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ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-368

JANUARY TERM, 2007

C.K. and M.K., Juveniles	}	APPEALED FROM:
	}	
	}	
	}	Franklin Family Court
	}	
	}	
	}	DOCKET NO. 18/20-1-05 Frjv

Trial Judge: James R. Crucitti

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

Father appeals the termination of his parental rights with respect to his two sons, C.K. and M.K. We affirm.

C.K. and M.K., the youngest of mother and father=s five children, were born in September 1991 and November 1996, respectively. Father has been incarcerated since October 2004 after being convicted of

sexually assaulting his daughter, who was a minor at the time. He pled guilty to charges of sexual assault on a minor, lewd and lascivious conduct, escape, violation of conditions of release, and domestic assault. His minimum release date is October 9, 2007, with a possibility that he could be released ninety days earlier. The children were living with their mother in January 2005 when they were placed in the custody of the Department for Families and Children (DCF) pursuant to an emergency order. Mother admitted to a petition alleging that the children were in need of care and supervision (CHINS). Except for one sentence involving one of his daughters, father also admitted to the petition. Following the disposition hearing, the disposition plan=s overall goal was for the children to be reunited with their mother in a safe, drug free, and permanent home. The plan also anticipated further parent-child contact with father.

At the permanency hearing held in January 2006, DCF sought termination of both parents= residual parental rights with respect to C.K. and M.K. The three older children had either reached majority or were preparing for legal independence. Mother voluntarily relinquished her parental rights to the boys, and the family court terminated father=s parental rights, concluding that there had been a substantial change in circumstances and that termination of father=s rights was in the children=s best interests under the criteria set forth in 33 V.S.A. ' 5540. On appeal, father argues that (1) there was no substantial change of circumstances; (2) the family court violated his due process rights by not allowing him to call fourteen-year-old C.K. as a witness in the termination hearing; and (3) termination of his parental rights is not in his sons= best interests.

Father first argues that the State failed to make a threshold showing of substantial changed circumstances. See In re S.W., 2003 VT 90, & 4, 176 Vt. 517 (mem.) (when termination of parental rights is sought, the family court must first find that there has been a substantial change of material circumstances, and, if so, must then find that termination of parental rights is in the child=s best interests). The family court determined that there had been a substantial change of material circumstances because the disposition plan called for reunification with mother, who had relinquished her parental rights, thereby creating Aan entirely different set of circumstances for the father=s anticipated contact with the children than existed at the time of the disposition plan approval.@ PC 5 The court explained that the children were residing with a totally new family rather than mother as before, and that father=s continued incarceration, his restrictive probation conditions

potentially limiting his activities with his children, and the significant challenge to family dynamics resulting from father=s assault on one of his children created a substantial change in material circumstances.

Father contends, however, that there has been no substantial change of circumstances pertaining directly to him, and therefore the court could not find changed circumstances regarding his relationship with the children. We find no merit to this argument. In determining whether changed circumstances exist, the family court must view the question from the perspective of the children. See 33 V.S.A. ' 5532(a) (the family court=s order in a CHINS proceeding may be modified or terminated at any time Aon the ground that changed circumstances so require in the best interests of the child@); In re S.W., 2003 VT 90, & 7 (A[T]he controlling standard under 33 V.S.A. ' 5532(a) is the best interests of the child.@). The fact that material circumstances have not changed with respect to one parentCin this case an incarcerated noncustodial parentCdoes not preclude the court from finding changed circumstances based on events directly involving the other parent. Plainly, the decision of mother to relinquish her parental rightsCparticularly considering that she had been the children=s custodial parent and was the only parent with whom DCF considered reunificationChad a significant impact on the children=s circumstances and the issues surrounding their future placement. Cf. In re K.F., 2004 VT 40, & 9, 176 Vt. 636 (mem.) (finding changed circumstances where the mother, with whom reunification had been contemplated, voluntarily relinquished her parental rights, and additionally where reunification had not been contemplated with the incarcerated father, who had failed to address the case plan requirements). Indeed, because father was never a candidate for reunification due to the circumstances of his incarceration, his request that his parental rights be preserved necessarily contemplated a substantial change of material circumstances with respect to the children after mother relinquished her parental rights.

Next, father argues that the family court violated his due process rights by denying his request to call C.K. as a witness. Again, we find no merit to this argument. At the termination hearing, father sought C.K.=s testimony concerning the boy=s preference with respect to adoption and termination of parental rights. The trial court denied father=s request to call the child as a witness because (1) C.K.=s preference would have no bearing on the most important factor in determining whether termination was in the children=s best interestsC whether father would be able to resume parental duties within a reasonable period of time; (2) other witnesses

had already testified that the children had made statements indicating that they did not favor adoption or termination of parental rights; (3) bringing C.K. into the proceedings and eliciting his testimony might cause unnecessary emotional turmoil, as suggested by the children=s attorney; and (4) having C.K. state his preference on the record would not benefit father=s presentation of the evidence. Based on these considerations, the court acted well within its discretion in declining father=s request to have the fourteen-year-old boy testify. See In re S.B., 174 Vt. 427, 429 (2002) (mem.) (concluding that the family court Amay@ consider an older child=s preference when it examines the first and fourth factors set forth in ' 5540, but noting that our Legislature has not made a child=s preference a critical factor in CHINS proceedings).

On appeal, father attempts to turn this discretionary issue into a question of due process, but he never raised the due-process issue during the termination hearing or suggested to the family court that C.K.=s testimony was necessary to rebut the testimony of other witnesses. See In re C.H. & M.H., 170 Vt. 603, 604 (2000) (mem.) (refusing to consider for the first time on appeal an issue not raised during the termination proceeding). In fact, this case does not present a situation in which C.K.=s testimony is necessary to rebut critical evidence against him. Father exaggerates the significance of testimony that the boys did not ask to see their father and that they had negative as well as positive memories of their father. As noted, the family court acknowledged testimony indicating that the boys opposed adoption and termination of parental rights. In the end, the court terminated father=s parental rights based on factors unrelated to the boys= preference as to their future placement or the extent to which they were interested in seeing their father.

Finally, father argues that terminating his parental rights is not in his sons= best interests. In making this argument, father essentially asks this Court to reweigh the evidence, which we will not do. In re S.B., 174 Vt. at 429 (noting that this Court=s Arole is not to second-guess the family court or to reweigh the evidence, but rather to determine whether the court abused its discretion in terminating@ parental rights). After carefully considering the statutory factors, the family court concluded that terminating father=s parental rights was in the best interests of the boys based on, among other things, (1) father=s history of sexually assaulting his daughter (their sister); (2) father=s lack of insight into and failure to take responsibility for his conduct, as well as his inability to place his children=s interests above his own; (3) his lack of the parental skills necessary to help the

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children recover from the trauma that they endured because of his actions; (4) the restrictive probation conditions that would limit his activities and interaction with his children; and (5) the uncertainty of father=s release date from prison, which depended upon his successfully completing the required programming. In light of these and other factors, the court concluded that father would be unable to engage in unsupervised visitation, let alone resume his parental duties, within a reasonable period of time. Moreover, the court concluded that, given father=s continued lack of insight into the harm he had caused, reunification with father would be Aquite devastating@ for the children. The record amply supports the court=s conclusions and its termination order.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice