

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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

ENTRY ORDER

NOV 18 2009

SUPREME COURT DOCKET NO. 2009-249

NOVEMBER TERM, 2009

In re J.B., C.B. and K.W., Juveniles	}	APPEALED FROM:
	}	
	}	
	}	Bennington Family Court
	}	
	}	
	}	DOCKET NO. 94/95/96-8-07 Bnjv
	}	
		Trial Judge: David Howard

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

Mother appeals termination of her parental rights to her three children, J.B., born in July 2001, C.B., born in June 2004, and K.W., born in February 2007. K.W.'s father also appeals termination of his parental rights to K.W.¹ We affirm.

The trial court found the following facts.² Both mother and father have a history of illegal drug and alcohol use, as well as criminal offenses and incarceration. The children first came into the custody of the Department for Children and Families (DCF) on an emergency petition for lack of proper parental care in August 2007, when J.B. was six years old, C.B. three years old, and K.W. six months old. At the time, mother and father were both incarcerated and the children's maternal grandmother, who had been caring for the children, had health problems and could not provide proper care. Mother was released from jail by the time of the detention hearing a few days later and the children were released into her custody under an order of protection. By November 2007, mother was facing additional charges and the court found that all three children were children in need of care or supervision (CHINS). From November 2007 to May 2008, the children were with mother for brief periods, but were placed in various foster homes or with grandmother due to mother's criminal charges and incarceration. Mother has often relied on her mother for assistance with housing and care for the children. Grandmother has numerous health problems, however, that prevent her from caring for the children full time. By May 2008, the children were placed in foster homes and have remained in placement ever since.

¹ The father of J.B. and C.B. did not participate in termination proceedings and has not appealed. All references to father in this decision refer to K.W.'s father.

² The family court issued two orders in this case: one pertaining to termination of mother's rights to J.B. and C.B.; and a second pertaining to termination of mother's and father's rights to K.W.

The goal of the initial plan in April 2008 was reunification. The plan required mother to attend therapy, take appropriate medication, avoid illegal drug use, obey her conditions, avoid new charges, attend parenting class, visit the children, and provide appropriate care for the children. In November 2008, mother was sentenced on a number of offenses, mostly property-related crimes, to six years and six months to fifteen years. Her minimum release date is April 2015. DCF filed a petition to terminate parental rights in January 2009.

Father has a long history of criminal offenses starting in 1989. He was incarcerated for the first twenty-two months of K.W.'s life. After her birth, father visited with K.W. three times while he was incarcerated in Vermont. Thereafter, he was transferred out of state and was unable to continue visiting with his daughter. Father was released on a conditional re-entry plan in December 2008. Except for a brief period of incarceration for violation of conditions, father has been living with his father and working since then. He has had supervised visits with K.W. once a week, which have gone well. He is engaged in substance abuse counseling and is taking medication to deal with an opiate addiction.

The trial court found that there was a change in circumstances warranting modification due to the parents' stagnation in ability to care for their children. While the court noted that father had made some progress, the court concluded that the progress was limited and that his ability to parent had stagnated.

As to mother, the court found that mother's lengthy incarceration, combined with her history of repeated incarceration and lack of progress on her case plan goals, constituted changed circumstances. In considering the children's best interests, the court explained that mother's pattern of going in and out of jail caused the children to be placed in multiple foster homes and "hampered their development of a sense of stability and safety." In addition, the court found that due to mother's criminal activities, she had not made serious progress on her goals. The court found it significant that mother continued her criminal activity even though repeated offenses meant she would be absent from her children's lives. The court concluded that termination was in the children's best interests. Mother and father appeal.

As we have often explained, when the termination of parental rights is sought, the trial court must first find that there has been a substantial change in material circumstances, and second, that termination of parental rights is in the child's best interests. In re B.W., 162 Vt. 287, 291 (1994); see 33 V.S.A. §§ 5113, 5114. A substantial change in material circumstances is most often found when "the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. at 291 (citation omitted). "Stagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child." Id. (quotation omitted). But "the mere fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances warranting modification of a previous disposition order." Id. (quotation omitted). On appeal, we will affirm the trial court's findings unless they are clearly erroneous, and we will affirm its conclusions if supported by the findings. In re B.S., 166 Vt. 345, 350 (1997).

We first address father's appeal. Father claims that the evidence and findings do not support the conclusion that he will not be able to resume his parental duties within a reasonable period of time or that there was stagnation in his parenting ability, given father's recent improvements. The trial court found that while he was incarcerated father was involved in various programs for substance abuse, domestic violence, parenting, and self-change. In

addition, in the five months following father's release from jail and up until the final hearing, he maintained a relatively stable life. During this time, he was crime and drug free, and had visitation with K.W. The trial court commended father for the improvements in his life and his efforts to make up for his absence from K.W.'s early life. The court explained, however, that father's long history of committing crimes and being incarcerated "does not support the risk of putting off stability and emotional support for K.W." The court concluded that father's acknowledged progress over such a short period of time was not enough to demonstrate that he could resume parenting K.W. within a reasonable period of time.

We conclude that there was sufficient evidence to support the court's findings. Like the trial court, we acknowledge father's efforts to change his life, but we also agree that his progress must be balanced against K.W.'s immediate need for stability and the overall progress that father must make to parent K.W. on a full-time basis. The trial court did not err in concluding that father's progress had stagnated given that father's improvements were small in relation to the requirements father needed to fulfill to go to resume a full parental role. See In re A.F., 160 Vt. 175, 182 (1993) (finding changed circumstances where, even though the mother had made some improvements in her life, she had not made progress in acquiring skills to care for her children). Further, the evidence supports the court's finding that termination was in K.W.'s best interests. "[T]he primary consideration is whether a parent will be able to resume her parental duties within a reasonable period of time, not merely whether there has been identifiable progress since the child was originally removed from the household." In re J.B., 167 Vt. 637, 640 (1998) (mem.). Further, a "reasonable period of time" must be evaluated from the perspective of the child's needs. See In re B.M., 165 Vt. 331, 337 (1996). Father's improvement over a short period of time does not indicate that he will be able to provide full-time parental duties to K.W. in the time frame that she needs, especially given her young age and the lack of a relationship between K.W. and father for the first part of her life.

Next, we turn to mother's claims of error. Mother first argues that the court erroneously concluded that there were changed circumstances due to stagnation solely because she is currently incarcerated for a lengthy period of time. We conclude there was no abuse of discretion. The trial court explained that there was a change of circumstances because mother had failed to meet any of the expectations in her case plan, including therapy, parent education, and avoiding criminal activity. Certainly, mother's incarceration played a central role in her inability to work on her case plan goals, but it was mother's conscious decision to continue criminal activity which resulted in this situation. See In re A.C., 161 Vt. 622, 623-24 (1993) (mem.) (concluding that trial court did not err in finding changed circumstances where parent's incarceration prevented him from pursuing reunification goals). The trial court noted that mother's criminal conduct involved planned decisions, even though mother knew that the criminal behavior would affect her children. The trial court was also concerned with the instability caused by mother's pattern of incarceration. The court's findings are supported by the evidence and not in error.


Mother next contends that the trial court erred in terminating her parental rights because she contends that no evidence supports the court's finding that termination is in the children's best interests. The trial court considered the statutory best interest factors. These factors include: the relationship of the children to their parents; the child's adjustment to home, school, and community; the likelihood that the parent will be able to resume parenting within a reasonable period of time; and whether the parent plays a constructive role in the children's lives. 33 V.S.A. § 5114. Of these factors, the most important is whether the natural parent will be able

to resume parental duties within a reasonable period of time. In re B.M., 165 Vt. at 336. The court found that mother has not played a constructive role in the children's lives in that her pattern of incarceration caused instability and stress in the children's lives. The court further found that J.B. and K.W. were doing well in their foster homes and making progress on their needs. Most importantly, the court found that mother's lengthy sentence and lack of progress on her case-plan goals prevent her from resuming her parental duties within a reasonable period of time, as measured from the needs of her children. See In re B.M., 165 Vt. at 337 (evaluating reasonable period of time from perspective of child). These findings are supported by the evidence, and in turn support the court's conclusion that termination was in the children's best interests.

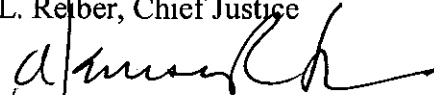
Mother also argues that DCF failed to use reasonable efforts to explore possible family placements for the children. At trial, mother claimed that the children could be placed either with her mother or her sister. Both of these placements had been explored by DCF at various times, but rejected. Although grandmother has provided care for the children at times when mother was incarcerated, DCF did not consider this a possible permanent placement due to grandmother's health problems. The court also noted that DCF had explored placement of the children with mother's sister in Ohio. DCF had initiated this process, but it was discontinued when sister's husband became ill. Mother argues that DCF did not make enough effort to explore these possibilities before terminating her rights. Mother's argument misses the point. We have explained that DCF's diligence in locating a kinship placement is not relevant to the court's decision at a termination hearing. In assessing whether to terminate mother's parental rights, the trial court was not required to make specific findings on the potential parental fitness of mother's mother or mother's sister. See In re S.W., 2008 VT 38, ¶ 13, 183 Vt. 610 (mem.). The only issues before the court at termination are whether there has been a substantial change in material circumstances and whether termination is in the children's best interests. Id. Having concluded by clear and convincing evidence that termination was in the children's best interests, the court was not required to address possible alternative placements for the children. In re T.T., 2005 VT 30, ¶ 7, 178 Vt. 496 (mem.).

Affirmed.

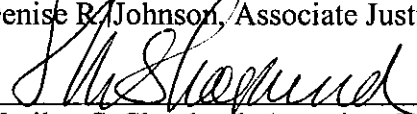
BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice