

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CJ 1114

**IN RE: A.M.B., APPLYING FOR INTRAFAMILY
ADOPTION OF A.M.A. AND J.H.A.**

Judgment Rendered: December 28, 2006

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany, State of Louisiana
Trial Court No. 2005-40050, Division "A"

Honorable Raymond Childress, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Handwritten initials 'RND' and a circled symbol resembling a stylized 'P' or 'Q'.

HUGHES, J.

This is an appeal from a judgment granting the stepparent adoption of the minor children, A.M.A. and J.H.A., by their stepfather, A.M.B. The biological father of the children opposed the adoption and files this appeal. For the reasons stated herein, we affirm.

FACTS AND PROCEDURAL HISTORY

A.M.A. and J.H.A. were born on March 26, 1996 and November 11, 2001, respectively, to their biological parents, J.L.H.B. and J.B.A. J.L.H.B. and J.B.A. were divorced on July 25, 2002, and awarded joint custody of the children, with J.L.H.B., the mother having physical custody. The father, J.B.A., has allegedly had no contact with the children for several years. On September 27, 2003 J.L.H.B. married the petitioner, A.M.B.

A.M.B. filed the "Petition for Intrafamily Adoption" at issue herein on June 14, 2005. In conjunction with the petition, J.L.H.B. filed an "Authentic Act of Consent to Adoption." The matter was heard by the trial court on December 1, 2005, and December 5, 2005. Thereafter, the trial court granted judgment in favor of plaintiff, decreeing adoption in his favor of A.M.A. and J.H.A., and ordering the names of the children changed to A.M.B. and J.H.B.

J.B.A. has appealed the judgment of adoption, and asserts the trial court erred: (1) in finding that J.B.A. failed or refused to comply with the court-ordered award of support without just cause for a period of at least six months; (2) in finding that J.B.A. refused or failed to visit, communicate, or attempt to communicate with his children without just cause for a period of at least six months; and (3) in finding that the intrafamily adoption by A.M.B. was in the best interest of the children.

LAW AND ANALYSIS

The intrafamily adoption of a child by a stepparent is authorized by LSA-Ch.C. art. 1243, which provides:

A. A stepparent, stepgrandparent, great-grandparent, grandparent, aunt, great aunt, uncle, great uncle, sibling, or first cousin may petition to adopt a child if all of the following elements are met:

(1) The petitioner is related to the child by blood, adoption, or affinity through a parent recognized as having parental rights.

(2) The petitioner is a single person over the age of eighteen or a married person whose spouse is a joint petitioner.

(3) The petitioner has had legal or physical custody of the child for at least six months prior to filing the petition for adoption.

B. When the spouse of the stepparent or one joint petitioner dies after the petition has been filed, the adoption proceedings may continue as though the survivor was a single original petitioner.

C. For purposes of this Chapter "parent recognized as having parental rights" includes not only an individual enumerated in Article 1193,^[1] but also:

(1) A father who has formally acknowledged the child with the written concurrence of the child's mother.

(2) A father whose name or signature appears on the child's birth certificate as the child's father.

(3) A father, if a court of competent jurisdiction has rendered a judgment establishing his paternity of the child.

Unless parental rights have been terminated in accordance with Title X or XI, consent to the adoption of a child or relinquishment of parental rights is

¹ Article 1193 provides:

Unless rights have been terminated in accordance with Title X or XI, consent to the adoption of a child or relinquishment of parental rights shall be required of the following:

(1) The mother of the child.

(2) The father of the child, regardless of the child's actual paternity, if any of the following apply:

(a) The child is a child born of the marriage in accordance with the Louisiana Civil Code or its legal equivalent in another state.

(b) The father is presumed to be the father of the child in accordance with the Louisiana Civil Code or its legal equivalent in another state.

(3) The alleged father of the child who has established his parental rights in accordance with Chapter 10 of Title XI.

(4) The biological father of the child whose paternity has been determined by a judgment of filiation and who has established his parental rights in accordance with Chapter 10 of Title XI.

(5) The custodial agency which has placed the child for adoption, except that the court may grant the adoption without the consent of the agency if the adoption is in the best interest of the child and there is a finding that the agency has unreasonably withheld its consent.

required of the mother of the child and the father of the child. LSA-Ch.C. art. 1193. However, as provided in LSA-Ch.C. art. 1245, parental consent is unnecessary under certain circumstances:

A. The consent of the parent as required by Article 1193 may be dispensed with upon proof of the required elements of either Paragraph B or C of this Article.

B. When a petitioner authorized by Article 1243 has been granted custody of the child by a court of competent jurisdiction and any one of the following conditions exists:

(1) The parent has refused or failed to comply with a court order of support without just cause for a period of at least six months.

(2) The parent has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least six months.

C. When the spouse of a stepparent petitioner has been granted sole or joint custody of the child by a court of competent jurisdiction or is otherwise exercising lawful custody of the child and any one of the following conditions exists:

(1) The other parent has refused or failed to comply with a court order of support without just cause for a period of at least six months.

(2) The other parent has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least six months.

Thus, where a parent has either failed to comply with a court order of support without just cause for a period of six months, or the parent has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of six months, that parent's consent to adoption is unnecessary. See In re J.A.B., 2004-1160, p. 5 (La. App. 1 Cir. 9/17/04), 884 So.2d 678, 681, writ denied, 888 So.2d 848, 2004-2963 (La. 12/14/04).

The party petitioning the court for adoption carries the burden of proving a parent's consent is not required under the law. To constitute "just cause," a parent's failure to support, visit, or communicate with his children must be due to factors beyond his control. In re J.A.B., 2004-1160 at p. 5, 884 So.2d at 681. See also In re T.A.S., 2004-1612, p. 6 (La. App. 1 Cir.

10/29/04), 897 So.2d 136, 140. Although the initial burden of proving that a parent's consent to an adoption is not required lies with the party seeking the adoption, once a prima facie case is proven, the burden shifts to the nonconsenting parent to show that his or her failure was due to factors beyond his or her control. **In re T.A.S.**, 2004-1612 at pp. 5-6, 897 So.2d at 140.

However, even where the other parent's consent is obviated by failure to visit, the court must also consider what is in the best interest of the child in determining whether the adoption should proceed. In fact, the primary consideration in adoption proceedings is whether the adoption is in the best interest of the child. **In re T.A.S.**, 2004-1612 at pp. 6-7, 897 So.2d at 140; **In re J.A.B.**, 2004-1160 at p. 8, 884 So.2d at 683; **In re Miller**, 95-1051, p. 6 (La. App. 1 Cir. 12/15/95), 665 So.2d 774, 777, writ denied, 96-0166 (La. 2/9/96), 667 So.2d 541. See also LSA-Ch.C. art. 1255.

Whether an adoption is in a child's best interests must be decided on the unique facts of each case, and the trial judge is vested with vast discretion in making that determination. Because the trial judge is in a better position to make the best interests determination, an appellate court will ordinarily not second-guess such sensitive decisions. However, the trial judge's discretion is not absolute, as the court's decision is subject to reversal if found to be manifestly erroneous or clearly wrong. **In re Morris**, 39,523, p. 8 (La. App. 2 Cir. 1/26/05), 892 So.2d 739, 744.

The trial court determined that the provisions of LSA-Ch.C. art. 1245 had been satisfied with respect to J.B.A., and that consequently his consent to adoption was not required. The court issued the following oral reasons for judgment on this issue:

In the adoption matter which we have been taking evidence on relative to the applicability of Children's Code Article 1245, which to be applicable, in which parental consent would be unnecessary, the moving party must prove by clear and convincing evidence any one factor listed in 1245 (B) or (C): the refusal or failure to comply without just cause of [a] court order of support for at least six months; or refusal or failure to visit, communicate, or attempt to communicate without just cause for at least six months. Then the Court is instructed that to find the evidence to be clear and convincing means to demonstrate the existence of a disputed fact as highly probable, that is much more probable than its non-existence.

With those parameters taken into consideration in the instant case, by [J.B.A.]'s own testimony he's had no contact with the children since 2002. And he has paid no child support since 2002. Although, he fosters some reasons for his failures to have contact with the children and to pay child support, the Court is not impressed with his reasons.

Therefore, the Court finds that his failure to pay child support and his failure to have contact with the children in without just cause.

Therefore, the Court determines that Children's Code Article 1245 is applicable and parental consent of [J.B.A.] is not necessary.

With respect to the best interests of the children, the trial court gave the following oral reasons:

We are here today to complete the hearing on the adoption of these two children, [A.M.A.] and [J.H.A.]. I previously had ruled on this past Thursday regarding the natural father's failure to maintain support for the children and attempts to communicate with the child[ren] and such. We are here today dealing with the best interest aspect of the equation that I am to wrestle with in making a determination as to whether or not these children can be adopted by [A.M.B.].

Best interest evaluations, such as this, I will absolutely say are not easy. I have to look at all the factors and really weigh things out to make a determination as to what I think is truly in the best interest of these children. I have to look at a few things that have been exhibited over the years and the situation that I'm faced with here and now.

I realize [J.B.A.] is ready to re-establish a relationship with his children that has laid dormant for at least three years. I think one of the telling questions that was posed to [J.B.A.]'s mother - - I think it was his mother who indicated that she felt that he had become a lot more mature - - was the fact that that supposed maturity was not exhibited through positive actions, like paying child support arrearages when he had the money available to him to do that or maintaining a relationship when he had ample opportunity to do that.

I think that there's certainly issues that have been rightfully asked as to what do you tell these children if, in fact, they are adopted? I'm sure that [A.M.A.] already recognizes that [A.M.B.] is not her biological father because she has had in the past - - the distant past - - some relationship with [J.B.A.], whereas [J.H.A.] apparently does not even know who his biological father is. Certainly, if I approve this adoption, at some point in time that's going to be an issue that will have to be dealt with. But that, in and of itself, is not the one thing for me to look at to make a determination as to what is in the best interests of these children here, now, and into the future. Even though [A.M.A.] has had a prior relationship, or certainly knows who her biological father is, I'm sure she would acknowledge that [A.M.B.] has been filling the role of her father for the last several years. And I'm sure [J.H.A.] would have the same response if he was asked who his father is.

I wrestle with issues such as this because these children have now had the opportunity to bond with [A.M.B.]; [J.B.A.] has been out of their life for a long time, by his own doing, no one to blame but himself. I feel for his mother and his sister who have wanted to maintain their own relationship with these children. Although there was really not a whole lot of evidence, I never heard anybody, whether it was his aunt or his mother or his sister, say that they continued to try to maintain these contacts for his behalf. I don't know what transpired between [J.B.A.] and his family, but apparently they've all mended any fences that needed mending. But the truth of the matter is, they were the ones trying to maintain their own relationship with these children. I haven't heard anything that would indicate to me that [J.B.A.] was doing much of anything in that regard.

So it's a shame that their relationship to these children, in essence, flows through [J.B.A.], who, for apparently quite some time, for whatever reason, could have cared less. So his failure to maintain this relationship with his children has taken a lot away from them, namely, his family. But I don't think his family alone, in their desire to maintain a relationship with these children, is in fact the only thing that I'm to look at in trying [to] make a determination as to what is in their best interest.

I considered the fact that these children have, in essence, been raised by their mother and their step-father, and for all intents and purposes from everything that I've heard, it sounds as though they are doing quite well. It sounds as though the situation that they are in right now has been very beneficial to them. And it sounds as though what [J.B.A.] proposes of just being involved in their life on his own terms - - I'll fly them out to California every now and then; I'll fly back in and visit them when I can - - I don't know that that, in essence, would be in their best interest. I think their best interest would be best served by allowing [A.M.B.] to adopt these children and then he can officially be their father.

During the testimony of the biological father, J.B.A., he admitted that he was ordered by the court in 2002 to pay child support in the amount of approximately \$800.00 per month,² which he did not pay, and that there was an arrearage in excess of \$40,000.00. J.B.A. further admitted that in the summer of 2004, he "received" in excess of \$500,000.00. He also admitted that he spent some \$350,000.00 of those funds on remodeling his house, "miscellaneous things, loans, and gifts," which included an expensive wardrobe for himself from Saks Fifth Avenue. J.B.A. stated that although he would have had \$150,000.00 remaining out of which he could have paid his child support arrearage, the C.P.A. firm managing his finances embezzled these funds, leaving him with no means to pay the arrearage.

J.B.A. testified that when he first received the funds, he directed his C.P.A. firm to send \$10,000.00 to J.L.H.B. toward payment of the amount of child support owed. Although J.B.A. seemed to be aware that the payment was never received by J.L.H.B., he admitted that he failed to tender any further sums because he was waiting for his attorneys to calculate the amount of the arrearage.

With respect to his failure to visit his children, J.B.A. indicated there was a period of time when he did not know where J.L.H.B. lived; however, he admitted that he never looked in the phone book to attempt to locate her. J.B.A. also admitted that he knew where J.L.H.B.'s mother lived and how to contact her.

J.B.A. acknowledged that he had not seen his children since 2002. J.B.A. testified that he did send several letters to J.L.H.B. in 2003, and left

² The record of the divorce/custody proceeding between J.B.A. and J.L.H.B. was introduced into evidence. J.B.A.'s child support obligation was fixed by an April 12, 2002 judgment as follows: from June 14, 2001 through October 31, 2001 in the amount of \$554.00 per month; from November 1, 2001 through February 6, 2002 in the amount of \$862.00 per month; and, from February 7, 2002 and thereafter in the amount of \$826.40 per month. The judgment recognized that J.B.A. was in arrears in the amount of \$2,913.00 on that date.

the occasional note or gift on her doorstep. However, J.B.A. indicated that he made no concerted effort to re-establish his relationship with his children until 2005.

J.B.A. offered as justification for his neglect that he had been in a car accident in July of 2002, underwent a surgery in 2003, and five surgeries in 2004. J.B.A. further testified that he was unemployed during this time, on pain medication, undergoing rehabilitation, and suffering from depression.³ He testified, "I did let a lot of time lapse and, once again, it's nobody's fault but my own." J.B.A. further admitted that J.L.H.B. had in no way prevented him from seeing the children.

J.B.A. also testified that he hired an attorney in August of 2004 to help him regain visitation with his children, but the rule he filed with the court to implement visitation with the children was not filed until May of 2005. Prior to that time, J.B.A. admitted that he did not seek legal assistance to obtain visitation with the children even though his sister is an attorney and despite having been employed by an attorney.

J.B.A. also admitted that during a 2002 custody proceeding he was ordered to submit to a drug screening program, that he subsequently tested positive for cocaine, and that he was removed from the program for non-compliance.⁴ J.B.A. indicated that thereafter he submitted proof of compliance to his attorneys. J.B.A. also admitted that when he had been allowed unsupervised visitation with A.M.A., he took her to work with him

³ J.B.A. submitted no medical evidence into the record to substantiate his alleged disability.

⁴ June and July 2002 orders issued in the divorce/custody proceeding ordered supervised visitation by J.B.A. with A.M.A., and visitation with J.H.A. only in the home of the child's mother or maternal grandmother. (The July order restricted visitation with A.M.A. to J.L.H.B.'s home as well.) J.B.A. was also ordered to refrain from consuming alcohol or illegal substances during visitations, and ordered to immediately begin random drug screening in East Baton Rouge Parish, as well as to provide J.L.H.B. with information concerning that screening. Testing at any other facility was prohibited. J.B.A. was further found in contempt of court for failure to pay child support.

"[o]ccasionally" at George's, a restaurant and bar in Baton Rouge. J.B.A. admitted that on such occasions he left A.M.A. in the care of a man named "Chuck" who he knew "pretty well" and who was a "good guy."

J.B.A. testified that he currently lives in California where he works for an insurance adjusting company and goes to school. He testified that he moved to California to "change the situation" (he stated he wanted to get away from bad influences in Baton Rouge), and that he enjoys living in California more than in Baton Rouge. J.B.A. testified that he would like to have the children visit him there eventually.

J.B.A.'s sister testified concerning her relationship with the children, but admitted that she had not seen the children since Christmas of 2003, and that her phone calls to J.L.H.B. had gone unanswered since that time. She stated that she nevertheless continued to send them cards and gifts. However, J.B.A.'s sister gave no testimony regarding any efforts that J.B.A. made to maintain his relationship with the children, other than to state that he sent cards to them at times that she did not specify. J.B.A.'s sister testified that J.B.A. had a good relationship with her own children and that it would be in A.M.A. and J.H.A.'s best interest to have J.B.A.'s influence in their lives.

J.B.A.'s mother testified that although she lives in Texas, she made attempts to visit the children, and sent them gifts on birthdays and holidays. She last saw them at Christmas in 2003, when she said she brought them gifts from her as well as J.B.A. J.B.A.'s mother also testified that she believed it was in the children's best interest to maintain a relationship with their father.

J.B.A.'s aunt also testified that although she had not seen the children in four years, she had witnessed what a good relationship A.M.A. had

previously had with her father, and that she believed it to be important for the children to have J.B.A. in their lives.

The children's mother, J.L.H.B., testified that in 2002, the court ordered that J.B.A.'s visitation with the children be supervised at the home of her mother. She testified that J.B.A. last saw the children in October of 2002 for forty-five minutes. J.L.H.B. testified that her phone number was at all times listed in the telephone directory, and that her mother's address and phone number did not change. J.L.H.B. admitted receiving letters from J.B.A. in October of 2003 and in March of 2005. J.L.H.B. stated that she was unable to contact J.B.A. because his phone either was unanswered and/or was disconnected.

J.L.H.B. further testified that J.B.A.'s mother and sister visited the children in 2003 and brought with them gifts, which they indicated were from J.B.A. She also stated that J.B.A. sent a birthday card to A.M.A. in March of 2005 containing \$500.00, and that at Easter in 2005, he dropped off gifts for the children at her mother's house. J.L.H.B. also testified that J.B.A.'s mother sent gifts to the children from time to time.

J.L.H.B. testified that when J.B.A. had previously exercised visitation with A.M.A., there were problems with his drug abuse and that he frequently left the child with various people, which led her to seek supervised visitation. She indicated that after supervised visitation was imposed, J.B.A. stopped visiting the children, and the last time she saw him was before J.H.A.'s first birthday. J.L.H.B. testified that A.M.A. no longer asks about her father, and that J.H.A. does not know him.

J.L.H.B. testified that she has a great marriage with A.M.B. and that they have extensive and supportive family in St. Tammany Parish, where they live. J.L.H.B. also testified that A.M.B. is a "daddy" to the children.

J.L.H.B. also testified to the numerous family activities she and A.M.B. engage in with the children.

The children's stepfather, A.M.B., testified that he has no children of his own, but that he loves A.M.A. and J.H.A. "with all [his] heart and soul." A.M.B. testified that the family engages in many activities together and with their extended family. A.M.B. testified that they spend holidays and birthdays together and "do everything pretty big." A.M.B. stated that he rides bikes with the children, takes them to the park, participates in sports, cooks, shops, and does household chores with them. He also testified that he takes them to school, doctor's appointments, and other activities. A.M.B. was able to recite to the court the children's favorite foods and activities, as well as details about their school work. In conjunction with his testimony, A.M.B. identified family photographs of activities, birthdays, and holidays with the children, which were submitted into evidence. A.M.B. declared his commitment to be a parent to the children, even if his marriage to J.L.H.B. were to end. A.M.B. testified that the children consider him their "dad" and have never mentioned their biological father to him.

J.L.H.B.'s mother and a family friend were called to testify. Both of these witnesses confirmed the testimony of A.M.B. and J.L.H.B. as to their closeness as a family, and the loving relationship between A.M.B. and the children.

After a thorough review of the record presented in this appeal, we are unable to say the trial court manifestly erred in granting the stepparent adoption in this case. Although we recognize that the permanent termination of the legal relationship existing between a natural parent and a child is one of the most drastic actions that can be taken, the primary concern in such matters is to determine and insure the best interest of the child, which may

include termination of parental rights if justifiable statutory grounds exist and are proven. See State ex rel. J.M., 837 So.2d 1247, 1254 (La. 2003).

In this matter, a prima facie case was proven that J.B.A. failed to support his children for a period in excess of six months, and that he further failed to visit, communicate, or attempt to communicate with the children without just cause for a period exceeding six months. The burden of proof was thereby shifted to J.B.A. to establish that his failure was due to factors beyond his control. J.B.A. failed to meet this burden of proof.

Furthermore, it was proven to the satisfaction of the trial court that the adoption of A.M.A. and J.H.A. by their stepfather was in their best interests. The children were shown to have a close and loving relationship with A.M.B. In contrast, no significant or meaningful relationship was shown to exist between the children and J.B.A. Under the facts and circumstances of this case, we find no error in the trial court judgment.

CONCLUSION

For the reasons assigned herein, we affirm the judgment of the trial court granting the petition for adoption of A.M.B. All costs of this appeal are assigned to J.B.A.

AFFIRMED.