

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-073

MAY TERM, 2017

In re O.K., Juvenile	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 197-8-15 Cnjv
		Trial Judge: Dennis R. Pearson

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

Father appeals from the termination of his parental rights to his son O.K. We affirm.

O.K. was born on July 9, 2015. Father has been incarcerated since before O.K. was born. On July 31, 2015, the Department for Children and Families (DCF) removed O.K. from his mother's care after she allegedly shook and injured him. O.K. was placed with a foster family with whom he has lived continuously since being removed from mother's care.

DCF filed a petition to have O.K. adjudicated a child in need of care or supervision (CHINS) on August 3, 2015. At a hearing held September 2, 2015, mother admitted the merits of the CHINS petition. The court approved a case plan with concurrent permanency goals of reunification with mother or adoption. Mother failed to make progress on her case plan goals, and in March 2016, DCF filed a petition to terminate parental rights.

Father was identified as O.K.'s putative biological father at the outset of the case. The court ordered a paternity test in October 2015. DCF believed that father was incarcerated in New York but had difficulty determining what facility he was in. Multiple court mailings sent to father's last known address were returned as undeliverable. DCF eventually located father at Bare Hill Correctional Facility in Malone, New York. Genetic testing results filed with the court in June 2016 confirmed father's paternity.

The termination of parental rights hearing was held in January 2017. Both parents participated in the hearing, and each was represented by an attorney. Mother voluntarily relinquished her parental rights at the hearing. Father participated in the hearing by telephone from the correctional facility. He testified that he was incarcerated for violating the terms of his probation for a ten-year sentence in New York for arson. He expected to be released in November 2017. Father stated that he has never met or had any contact with O.K. He testified that he first learned of O.K. when he was given the paperwork for this case on August 1, 2016.

The court issued a written decision following the termination hearing. The court first noted that it was uncertain whether modification of an order was really at issue, since placing O.K. in father's care had never been a goal of any disposition order in the case. Regardless, the court

proceeded to analyze whether there had been a material change in circumstances since approval of the controlling case plan. The court found that father had taken no concrete steps toward becoming O.K.'s parent since learning that he was O.K.'s father. The court acknowledged that father was limited from taking such steps due to his incarceration, but found that father's incarceration and the resulting consequences were the result of father's own choices and were not the result of factors beyond his control. It concluded that there was clear and convincing evidence that father had stagnated in his ability to parent O.K.

Proceeding to the best-interests analysis, the court found that father and O.K. had no relationship and that father had never played a role, positive or otherwise, in O.K.'s life; that O.K. was well-adjusted to and thriving with his current foster parents, who wished to adopt him; that there was no evidence that father would be able to establish a stable home or to care for O.K. upon his release from prison; and that father's lack of contact with O.K. was due to his own actions and choices. Based on these factors, the court found that it was in O.K.'s best interests to terminate father's parental rights.

Father does not challenge any of the court's factual findings on appeal. Rather, he argues that DCF's failure to notify him in a timely fashion of O.K.'s existence and the termination proceedings were "factors beyond his control." Father relies on In re S.R., 157 Vt. 417, 421-22 (1991), in which we recognized that "stagnation caused by factors beyond the parents' control could not support termination of parental rights." According to father, DCF's dilatory behavior deprived him of a meaningful opportunity to advocate for reunification efforts.

Father's argument is without merit. In determining whether there had been a material change in circumstances, the court considered the fact that father reported to the court via handwritten letter that he was unaware of O.K. until August 2016. However, he gave a DNA sample in early June 2016 so it is likely he became aware of O.K. at that time. The court focused solely on father's actions after he learned of O.K.'s existence and the ongoing termination proceedings. As the court stated, there is no evidence that father attempted during the following months to work with DCF to establish a relationship with O.K. or to take concrete steps towards becoming O.K.'s parent. Although father would be limited in what he could do due to his incarceration, there is no evidence that he tried to do anything. Further, as the court properly noted, father's incarceration was a matter entirely within his control. In re K.F., 2004 VT 40, ¶ 12, 176 Vt. 636 (holding that "father bears sole responsibility for his frequent incarceration, his failure to maintain consistent contact with SRS, and his lack of a bond with" child). These factors were sufficient to support a finding of stagnation.

Moreover, any error in the court's stagnation analysis was harmless. Other facts in the record amply supported a finding of changed circumstances—namely, the voluntary relinquishment of parental rights by mother, the only parent who was the subject of reunification efforts. See In re D.C., 2012 VT 108, ¶ 19, 193 Vt. 101 (holding, in appeal by mother, that changed circumstances existed where initial disposition order called for reunification with father, who subsequently relinquished parental rights, and grandmother who had volunteered to take custody of child had died).

Father argues that DCF dismissed him as a parent solely because he was incarcerated. Although incarceration alone does not necessarily justify termination of parental rights, a parent's incarceration is a relevant consideration in the statutory best-interests analysis. In re D.S., 2014 VT 38, ¶¶ 26, 29, 196 Vt. 325. The court must also consider "the nature of the relationship between the parent and child before incarceration, the terms of the incarceration, the needs of the child, and

the effect of incarceration on the parent's ability to remain involved with the child and to be in a position to resume parental duties within a reasonable period of time from the perspective of the child." In re M.W., 2016 VT 28, ¶ 22, __ Vt. __. Here, the court found that (1) father had never provided parental care or even had any contact with O.K.; (2) father had been incarcerated for O.K.'s entire life and would continue to be incarcerated until November 2017, and would thus miss the opportunity to be part of O.K.'s life during his first two years, a critical time for forming a parent-child attachment; (3) O.K. had bonded to his foster family and was thriving in their care; and (4) there was no evidence that father could establish a stable home and provide care for himself and O.K. following his incarceration. These findings are supported by the evidence and in turn, support the termination order.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice