

SMITH & NWOKORIE

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Princeton S. Vallo,
Individually, and o/b/o
Prince Isaiah Holley,
(Minor, Deceased)

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Jalynn Faith Myles
(Minor)

SMITH & NWOKORIE

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Ezekial Owojori
(Deceased)

MUSGRAVE, McLACHLAN & PENN, LLC.

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Counsel for Appellees,
Gary M. Howell and
GMH Housing, LLC.

* * * * *

Before PITMAN, STEPHENS, and McCALLUM, JJ.

McCALLUM, J.

Princeton Vallo appeals a judgment sustaining the exception of no right of action and dismissing his lawsuit related to the death of his minor son, Prince Isaiah Halley. The premise for the exception was that Mr. Vallo, who was incarcerated during Prince's entire life, did not care for or support him and, accordingly, had abandoned his son as contemplated by La. C.C. arts. 2315.1(E) and 2315.2(E).

To put the issue differently, Mr. Vallo, with complete disregard of the future consequences, refused to circumscribe his own desires and entered into an act of procreation while facing a lengthy hard labor sentence. He does not believe that this behavior constitutes abandonment of the child who was born as a result. This court disagrees with his evaluation of the matter and we affirm the judgment of the trial court.

FACTS

Ashley Wilkins Owojori and her husband, Jeremiah Owojori, had one child together, Ezekiel Owojori, who was a minor. Mrs. Owojori had two minor children, Jalynn Faith Myles and Prince Isaiah Halley, from prior relationships. Albert Myles is the father of Jalynn.

Ashley, Jeremiah, Ezekiel, and Prince lived in an apartment in Ouachita Parish owned by GMH Housing, LLC. On the night of January 24, 2016, a fire caused by faulty wiring occurred at the apartment. Tragically, all four apartment occupants later died from severe injuries as a result of smoke inhalation.

On April 20, 2016, Albert Myles, who had custody of Jalynn, filed a wrongful death suit on her behalf against XYZ Insurance Company and Gary Howell, who was GMH's agent. Mr. Myles, who asserted that Jalynn

was her mother's only living descendant, later amended his petition to add GMH Housing as a defendant.

On November 22, 2016, Mr. Vallo, individually and on behalf of Prince, filed suit under a separate suit number against GMH, Howell, and XYZ Insurance. This petition was amended on February 22, 2017, to add Samuel Owojori, Jeremiah's father, as a plaintiff to recover damages for the deaths of Jeremiah and Ezekiel. The lawsuits were consolidated on September 1, 2017.

Mr. Myles amended his petition on August 31, 2017, to allege that Jalynn was the sole surviving sibling of Ezekiel, which made her the proper person to bring an action seeking wrongful death and survival damages resulting from Ezekiel's death.

Arguing that Jalynn had no right of action to bring a wrongful death or survival claim related to Ezekiel's death, Samuel filed an exception of no right of action against the claims in Mr. Myles's amended petition. Mr. Myles then filed an exception of no right of action against Samuel's claims. He contended that Samuel lacked the right of action to bring claims on behalf of either Jeremiah or Ezekiel because Mrs. Owojori was the last of the four victims to die. He further contended that upon Mrs. Owojori's death, Jalynn, as her only surviving child, acquired the right to assert all claims belonging to Mrs. Owojori.

The trial court sustained Mr. Myles's exception of no right of action, and denied Samuel's exception of no right of action. Samuel's claims, individually and on behalf of his son and grandson, were dismissed. This Court affirmed the judgment. *Myles v. Howell*, 52,460 (La. App. 2 Cir. 1/16/19), 265 So. 3d 22.

On April 11, 2018, Mr. Myles filed an exception of no right of action against Mr. Vallo's claims. He asserted that because Mr. Vallo had abandoned Prince, he should be considered to have predeceased Prince under the terms of La. C.C. art. 2315.1(E) and 2315.2(E). Article 2315.1 sets out the order of claimants for survival actions. Article 2315.2 delineates the order of claimants for wrongful death actions. Subparagraph (E) in both articles states, "For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him."

The trial court rendered judgment sustaining Mr. Myles's exception of no right of action and dismissing Mr. Vallo's claims, individually and on behalf of Prince. The exception was sustained on the grounds of abandonment as well as the failure by Mr. Vallo to couple an avowal action with his lawsuit for damages. Mr. Vallo appeals the judgment.

DISCUSSION

An action can be brought only by a person having a real and actual interest which he asserts. La. C.C.P. art. 681. The function of an exception of no right of action is to determine whether a plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. La. C.C.P. art. 927; *Turner v. Busby*, 2003-3444 (La. 9/9/04), 883 So. 2d 412. The exception of no right of action serves to question whether the plaintiff in the particular case is a member of the class of persons that has a legal interest in the subject matter of the litigation. *Id.*

The exception of no right of action presents a question of law; therefore, an appellate court conducts a *de novo* review of the trial court's

action on this exception. *Waggoner v. America First Ins.*, 42,863 (La. App. 2 Cir. 1/16/08), 975 So. 2d 110.

No definition of “abandoned” is provided in either art. 2315.1 or 2315.2. However, a definition of “abandoned” is given in La. C.C. art. 3506, which provides general definitions of terms that are used in the Civil Code. Article 3506 states, in relevant part:

Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:

.....

3. Abandoned.--In the context of a father or mother abandoning his child, abandonment is presumed when the father or mother has left his child for a period of at least twelve months and the father or mother has failed to provide for the child’s care and support, without just cause, thus demonstrating an intention to permanently avoid parental responsibility.

Mr. Vallo’s deposition was taken by defendants on March 15, 2017, at Hunt Correctional Center in St. Gabriel, Louisiana, where he had been incarcerated since July of 2016. This deposition was received by the trial court as an exhibit in support of the exception.

Mr. Vallo asserted that he was incarcerated when Prince was born on November 17, 2010. He stated that he had been sentenced to a term of 11 years for a conviction of possession with the intent to distribute. He was incarcerated at Allen Correctional Center in Allen Parish at the time of the fire.

Mr. Vallo was never married to Mrs. Owojori. He claimed that he was able to maintain contact with his son by exchanging letters with Mrs. Owojori and had kept all of the letters from her. However, no letters were introduced at the hearing on the exception. Mr. Vallo also claimed that he spoke with his son over the phone about once a week. According to Mr.

Vallo's testimony, Prince, who was deaf, would mumble during the conversations. Mrs. Owojori, who lacked a car while living in Monroe, did not bring Prince to visit his father in prison.

Mr. Vallo was in prison for the entirety of Prince's short life and never provided for Prince's care and support. He could barely support himself before going to jail, as he claimed that he sold drugs to survive and to support his own habit. According to Mr. Vallo, Mrs. Owojori lacked transportation and money. Thus, the un rebutted deposition testimony established that Mr. Vallo abandoned Prince, triggering the provisions of La. C.C. arts. 2315.1(E) and 2315.2(E).¹

Citing the abandonment provisions found in the Children's Code for termination of parental rights cases, Mr. Vallo argues that Mr. Myles was required to prove his abandonment of Prince by clear and convincing evidence. We find his argument to be unpersuasive.

La. Ch. C. art. 1015 sets forth the statutory grounds by which a court may involuntarily terminate the rights and privileges of parents. The grounds include:

(5) 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.

(c) As of the time the petition is filed, the parent has failed to maintain significant contact with the child by visiting him or communicating with him for any period of six consecutive months.

¹ Because we conclude that the exception of no right of action was properly granted on this ground, it is unnecessary to consider the additional ground related to an avowal claim.

A petitioner bears the burden of establishing each element of a ground for termination of parental rights by clear and convincing evidence. La. Ch. C. art. 1035(a).

While the Children's Code may be somewhat instructive in this case, we also note that the case before us arises in a different context. The heightened burden of proof is inapplicable to this proceeding. First, it is unnecessary to even look to the Children's Code as this is not a termination of rights proceeding, and abandonment is defined for our purposes in the Civil Code. We note that the circumstances for abandonment under the Children's Code are even broader than what is found in the Civil Code, as the failure to maintain significant contact with the child is included. A finding of abandonment based upon six consecutive months of avoiding parental responsibility is also allowed under the Children's Code.

Second, this onerous burden of proof is a recognition of what is at stake in a proceeding to terminate a parent's rights. The termination of parental rights is a severe and terminal action. *State ex rel. B.H. v. A.H.*, 42,864 (La. App. 2 Cir. 10/24/07), 968 So. 2d 881. Parents have a natural, fundamental liberty interest to the continuing companionship, care, custody and management of their children warranting great deference and vigilant protection under the law, and due process requires that a fundamentally fair procedure be followed when the state seeks to terminate the parent-child legal relationship. *State ex rel. D.L.R.*, 2008-1541 (La. 12/12/08), 998 So. 2d 681; *State ex rel. K.G.*, 2002-2886 (La. 3/18/03), 841 So. 2d 759. In a termination of parental rights case, the interests of the parent must be

balanced against the child's interest, but the child's interest is paramount.

State In Interest of C.F., 2017-1054 (La. 12/6/17), 235 So. 3d 1066.

La. C.C. arts. 2315.1(E) and 2315.2(E) act as barriers to a parent who failed during the child's life to take parental responsibility from bringing an action to benefit from the child's death. These limitations on a parent's right to sue obviously pale in comparison to what could be lost in a termination of parental rights case. Lamentably, this is not a case involving termination of parental rights, would that it were.

Mr. Vallo next argues that a finding of abandonment is precluded because he established an affirmative defense of just cause in that his incarceration during Prince's life was the cause of his inability to provide care and support. He further argues that this condition was temporary, as he would have been in a position to provide care and support upon his release from jail. Thus, he maintains that he did not permanently avoid his responsibilities as a parent. He urges that even though he had limited resources to provide for Prince's care and support, he still maintained a relationship with Prince.

Imprisonment is not an excuse to escape parental obligations. *State In Interest of B.J.*, 48,857 (La. App. 2 Cir. 1/15/14), 135 So. 3d 777. Notably, it is not a defense for failing to support one's child in a termination-of-parental-rights case particularly because incarceration results from one's own actions. *Id.*

Mr. Vallo maintains that while incarceration is not a justification, his case is unique because he was incarcerated before Prince was even born. We take a contrary view as his situation is even more egregious than the parent who is confined to prison after a child is born. At the hearing on the

exception, Mr. Vallo's attorney informed the trial court that Prince was conceived while Mr. Vallo was in prison. Thus, Mr. Vallo fathered a child under circumstances that any reasonable male would recognize as precluding his ability to support his offspring.²

Finally, Mr. Vallo also argued to the trial court that the issue of abandonment in terms of the Children's Code cannot be raised after the child's death. This argument is baseless. First, Mr. Vallo is confusing abandonment in the context of a termination of parental rights case with abandonment in regard to who is the proper party to bring a wrongful death or survival action. Second, there is no such prohibition indicated in either art. 2315.1(E) or 2315.2(E). Finally, we note that in *Stewart v. Gordon*, 2017-812 (La. App. 3 Cir. 10/3/18), 2018 WL 4858748, __ So. 3d __, the Third Circuit remanded to the trial court for a determination of whether, for purposes of La. C.C. arts. 2315.1(E) and 2315.2(E), a mother had abandoned her minor children who had been killed in an accident.

CONCLUSION

For the foregoing reasons, we conclude that the exception of no right of action was properly sustained. At Mr. Vallo's costs, the judgment dismissing his claims, individually and on behalf of Prince, is **AFFIRMED**.

² We use the term "fathered" solely in its biological sense.