

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-201

OCTOBER TERM, 2007

In re D.P., D.P. & S.P., Juveniles	}	APPEALED FROM:
	}	
	}	
	}	Franklin Family Court
	}	
	}	
	}	DOCKET NO. 43/45/46-3-98 Frjv

Trial Judge: Linda Levitt

In the above-entitled cause, the Clerk will enter:

Mother and father individually appeal the family court’s decision denying their motion to modify a disposition order concerning three of their children. We affirm.

Mother and father are the parents of four children, three of whom are the subject of this appeal. In 1998, the State filed a petition alleging that the four children, L.P., D.P., D.P., and S.P., were children in need of care or supervision (CHINS) because of the parents’ longstanding domestic violence and drug problems. The original disposition order allowed the children to remain in the parents’ care, with the Department for Children and Families (DCF) providing protective supervision. In January 2001, in response to the State’s motion to modify the disposition order, the parties stipulated to a new disposition order making the maternal grandmother the children’s guardian pending the parents’ compliance with case plan goals. In order to be reunited with the children, the parents agreed that they would have to participate in domestic-violence and substance-abuse counseling, abstain from the use of alcohol and drugs, establish and maintain support systems and sponsors with respect to their substance abuse problems, maintain a smoke-free environment because two of the children have asthma, monitor the children’s medical care, work with communication specialists, maintain stable living quarters, attend educational meetings for the children, and avoid criminal activity. The projected time for reunification was before the commencement of the 2001-2002 school year.

Unfortunately, the parents were unable to attain these goals, and the projected reunification period passed. In October 2004, father filed a motion to modify the disposition order to allow him to assume custody of the children. Following a hearing, the family court denied the motion in February 2005, finding that father had failed to comply with the disposition case plan in several respects. In the spring of 2006, the parents and grandmother agreed that

L.P., then fourteen years old, should live with mother. In November 2006, the family court returned custody of L.P. to mother.

Mother and father then requested that custody of the remaining three children be transferred to them. Mother indicated that father could take the two older boys, D.P. and D.P., while she took the younger girl, or that, in the alternative, she could take all three children. Following permanency planning hearings in December 2006 and March 2007, the family court denied the parties' motion to modify, concluding that the parents had failed to demonstrate a substantial change of circumstances warranting modification of the disposition order. The court found that neither of the parents had satisfied the case plan goals stated in the 2001 disposition order and that their situation was slightly worse than in 2005 when the court denied father's previous motion to modify. The court noted that mother was jobless and homeless and had no sponsor to help in remaining sober as required by the 2001 order. While acknowledging that mother had recently separated from her abusive boyfriend, the court also noted that mother had a history of breaking up with but then getting back together with the boyfriend. As for father, the court noted that as recently as 2005 he had been convicted of vehicle-related offenses involving alcohol, that he had had also been charged with fraud, that he had been terminated from substance-abuse counseling for failure to attend, that he had not attended domestic-abuse classes, and that he had had multiple residences and inconsistent employment in the last few years. The court also noted that neither parent had demonstrated an interest in the children's education or health issues, and that neither parent could provide a smoke-free home, which was critical because of the older boys' asthma. In sum, the court concluded the parents' unstable, dysfunctional lifestyle would cause the children to lose the stability, care, and consistency that the maternal grandmother had provided them over several years.

Father and mother appeal the family court's decision, and the children join the State in opposing the appeal. Mother argues that the family court's finding of a lack of changed circumstances and its best-interests analysis reflects a serious misapprehension of the evidence. According to mother, because drug use caused her to neglect and lose custody of her children, the fact that she has been drug-free for three years demonstrates a substantial change of circumstances. She contends that the real issue is whether she has overcome obstacles to adequate parenting, not whether she has complied with every nuance of the case plan. She contests the court's findings concerning her joblessness, homelessness, and relationship with an abusive boyfriend, noting that she is in the process of obtaining subsidized housing, that she has left her abusive boyfriend, and that the State has not demonstrated that her lack of employment is relevant to the best interests of the children. As for the court's best-interests analysis, mother emphasizes that L.P. has been living with her since March 2006.

For his part, father argues that he and mother demonstrated that their own circumstances had substantially improved of circumstances by showing both and that grandmother's health and ability to deal with teenagers. Father argues that the grandmother's obesity prevents her from engaging in physical activities with the children and encourages a sedentary lifestyle. On this point, he further argues that the family court erred by denying his motion to obtain medical records concerning the grandmother's health. He also argues that the grandmother has difficulty dealing with teenagers, as evidenced by her agreeing to send L.P. to her mother and complaining about the attitude of one of the older boys. In contrast, he claims that his circumstances have

improved substantially, stating that he has remained drug-free for four years and has custody of a young daughter from another relationship.

Before considering these arguments, we emphasize the applicable standard of review. The family court “is permitted to consider modification of the court-approved goal only upon a showing of a substantial and material change of circumstances.” In re A.G., 2004 VT 125, ¶ 17, 178 Vt. 7 (citing 33 V.S.A. § 5532). “The party seeking modification bears the burden of demonstrating the requisite change of circumstances, and must show how the proposed change serves the child’s best interests under the criteria of [33 V.S.A.] § 5540.” Id. “The decision on modification will be upheld if the findings are not clearly erroneous and the conclusions are supported by the findings.” Id., ¶ 19. More specifically, the family court’s decision as to whether the moving party has met the threshold requirement of demonstrating substantially changed circumstances rests within its sound discretion and will not be set aside unless the moving party shows that the court exercised its discretion based upon clearly untenable grounds or to a clearly unreasonable extent. Id.; In re R.F., 135 Vt. 275, 276 (1977). As the reviewing court, we may not reweigh the evidence or make independent findings or conclusions; rather, we must “rely on the factfinder’s assessment of credibility of the witnesses and weighing of the evidence.” In re N.H., 168 Vt. 508, 512 (1998).

In light of these standards and upon review of the record, we find no basis for overturning the family court’s decision. As for mother’s arguments, her drug use may have been the ultimate cause of her losing her children, but there were a variety of issues she had to address, as set forth in the case plan, to put herself in a position to resume her parental duties. The court relied upon her continued lack of progress in several of these areas, and the record supports the court’s findings. With respect to mother’s challenge to specific findings, mother herself testified that her housing situation was still uncertain and not finalized. Further, mother’s relatively recent separation from an off-again on-again boyfriend of six years did not guarantee the safety of the children, given her propensity to renew the relationship. Finally, although mother testified to certain steps she took to reduce smoke in her home, she was still smoking and living with persons who smoked, which might have harmed the asthmatic boys. All in all, the court found that mother’s circumstances had not improved substantially, and the record supports this finding.

Father’s arguments are also unavailing. As the family court stated in rejecting the parties’ motion to compel production of the grandmother’s medical records, the grandmother’s health issues have minimal relevance in the context of this case, given the significant obstacles parents face before they are able to resume parental duties. In claiming a substantial change of circumstances with respect to the grandmother, father states, in general terms, that the grandmother leads an unhealthy sedentary lifestyle and that she has trouble dealing with teenagers. Without specific evidence of the negative impact that these alleged deficiencies have had on the children’s lives, such general statements do not support a claim of substantially changed circumstances. Furthermore, like mother, father has failed to demonstrate that his own circumstances have changed substantially with respect to his ability to care for his children. Father claims to be drug free over a period of years, but he was arrested and convicted for alcohol-related driving offenses in 2005, as well as for fraud for forging a document concerning a vehicle. These are very serious offenses, given father’s five previous convictions for driving while intoxicated and the lifetime suspension of his driver’s license.

In short, neither mother nor father has demonstrated that the family court erred by concluding that both mother and father failed to address satisfactorily significant impediments to their resumption of parental duties and further failed to demonstrate substantially changed circumstances warranting a best-interests analysis of the children's situation. In essence, mother and father ask this Court to reweigh the evidence and find changed circumstances. This we will not do.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice