgment awarding guardianship of S.U.C., W.U.C. and D.U.C. to W.F. and K.F. from the Juvenile Court for Jefferson Parish, Section “A”.¹ For the following reasons, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The minor children, S.U.C., W.U.C., and D.U.C., were placed in the custody of the State of Louisiana through the Department of Children and Family Services in February of 2014 pursuant to a report that the oldest child, S.U.C., had been sexually abused by a family friend, and her mother had continued to allow access to the child and her sisters in exchange for use of the perpetrator’s washer and dryer. On February 12, 2014, Ms. Lillie Reed, a clinical nurse specialist with a master’s degree in mental health, was appointed as the children’s court-appointed special advocate, or C.A.S.A. The juvenile court confirmed her appointment on February 13, 2014.

The children, then ages 2, 4, and 5, were initially placed in the home of their maternal great-aunt, L.C. After placement in the home of L.C., L.C. determined

¹In accordance with Uniform Rules—Courts of Appeal, Rules 5-1 and 5-2, we will use initials throughout the opinion to identify the parties to ensure the privacy of the minor children in this case.

that she was unable to care for the children. However, she advised that her brother and his wife, W.F. and K.F., the children's great-uncle and great-aunt, were interested in caring for the children. Although L.C. was not certified as a foster parent, the Department required W.F. and K.F. to be certified prior to placement of the children in their home. The Department then moved the children out of the home of L.C. and separated them. The Department placed the oldest child, S.U.C., in one certified foster home and W.U.C. and D.U.C. in another certified foster home.

The juvenile court adjudicated the children as Children in Need of Care on April 10, 2014. Initially, the case plan goal for permanent placement of the children was reunification with the parents with a concurrent plan of adoption, if reunification could not be accomplished. The court further ordered that the children were to be placed with W.F. as soon as the home was certified as a foster home, for the Department to complete the certification process as soon as possible, and for the children to visit with W.F. and K.F. at their home on Easter. The children were placed with W.F. and K.F. on June 20, 2014.

On December 23, 2014, the Department filed a report, which was signed by foster care caseworkers Ian Dermody and Mica Knatt, that indicated that S.U.C., W.U.C. and D.U.C. expressed feelings of being protected and safe in their placement with W.F. and K.F. The Department's report attached a copy of the report of Patsy White, the therapist for the children. Ms. White's report also described the children's feelings of being protected and safe with W.F. and K.F. On January 7, 2015, the children's C.A.S.A., Ms. Reed, submitted a report to the court regarding the children's progress and indicated that she felt that the placement in the home of W.F. and K.F. was the best placement for the children.

On February 12, 2015, the Department changed the case plan goal to the

goal of adoption with a concurrent plan of guardianship. Subsequently, the Department filed a Petition for Termination of Parental Rights on March 5, 2015. The juvenile court granted the petition on May 22, 2015. During that time period, W.F. and K.F. expressed an interest in becoming the children's adoptive parents.

After the termination of parental rights was granted, W.F. and K.F. decided that they would not adopt S.U.C., W.U.C. and D.U.C. In a letter dated June 3, 2015, the Department informed the court that the case plan goal had changed solely to adoption. The Department located a family willing to adopt all three girls, although the Department was still working with W.F. and K.F. to permanently place the children with them. On June 10, 2015, S.U.C., W.U.C. and D.U.C., through their court-appointed attorney, filed a Motion for Guardianship, which sought to have W.F. and K.F. granted permanent guardianship. The hearing on the motion was set for June 18, 2015, the same date a case review hearing had previously been scheduled. The Department was not served with a copy of the children's motion. After receiving notice from the children's attorney that the Motion for Guardianship had been filed, the Department filed a Motion for Continuance on June 11, 2015, asserting it had not been served with the children's motion and it could not prepare for the June 18th hearing.

At the hearing for the case review and Motion for Guardianship, the Department orally moved for a continuance of the Motion for Guardianship on the basis that it was not served on the Department and consideration of guardianship was premature because adoption had not been first explored as the best case plan in the interest of the children. The Department's motion was denied. The Department then requested that caseworker Ian Dermody's testimony be taken that day, and that the rest of the hearing be taken up at a later date. The Department requested a later date in an effort to explore adoptive resources for the children.

Although the court denied the Department's request for continuance, the court gave the Department the opportunity to call more witnesses and present more evidence on another day to rebut the children's motion. The juvenile court judge stated that the Department could explore the adoptive resources; however, the Department was not allowed to subject the children to meeting any prospective adoptive parents until the guardianship issue had been determined. The Department then consented to proceed with arguments on the children's motion and have a ruling on the guardianship rendered. At the conclusion of the hearing, the court allowed both sides to submit post-hearing memoranda.

In its judgment rendered on July 21, 2015, the juvenile court ordered that guardianship of S.U.C., W.U.C. and D.U.C. be granted to W.F. and K.F. until the children reach the age of majority. The court also ordered that the case be closed and relieved the Department of its supervision of the children. On the same date, the court signed the Order of Guardianship, which granted W.F. and K.F. guardianship pursuant to the children's motion. In the Reasons for Judgment, the juvenile court provided a detailed procedural and factual history and summary of the trial testimony. The court found that the facts of the case demonstrated that adoption by unknown persons was not in the children's best interest. The court then held that the Louisiana Children's Code does not place an absolute supremacy on adoption as the only permanent plan for a child. The court further found that it was in the best interest of the children to remain in the care of W.F. and K.F. The instant appeal of the Department followed.

ASSIGNMENTS OF ERROR

On appeal, the Department alleges the trial court committed manifest error in finding that guardianship was the plan goal in the best interest of the children. The Department argues that: 1) the hearing for the Motion for Guardianship was

improperly held; 2) the children's attorney failed to prove by clear and convincing evidence that guardianship was in the best interest of the children; and 3) the trial court erred in prohibiting the Department from exploring adoptive resources for the children.

LAW AND ANALYSIS

Motion Hearing

The Department alleges the trial court erred in granting an order for guardianship because the hearing on the Motion for Guardianship was improperly held. The Department argues that it did not receive service for the hearing; thus, the trial court should not have considered the children's motion at the case review hearing. The Department contends it did not have time to respond to the allegations contained within the motion as to the children's best interests or subpoena any necessary witnesses for the hearing.

At the hearing on the Motion for Guardianship, the Department moved for a continuance of the hearing, arguing that the motion was not served on the Department and was premature because adoption had not been explored. The juvenile court denied the continuance but offered to hold the hearing open and allow the Department the opportunity to call witnesses at a later date to rebut the motion. The Department chose to proceed with the hearing and have a ruling on the guardianship rendered.

A continuance may be granted in any case if there is good ground therefor. *Morris v. Westside Transit Line*, 02-1029 (La. App. 5 Cir. 2/25/03); 841 So.2d 920, 928, *writ denied*, 03-0852 (La. 5/16/03); 843 So.2d 1132, citing La. C.C.P. art. 1601. A trial court has great discretion in granting or denying a motion for continuance under La. C.C.P. art. 1601, and that discretion will not be disturbed on appeal in the absence of clear abuse of discretion. *Id.*

In this matter, we do not find the juvenile court erred in denying the Department's Motion for Continuance. The court was notified that Mr. Dermody's, a caseworker for the children, last day with the Department was effective on June 19, 2015, and that his testimony was crucial because he could provide important information about the children's care. The court denied the request for continuance and proceeded to hear the testimony of Mr. Dermody. We find that the court's procurement of Mr. Dermody's testimony was a valid reason to deny the Department's motion. Furthermore, the court allowed the Department to hold the hearing open until a later date, which had previously been requested by the Department. The Department, subsequently, chose not to take the opportunity to present witnesses or evidence on another date to rebut the motion. Under these circumstances, we find the juvenile court did not abuse its discretion in denying the Department's Motion for Continuance.

Burden of Proof

The Department alleges the trial court erred in finding that the children's attorney proved by clear and convincing evidence that guardianship was in the best interest of the children. The Department argues that adoption is the best plan goal of permanent placement in the interest of the children because it requires a higher level of commitment from the adoptive parents and gives more stability than guardianship. The Department asserts that adoption had not been ruled out as a plan of permanent placement for the children; thus, guardianship could not have been found to be in the children's best interest.

The court is required to determine the permanent plan for the child that is most appropriate and in the best interest of the child. *State ex rel. P.B.*, 49,668 (La. App. 2 Cir. 12/17/14); 154 So.3d 806, 812, citing La. Ch.C. art. 702(C). In most permanent plan determinations, the court is required to determine whether the

Department has made reasonable efforts 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. *Id.* The child's health and safety is the paramount concern in the court's determination. *Id.* To reverse a trial court's permanency plan determination, an appellate court must find from the record that the trial court's finding is clearly wrong or manifestly erroneous. *Id.* In a manifest error review, it is important that the appellate court not substitute its own opinion when it is the juvenile court that is in the unique position to see and hear the witnesses as they testify. *State v. N.C.*, 50,446, p. 28 (La. App. 2 Cir. 11/18/15); -- So.3d ---, 2015 La. App. LEXIS 2288, *rehearing granted*, (La. App. 2 Cir. 12/14/15); -- So.3d ---, 2015 La. App. LEXIS 2541. If the juvenile court's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

Title VI of the Louisiana Children's Code sets forth the statutes regarding children in need of care. *Id.* The health, safety, and best interest of the child shall be the paramount concern in all proceeding under Title VI. *Id.*, citing La. Ch. C. art. 601. According to La. Ch.C art. 702(C), the court shall determine the permanent plan for the child that is most appropriate and in the best interest of the child in accordance with the following priorities of placement: 1) return the child to the legal custody of the parents within a specified time period consistent with the child's age and need for a safe and permanent home; 2) adoption; 3) placement with a legal guardian; 4) placement in the legal custody of a relative who is willing and able to offer a safe, wholesome, and stable home for the child; and 5) placement in the least restrictive, most family-like alternative permanent living arrangement. The purpose of guardianship is to provide a permanent placement for

children when neither reunification with a parent nor adoption has been found to be in their best interest; to encourage stability and permanence in the lives of children who have been adjudicated to be in the need of care and have been removed from the custody of their parent; and to increase the opportunities for the prompt permanent placement of children, especially with relatives without ongoing supervision by the department. La. Ch.C. art. 718.

Here, Mr. Dermody, one of the children's caseworkers, testified as to the positive progression of S.U.C., W.U.C. and D.U.C. while in the custody of W.F. and K.F. Ms. Lillie Reed, the children's C.A.S.A., also testified to the children's positive progress while in the care of W.F. and K.F. Ms. Reed testified that the children were happy, safe and content, and the children were in the best place for them, in the care of W.F. and K.F. In its Reasons for Judgment, the juvenile court noted the testimonies of Mr. Dermody and Ms. Reed and concluded that adoption by unknown persons was not in the best interest of the children. The trial court found that it was in the children's best interest to remain in the care of W.F. and K.F.

After review, we cannot find the juvenile court was manifestly erroneous in finding that adoption was not in the best interest of the children. The court found that permanent placement with W.F. and K.F. through guardianship was in the best interest of the children, and that position is supported by the testimony that the children are safe, happy and thriving in the care of W.F. and K.F. In this situation, uprooting the children from the stability and safe environment they have become accustomed to at this point simply because the case plan of adoption was not pursued first can be detrimental to the development of these young children. Therefore, we find the trial court was not manifestly erroneous in awarding guardianship to W.F. and K.F.

Exploration of Adoptive Resources

The Department alleges the trial court erred when it ordered that no adoptive resources could be explored by the Department. The Department argues that the foreclosure of the possibility of, at least, exploring adoptive placement does not serve the best interest of the children or follow the mandates of La. Ch.C. art. 702, which places adoption in a higher preference category than guardianship.

Here, the juvenile court made a determination that adoption was not in the best interest of S.U.C., W.U.C. and D.U.C. As we discussed earlier, we cannot find that the court was manifestly erroneous in that determination; thus, there was no need for exploration of any more adoptive resources. Moreover, despite the Department's argument, we note that the juvenile court did not order that no adoptive resources could be explored. In reference to the exploration of adoptive resources, the juvenile court judge stated, "you can explore all you want, but you are not going to subject these children to another individual or another set of parents until I rule on the guardianship issue...." Because the Department chose not to present any further testimony or evidence to rebut the Motion for Guardianship, the Department essentially chose not to present the court with any of its adoptive resources. Therefore, we again find the juvenile court was not manifestly erroneous in granting guardianship to W.F. and K.F.

DECREE

For the foregoing reasons, the judgment awarding guardianship of S.U.C., W.U.C. and D.U.C. to W.F. and K.F. is affirmed.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
HANS J. LILJEBERG

JUDGES



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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **JANUARY 28, 2016** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in black ink, appearing to read "Cheryl Q. Landrieu", is written over a horizontal line.

CHERYL Q. LANDRIEU
CLERK OF COURT

15-CA-644

E-NOTIFIED

MARY R. MUSTALLER MCMILLAN

JESSICA COALTER

MAILED

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