

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-101

JULY TERM, 2010

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| In re J.V., Jr., Juvenile | } | APPEALED FROM: |
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| | } | Bennington Family Court |
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| | } | DOCKET NO. 97-8-07 Bnjv |

Trial Judge: Ellen H. Maloney

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

Mother and father both appeal termination of their parental rights to J.V., born in August 2007. On appeal, mother argues that the findings and evidence do not support a conclusion of changed circumstances based on stagnation. Mother also contends that there is no basis for the court's conclusion that mother will not be able to parent within a reasonable period of time. Father argues that any stagnation was caused by factors outside his control. We affirm.

The court found the following facts by clear and convincing evidence. J.V. is mother's second child. Mother's first child, A.B., was born in December 2005 and had a different father. A.B.'s father was abusive towards mother. In March 2006, mother left to run an errand and when she returned emergency personnel were attempting to revive her injured baby. The child survived, but suffers from Shaken Baby Syndrome and is blind, unable to walk, and seriously developmentally disabled. Mother and A.B.'s father made conflicting statements to police regarding the injury. Mother at first sought to protect A.B.'s father. Both were charged with injuring the child and permitting the injury to occur. Massachusetts commenced termination proceedings and in March 2007 mother voluntarily relinquished parental rights to A.B. A jury found mother guilty of permitting assault and battery on a child in March 2009. Mother was immediately incarcerated and remained so until six months later when an appeals court released her on a stay of execution. The appeals court reversed the verdict just thirteen days before the termination hearing in this case. For purposes of this case, the family court found that A.B.'s father shook the baby while mother was at the store, but mother knew A.B.'s father posed a risk of harm to the child. The court also found that mother lied to police regarding the incident.

In July 2006, mother and father began a relationship. Father has treated mother well, and their relationship is not violent. Mother became pregnant, and J.V. was born on August 30, 2007. The parents traveled to Southwestern Vermont Medical Center (SVMC) in Bennington for the birth. The court found that they did this in part to avoid Massachusetts taking custody of the baby. Once mother was admitted, SVMC contacted Massachusetts and learned of the pending criminal charges against mother. The Vermont Department for Children and Families (DCF) became involved and obtained an emergency detention order based on the pending criminal charges against mother. DCF placed J.V. with a foster family upon his release from the hospital.

He has remained in that home ever since. The court found that both parents were “dismayed” at J.V.’s removal from their care. Parents sought to have the baby placed with father, but DCF was suspicious that father would allow mother to have unsupervised contact with the infant. Although the child was placed in a foster home, mother continued on her promise to vacate father’s apartment and maintained a separate apartment around the corner from father’s.

In January 2008, all parties stipulated that J.V. was a child in need of care or supervision (CHINS). There was no challenge to Vermont’s jurisdiction. Initially, the plan was for reunification. The April 2008 disposition report required father, among other things, to engage community providers to set up necessary services for the child so he could be a competent caretaker, to enroll in a parenting program, and to communicate with Vermont DCF. Mother was required to cooperate with Massachusetts legal authorities, keep DCF informed, and engage in a parenting program and counseling. Massachusetts DCF was asked to facilitate and monitor a plan of services, but declined. Because parents were out-of-state, DCF asked Massachusetts to perform a home study regarding father’s living situation and parenting ability. The home study was completed in April 2008. This indicated that father had the capacity to become a good parent, but lacked any support services and did not acknowledge the seriousness of the criminal matter pending against mother. The report recommended that the baby should not be placed with father at that time. The report identified a list of services for father, which Vermont DCF provided to father. A parent evaluator also met with father. She found he was affectionate and caring towards his son. She also concluded that he lacked an ability to plan and had little understanding of the child’s developmental needs.

Parents initially had weekly visits with J.V. They attended faithfully and were appropriate and attentive towards the baby. In February 2008, at mother’s request, an additional weekly visit was added. Visits between May and October 2008 went very well. J.V. was upset when separated from his foster mother, but responded well to parents’ affections. In October 2008, mother reported to the visit supervisor that parents had received certificates from a parent education course. Parents did not report this to the DCF caseworker. In October 2008, father moved to a new home, but no social worker has ever visited his new home. From October 2008 to January 2009, parents continued to attend visits twice a week.

DCF filed for termination in January 2009. Because of her incarceration, mother had only six visits with J.V. between February and October 2009. During her incarceration, mother participated in several programs. Father continued to visit with J.V., but missed ten visits during this time. Due to father’s missed visits, the frequency of visits was reduced to once per week in August 2009. In June 2009, J.V. began showing signs of identity confusion because his foster family called him by his middle name and his parents call him by his first name. His bond with his foster family was increasingly evident. By November 2009, he declined to tell his father and mother he loved them, but freely expressed these feelings towards his foster parents and siblings.

A contested termination hearing was held in January 2010. The court issued an order on February 22, 2010, terminating parental rights. The court found a change in circumstances due to stagnation for both parents. The court concluded that father is a quiet and gentle person who is affectionate towards his son. The court credited father for maintaining full-time employment for the last three-and-a-half years, and paying child support for his son. While well-intentioned, the court found that father functions on about a ninth-grade level, lacks understanding of J.V.’s developmental needs, and has difficulty planning for events in J.V.’s life. The court also concluded that father has not been able to deal effectively with local support agencies and has failed to report progress to DCF. Father participated in a fathers’ support group, a substance abuse assessment, and a parenting course. Other than the support group, he did not report this to

DCF. The court found that at the time of the TPR hearing, father remained unable to parent on his own, and would require the constant assistance of mother or the involvement of a parent educator.

The court also found that mother's progress had stagnated and she was not able to parent J.V. at the time of the TPR hearing. While she exhibited good parenting skills during visits and acted appropriately with the child, the court found that her decreased visitation during her incarceration had "clearly impaired whatever relationship the child had with her. There is no cognizable bond between mother and child at this time." The court explained that mother's poor choices concerning her abusive relationship with A.B.'s father had resulted in disastrous consequences, including her estrangement from J.V. In addition, the court noted that mother had no job at the time of the final hearing and there was no evidence on where she planned to live. Given mother's past misrepresentations, the court found that "it is hard to know that [mother] would report truthfully if the child were placed with her or [father] and something went wrong."

The court then concluded that termination was in the child's best interests based on the statutory best-interests criteria set forth in 33 V.S.A. § 5114. The court explained that J.V. has a very strong attachment to his foster mother and a close relationship with his foster siblings. The court found that removing J.V. from his foster home would be disruptive, destroy any sense of permanency, and harm J.V.'s well-being. The court noted that the length of time it took to resolve mother's criminal charges and the fact that the proceeding crossed state lines had "worked against progress toward reunification which might otherwise have been possible."

Both parents appeal. The family court has discretion in deciding whether to terminate parental rights. In re D.M., 162 Vt. 33, 38 (1994). Termination requires a threshold showing of a substantial change in material circumstances. Id. "If the change in circumstances has been established, the court may order termination only upon concluding that severance of the parent-child bond is in the best interest of the child." Id.; see 33 V.S.A. § 5113(b). The most important of the best-interests factors is whether the parent will be able to resume parenting within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.).

We first consider father's argument that the court erred in finding changed circumstances in his case. A change in circumstances is most often found in these types of cases when a parent's ability to care for the child has stagnated. In re D.M., 2004 VT 41, ¶ 5, 176 Vt. 639 (mem.). To determine if a parent's progress has stagnated, the court must consider whether the parent's abilities have improved from the time of the CHINS adjudication so that the parent's improved ability substantially conforms to the expectations in the case plan. In re D.C., 168 Vt. 1, 4 (1998). If the expectation of improvement is met, then there is no change of circumstances. Id. Furthermore, this Court has previously stated that stagnation cannot be based on factors beyond a parent's control. In re S.R., 157 Vt. 417, 421-22 (1991).

Father argues that any shortcomings in his ability to parent were caused by factors outside of his control, including the failure of DCF to use reasonable efforts to assist father in achieving his case plan goals. Father claims that it was beyond his control to do more to establish a bond with J.V. Father states that he faithfully attended visits and engaged in a support group and parenting class, without help from DCF. According to father, Vermont DCF completely failed to assist him in reuniting with his son.

We disagree. It is evident that Vermont DCF was hampered in its ability to directly aid father because he was in a different state, but DCF certainly assisted father in receiving the services necessary to meet the case plan goals. Father's DCF caseworker ordered a home study

for father, arranged regular visits with J.V., arranged for a parenting evaluation, attempted to have Massachusetts DCF assist father, and passed along to father a list of services. It was within father's control to follow up with this list of services. It was also within father's control to relocate to Vermont or attempt to have J.V.'s case transferred to Massachusetts.* Despite DCF's efforts and father's participation in a parenting course and some counseling, the court found that at the time of the final hearing father remained unable to parent J.V. on his own due to his inability to plan, to make the arrangements necessary for caring full-time for a child, and his lack of understanding regarding J.V.'s development. Stagnation was also demonstrated because father's relationship with J.V. had failed to advance or progress since the time of the CHINS adjudication. Father had the opportunity to spend longer visits with his son and form a stronger bond, but he was unable to take advantage of this due to his work schedule. The deterioration in this relationship is not attributable to DCF given that DCF encouraged visitation. Thus, the court's finding that father's progress towards being able to parent on his own had stagnated is not erroneous.

Next, we turn to mother's appeal. Mother first argues that the evidence does not support the court's finding that there was stagnation. According to mother, she made progress by engaging in services and her only failing was in neglecting to report this to DCF. Mother also contends that even though she cooperated with Massachusetts authorities, her criminal case dragged on and delayed resolution of this case and reunion with her son in a manner beyond her control.

We conclude that the court's finding of stagnation is supported by the evidence. The court did not, as mother contends, conclude her progress had stagnated simply because mother failed to report her participation in counseling and other programs. While the court faulted mother for not timely apprising DCF of her participation in programs, the main obstacle towards reunification between mother and J.V. was that at the time of the final hearing there was "no cognizable bond between mother and child" from the child's perspective. Due to mother's incarceration and consequent reduced time visiting J.V., mother's relationship with J.V. deteriorated. The trial court acknowledged that mother was a capable parent, but that it would take time to restore this relationship. While mother portrays the separation due to the trial and resulting incarceration as beyond her control, the court found that mother "was not without some responsibility for this result." As the court found, mother knew A.B.'s father posed a risk of harm to the child, and thus was not wholly blameless for the damage that was caused to that baby. In addition, the court found that mother's dishonesty with authorities regarding the incident contributed to charges being brought and the protracted criminal process. Thus, we conclude that mother's predicament in Massachusetts and estrangement from the child was not entirely beyond her control and that she was not a mere victim of circumstance. See In re A.D.T., 174 Vt. 369, 376 (2002) (finding in termination proceeding that court properly relied on mother's lack of contact with minor during imprisonment where incarceration was due to mother's own conduct). Moreover, the court noted that mother's ability to house and provide for her child had stagnated in that at the time of the final hearing mother was not employed and her future living situation was unknown. All of these findings adequately support the court's conclusion that mother's progress in being able to care for her child had stagnated.

* Indeed, it was mother and father's choice to have the baby in Vermont initially. As part of the CHINS adjudication, mother admitted that she came to Vermont to have the baby to avoid Massachusetts DCF from taking the child. While mother now contests this fact, it was stipulated to at the CHINS hearing, and we therefore accept it as fact.

Second, mother contends that the court's best-interests analysis was flawed because there is no evidence to support the court's conclusion that reunification with mother would require an unreasonable period of time. In assessing the child's best interests, the family court is directed to consider the statutory factors set out in 33 V.S.A. § 5114. These factors include: the quality of the child's relationship with his parents, foster parents, and other significant individuals; the child's adjustment to his current home, school, and community; the likelihood that the parent will be able to resume parenting within a reasonable period of time; and the parent's ability to play a constructive role in the child's life. Id. 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 J.B., 167 Vt. at 639.

Here, the court found that all factors indicated that termination was in the child's best interests. The family court concluded that J.V. has a strong bond with his foster family, and that his relationship with his mother had diminished greatly. The court also found that J.V. was well-adjusted in his foster family, which is the only home he has ever known. On the most important factor, the court found that mother was not able to resume parenting within a reasonable period of time, as measured from the perspective of the child.

Mother agrees that separating J.V. from his foster family would be painful, but contends that the court's finding that she cannot resume parenting within a reasonable period of time is erroneous because there was no evidence that separation from his foster family would be permanently harmful to J.V. or how much time would be required to reunite her with J.V. Mother also argues that the court erred in relying on In re C.L., 2005 VT 34, 178 Vt. 558 (mem.), to conclude that the delay in establishing a relationship would be too long because in C.L., the father never had a relationship with the child. We find no error. Although in this case, unlike C.L., mother had a relationship with J.V., the evidence supports the court's conclusion that it would require an additional six-to-twelve months to begin the process of transitioning J.V. into mother's home, and that this was too much for J.V., given his young age and strong attachment to his foster parents. See In re J.S., 168 Vt. 572, 574 (1998) (mem.) (considering age of children and children's need for stability in measuring reasonable period of time). Furthermore, the time-frame was not speculative since both mother and father requested at least six months to demonstrate some progress. Considering all of these findings, the court did not abuse its discretion in concluding that mother would not be able to resume parenting within a reasonable period of time.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice