

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

ENTRY ORDER

**VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE**

SUPREME COURT DOCKET NO. 2009-004

APR 16 2009

APRIL TERM, 2009

In re J.B., Juvenile

} APPEALED FROM:
}
} Caledonia Family Court
}
} DOCKET NO. 60-9-08 Cajv

Trial Judge: Howard E. VanBenthuyzen

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

Father appeals from the family court's order adjudicating son J.B. as a child in need of care or supervision (CHINS) due to medical neglect. He argues that the court's key findings are not supported by the evidence, and that the court erred by failing to enter a visitation order. We affirm.

J.B. was born in October 1995. He was taken into emergency custody of the Department for Children and Families (DCF) in September 2008 based on an allegation of medical neglect. Following a hearing, the court adjudicated J.B. CHINS and it made the following findings. J.B. has a condition called encopresis, which is a chronic inability to control one's bowels that results in the leakage of stool. This condition is very treatable, but if not properly treated, it can create numerous problems, including health hazards and social ostracization. Generally, treatment involves the use of anti-constipation medication, as well as increasing the amount of fiber in the diet and allowing for regular bathroom breaks. When a child has this condition, the success of a treatment plan depends heavily on a parent's consistent involvement, insight, cooperation, and encouragement. If the disease does not respond to or improve with this standard treatment, then brief hospitalization is often needed to allow the patient to return to a normal intestinal condition.

Dr. Price has been J.B.'s doctor since birth, and he has been treating J.B. for encopresis since 2004. Consistent with the standard treatment plan, he prescribed a laxative for J.B., regular bathroom breaks, and a toileting plan. He also stressed the need for and the importance of family support. Notwithstanding this plan, J.B. showed no improvement between 2004 and 2007. It was highly unusual for this condition to persist for three years at the high and severe level seen in J.B., and Dr. Price recommended that J.B. be hospitalized for the next step in treatment. Father failed, refused, or neglected to permit that step to be taken. Father did meet with a gastroenterologist recommended by Dr. Price, who similarly advised hospitalization. Father failed to take J.B. to the follow-up appointment, however, and he again declined to allow J.B. to be treated in the hospital. J.B. did not see Dr. Price again until September 2008.

Between 2004 and 2007, father reported to Dr. Price that the child's condition was improving. Father did not allow Dr. Price to contact school officials directly, however, which

prevented Dr. Price from learning that J.B.'s condition was not in fact improving. J.B. continued to leak stool at school, he struggled with an odor problem, and he was occasionally noncompliant with the treatment schedule. Dr. Price's examinations of J.B. also showed that J.B.'s bowels were full of stool. The court found that if father had allowed communication between Dr. Price and the school, Dr. Price would have learned that J.B.'s condition was worsening, that he was increasingly isolated from other children, and that the school, its students, and parents were greatly discomfited by the situation.

The court found that J.B.'s medical condition made him unpopular at school, it presented a health risk to himself and others, and it put an unnecessary burden on school authorities. Father did not ensure that J.B. was clean when he came to school or that his soiled clothing was removed from his backpack; he did not cooperate in obtaining counseling for the child; and he generally failed to completely follow through with treatment suggestions, including the provision of healthy foods. J.B.'s condition worsened in the late summer of 2008, and it became medically clear that to avoid further physical damage and emotional problems, J.B. needed to move to the next stage of treatment. J.B. was taken into custody on an emergency detention order in late September 2008. J.B. has since been treated at the hospital for his condition, and DCF has executed releases allowing the school to communicate with J.B.'s treatment providers. J.B.'s medical condition has since improved significantly, as has his performance at school. He arrives at school clean and odor-free, and he has been following the treatment plan and spending less time in the bathroom. His social interactions and his attitude have improved as well.

Based on these and other findings, the court concluded that J.B. was CHINS at the time that the petition was filed due to medical neglect. It reasoned that for J.B.'s condition to have gone unresolved for four years was highly unusual and completely avoidable. Although J.B. had a fine pediatrician making appropriate treatment suggestions for J.B., the combination of J.B.'s occasional resistance and father's chronic failure to cooperate with either medical providers or the necessary treatment plan combined to unnecessarily prolong J.B.'s medical and emotional suffering. For these and other reasons, the court concluded that J.B. was CHINS and continued him in DCF custody. Father appealed from this order.

Father argues that the court's key factual findings are unsupported by the record. Specifically, he challenges the court's findings that: (1) father kept Dr. Price "in the dark" about J.B.'s condition by refusing to allow him to communicate directly with school officials, which forced Dr. Price to rely on father's misrepresentations; (2) father failed to follow through with school treatment plans; and (3) father refused to allow the child to go to the hospital to treat his condition.

We find no error. As an initial matter, we reject father's contention that the court's decision rested solely on the three findings cited above. The court's decision is replete with findings about father's consistent refusal to fully address J.B.'s medical needs, which led to unnecessary suffering for the child. See 33 V.S.A. § 5102(3)(B) (defining child in need of care or supervision as a child who is without proper medical care or other care necessary for his well-being); see also *id.* § 4912(2) (abused or neglected child is one whose physical health or welfare has been harmed or is at substantial risk of harm by acts or omissions of parent). In any event, there is also credible evidence in the record to support the findings identified by father. See *In re*

M.B., 162 Vt. 229, 238 (1994) (Supreme Court will affirm the family court's findings unless they are clearly erroneous, and affirm family court's conclusion if supported by the findings).

Father does not dispute that he reported to Dr. Price that J.B.'s condition was improving when in fact, it was not. He suggests instead that the doctor was not really "in the dark" about J.B.'s condition because the doctor's x-rays showed that J.B.'s bowels were full. This argument is unpersuasive. Dr. Price sought to monitor J.B.'s progress at school so that he could evaluate the success of the treatment plan. The record shows that, with one minor exception, father did not allow Dr. Price to contact school officials directly. It necessarily follows that Dr. Price had to rely on father's representations about J.B.'s day-to-day progress. Indeed, Dr. Price stated at trial that he "based all of [his] conclusions about [J.B.'s] improvement or lack of improvement . . . on what [father] told [him]." Of course, Dr. Price conducted his own examination of the child when he came in for appointments, but that does not undermine the thrust of the court's finding, which is that father's refusal to cooperate was impeding J.B.'s treatment. In fact, Dr. Price testified that the conflicting nature of the information—father's reports as opposed to his own observations—caused him consternation, and that it also led the gastroenterologist to believe that further evaluation was warranted. There is ample evidence to show that Dr. Price was forced to rely on father's reports, and that father's behavior interfered with Dr. Price's ability to assess the success of J.B.'s treatment plan.

Father argues that the court erred in finding that he failed to follow through with various "school treatment plans." He complains that the court's statement was based on speculation, and that the school treatment plans were not medical treatment plans and thus, his failure to follow through could not be considered medical neglect. The record belies father's assertions. Much of the school's oversight of J.B.'s behavior—such as ensuring that he took his medication as well as encouraging him to take frequent bathroom breaks—was implemented pursuant to a medical treatment plan. School officials testified that father did not always provide the school with J.B.'s medicine. Father did not send J.B. to school with healthy food, nor did he complete paperwork that would have allowed J.B. to have a free lunch at school. He did not ensure that J.B. was clean, or that his soiled garments were removed from his school backpack. He refused to allow the school to implement a coordinated services plan, which was designed to help meet the family's needs. He refused to allow school officials to contact Dr. Price, which hampered their ability to address J.B.'s needs at school. The record also shows that father resisted the school's efforts to closely monitor J.B.'s progress. There is ample evidence to show that father did not follow through with "school treatment plans," which had a negative effect on his son's well-being.


Father next argues that the court erred in finding that he refused to allow J.B. to enter the hospital for the next stage of treatment. Father asserts that in the fall of 2007, Dr. Price was still prescribing medication for J.B. and that there was no evidence to show that Dr. Price told father that hospitalization was necessary and that father refused. The record indicates otherwise. Dr. Price testified at trial that hospitalization was appropriate in severe cases, and that J.B.'s case was highly unusual and severe. Given the child's lack of progress over three years, it became apparent to Dr. Price by the fall of 2007 that hospitalization might be appropriate. He discussed this with J.B., who indicated that he did not want to be hospitalized. It is certainly reasonable to infer that, having discussed this option with J.B., Dr. Price also discussed hospitalization with father. After September 2007, however, father stopped bringing J.B. to see Dr. Price. The

record also shows that a gastroenterologist recommended that the J.B.'s bowels be emptied, but father similarly failed to follow up with this doctor. Even if the record did not show that a specific recommendation of hospitalization was made and refused, any error would be harmless. The record plainly shows that father's failure to follow up with Dr. Price or with the gastroenterologist resulted in J.B. continuing to suffer for another year from this highly treatable medical condition.

Finally, we reject father's assertion that the court erred by failing to enter a written visitation order as part of its CHINS decision. It appears that the visitation request was the subject of a motion that was discussed at the close of the merits hearing. Father sought to establish a formal visitation schedule rather than continuing to arrange visits himself with J.B.'s foster mother. DCF was not opposed to a formal visitation schedule. The court stated on the record that it encouraged a "prudent, reasonable and safe increase in [father's] contact with the child, consistent with the child's therapeutic needs, and medical needs post-surgery." It found that a formal schedule would likely be easy to implement and that it should provide for at least weekly visits with a transition to twice weekly if that could be accommodated. Father apparently believes that the family court should have included the specific days for visitation in its CHINS decision. We agree with the State, however, that no fundamental error occurred. The court could have reasonably concluded that the parties should work out a specific weekly schedule suited to their needs. If the omission of a weekly schedule was an oversight, it can be easily remedied in the family court. There is no indication from the record that father is being denied visitation or that he is somehow precluded from submitting his proposed visitation schedule to the family court for its approval.

Affirmed.

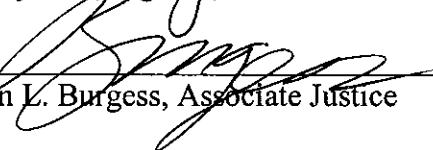
BY THE COURT:



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice