

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-119

SEPTEMBER TERM, 2017

In re C.D., Juvenile	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 25-1-14 Cnjv
		Trial Judge: James R. Crucitti

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

Parents appeal from the termination of their rights in C.D. Father argues that the court erred by failing to find a material change of circumstances with respect to him. Both parents argue that the court erred in finding that father posed a risk of harm to mother and to C.D. We affirm.

C.D. was born in April 2011. Mother has an older child as well. The Department for Children and Families (DCF) had an open family assessment at the time of C.D.'s birth due to mother's drug use and domestic violence in the home. Father was incarcerated at the time of C.D.'s birth for aggravated domestic assault and violations of his conditions of release. Mother was the victim of the assault, and father was not supposed to have contact with her. In November 2011, father again assaulted mother. He was charged with aggravated domestic assault, violation of an abuse prevention order, and violation of probation. A warrant issued for his arrest. Father became a fugitive and did not attend any court proceedings until his arrest four years later.

C.D. has been in and out of DCF custody since September 2011. Mother would make progress, then relapse, and then make progress again. In June 2012, DCF moved to terminate parents' rights. Due to mother's progress, however, the petition was withdrawn, mother's case was closed, and C.D. was returned to mother's care. Not long thereafter, DCF learned that father was living with mother and C.D. Drug paraphernalia was found in mother's room. Mother began missing appointments, and she tested positive for drugs. Father remained a fugitive. In January 2014, C.D. again was returned to DCF custody. Mother stipulated that C.D. was a child in need of care or supervision (CHINS) based on mother's lengthy history with DCF; her recent contact with father; father's two felony convictions for assaulting mother; mother's decision to spend time with father even though she knew that he posed a risk to her and to C.D.; mother's jeopardizing of her housing by allowing people to stay with her; mother's positive test for cocaine and THC; and mother's drug use the weekend before her test when she also visited with father. Following an April 2014 disposition hearing, the court adopted a concurrent plan of reunification with mother or adoption within three to six months. The disposition plan required mother, among other things, to have no contact with father because it jeopardized mother's and C.D.'s safety.

Mother did not comply with the case plan, and in January 2015, DCF filed another TPR petition. DCF later withdrew this petition, and in October 2015, mother was given conditional custody of C.D. The court adopted most of the conditions set forth in the plan of services approved at the time of the initial disposition order, including a requirement that mother have no contact with father. In December 2015, father was arrested at mother's home. C.D. was returned to DCF custody for the third time. In March 2016, C.D.'s attorney, with the support of her guardian ad litem, filed a TPR petition.

In April 2017, following a hearing, the court terminated parents' rights. It made extensive findings, including the following. Father had been on arrest warrant status since 2011, and he did not play a constructive role in C.D.'s life. Because father did not appear in court until after his December 2015 arrest, a plan of services was not developed for him as part of a disposition order. Father was referred to Family Time Coaching (FTC) in the fall of 2016. Neither father nor mother successfully completed the FTC coaching. They did not have appropriate housing. Both parents appeared to have little insight as to how domestic violence had impacted C.D.'s life. They minimized the violence between them.

Mother admitted that father physically and verbally abused her. Her trial testimony, however, was inconsistent with allegations in a sworn affidavit that she had filed when seeking a relief-from-abuse order against father. In that affidavit, mother stated that father had pointed a gun at her head and threatened to hurt her a number of times; she also asserted that father broke into her motel room and beat her with a closed fist in front of her older child. Mother acknowledged at the TPR trial that she feared for her life at the time. Mother's mother testified that mother told her of ongoing physical abuse by father. Nonetheless, the parties' plan was to live together and co-parent C.D. Mother testified that she gets along "great as a family" with father. The court noted that mother's testimony at the hearing was quite different from her discussions during the forensic evaluation in this case. Mother had acknowledged there that father physically abused her on multiple occasions.

At the time of the court's decision, father was on furlough for aggravated domestic assault and two counts of violation of conditions of release. His furlough was scheduled to end in December 2018. Father had two felony convictions and nine misdemeanor convictions in Vermont. Five of the convictions involved violations of court orders and abuse prevention orders. Three included assaultive crimes, including a prior aggravated domestic assault as well as convictions for possession of cocaine. Father was also on parole in New York for a robbery and assault charge. DOC considered father a high risk to reoffend. Father was attending risk reduction programming while on furlough with the DOC.

The court recounted numerous findings contained in the forensic evaluation. The court found the evaluator's opinion and the considerations used in forming the opinion very persuasive. The evaluator concluded, among other things, that the chaotic nature of parents' relationship negatively affected their ability to safely parent C.D. and that the prognosis was between poor and guarded for them to be successful in overcoming their relationship challenges. The evaluator also noted how long C.D. had been in substitute care and the developmental trauma that she suffered related to intrauterine distress from maternal addiction and multiple caregiver transitions. The court agreed with the evaluator that mother and father, given all of their circumstances, were extremely unlikely ever to be able to safely parent C.D. together. The court made numerous additional findings, which we do not repeat here.

Based on its findings, the court concluded that there had been a substantial change in material circumstances. It explained that mother continued to have contact with father despite

repeated warnings and orders from the court and despite mother's recognition that she might lose custody of C.D. if such contact continued. The court found it abundantly clear, based on father's long-term physical and emotional abuse of mother, which occurred on at least one occasion in a child's presence, that the prohibition of contact with father was an essential part of the reunification plan. Separately, the court observed that mother's inability to provide an environment for C.D. and herself free from the threatened violence of father suggested a form of stagnation. Since shortly after C.D.'s birth, father's violence and presence had caused C.D. to be removed from mother's care. Based on her trial testimony, mother continued to face the same predicament, even though at one point, mother acknowledged to the forensic evaluator that she would choose C.D. over father and did not think it was realistic for them to coexist as a family. A significant period had passed where C.D. had endured disruptions, and the situation was the same at the time of the TPR hearing as it had been in 2011.

The court then turned to the statutory best-interest factors and concluded that they all supported termination of parents' rights. It explained that C.D. had a loving and secure relationship with her foster mother, foster siblings, and extended foster family. She was thriving in their care. As noted above, father was absent from C.D.'s life since 2011 by choice, and he had only limited contact with her since 2016. While mother loved C.D., mother's substance use disorder and continued relationship with father had a negative impact on her relationship with C.D. Her continued relationship with father caused C.D. to be removed from her care and limited her relationship with C.D. As to the most important factor, the court found that neither parent could appropriately care for C.D. within a reasonable time. Father had abandoned C.D. for a significant period, and following his arrest, he failed to fully engage in a plan of services. The court also cited the violence father had perpetrated against mother and his unwillingness to work to improve his minimal relationship with C.D. The court found that parents' continued chaotic relationship—marked by a long history of domestic violence—was another indicator that they could not safely parent together. Mother's desire to continue her relationship with father and her desire to co-parent with him made it unlikely that she could appropriately care for C.D. within a reasonable time. The court found that mother's proposed plan would nearly guarantee the likelihood of continued violence, instability, and chaos for C.D. The court emphasized that C.D. needed a parent who could recognize and respond consistently to her needs. A significant period had passed in which C.D. had endured disruptions, mostly due to parents' actions and their inability to consistently meet her needs. The court concluded that returning C.D. to mother's care would have a detrimental impact on her and on her need for a safe and secure environment. For these and other reasons, the court terminated parents' rights. Parents appealed.

Father first argues that the court reversibly erred because it failed to find that there was a material change of circumstances with respect to him. Both parents argue that the court erred in assessing the risk that father posed to mother and to C.D., focusing on the court's finding that they are unable to parent C.D. within a reasonable period of time. According to parents, the court's assessment was not based on present circumstances. They note that father has engaged in risk-reducing programming through the Department of Corrections, and they assert that the forensic evaluator was not familiar with anything that transpired during the seven months before the TPR hearing. They cite mother's bond with C.D. and argue that father has a growing bond with the child.

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 since the disposition order, 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. To determine a child's best interests, the court must consider four statutory factors. See 33 V.S.A. § 5114. The most important

factor is the likelihood that the natural parent will be able to resume his or her parental duties within a reasonable period of time. See In re B.M., 165 Vt. 331, 336 (1996). As long as the court applied the proper standard, we will not disturb its findings on appeal unless they are clearly erroneous; we will affirm its conclusions if they are supported by the findings. In re G.S., 153 Vt. 651, 652 (1990) (mem.).

Contrary to father’s assertion, the court did not need to find a substantial change in material circumstances with respect to each parent; it needed only find that there was a change of circumstances warranting a change in the disposition plan, regardless of its source. See In re D.C., 2012 VT 108, ¶¶ 16-18, 193 Vt. 101. The court made that finding here. As set forth above, it found that despite repeated warnings, mother continued to have contact with father, thereby violating an essential component of the reunification plan. Additionally, the court found that since 2011, mother had been unable to provide a safe environment for herself and for C.D., which suggested a form of stagnation. See In re B.W., 162 Vt. at 291 (explaining that “[s]tagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child” (quotation omitted)). Father’s first claim of error is without merit.

We similarly reject parents’ second argument. It is evident that the court considered the parties’ present circumstances as well as their prior behavior, including father’s multiple domestic assaults against mother. Certainly, the findings in the forensic evaluation were not outdated, as parents suggest. Indeed, parents cite no information that arose after June 2016 that would support such a conclusion. In any event, the court’s findings obviously reflect parents’ behavior after June 2016, including father’s failure to fully engage in a plan of services during this period and his refusal to participate in Family Time coaching. The court considered mother’s present circumstances as well, most significantly, her insistence on co-parenting C.D. with father despite the long history of violence and instability between them. The court acknowledged that father was engaged in DOC programming but concluded that he continued to present a risk to both mother and child. The record amply supports this conclusion, as well as the court’s conclusion that mother’s desire to continue her relationship with father rendered her unable to parent C.D. within a reasonable period of time. The record equally supports the court’s conclusion that father cannot parent C.D. within a reasonable period of time. Essentially, parents challenge the trial court’s evaluation of the weight of the evidence and the credibility of the witnesses, matters reserved exclusively for the trial court. In re A.F., 160 Vt. 175, 178 (1993); see also In re S.B., 174 Vt. 427, 429 (2002) (mem.) (“Our role 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 mother’s parental rights. . . .”). We find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice