

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-179

SEPTEMBER TERM, 2017

In re Z.R. and J.R., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 96/97-8-14 Wmjv
		Trial Judge: Karen R. Carroll

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

Mother and father separately appeal the termination of their parental rights to minors J.R. and Z.R. We affirm.

Mother and father are the parents of Z.R., who was born in August 2014 and is three years old, and J.R., who was born in July 2012 and is five years old. When Z.R. was born, she tested positive for amphetamines and was hospitalized for a period due to Suboxone withdrawal. At the end of August 2014, the Department for Children and Families (DCF) requested an emergency care order because mother had been terminated from a medically assisted substance abuse treatment program for altering her urine samples and would not agree to voluntary care for her children while she attended residential treatment. At the time, the family was homeless and living in a motel through a voucher that was contingent upon father not living with mother due to his criminal history. However, father was frequently in the motel room and answered the telephone when DCF called, jeopardizing mother's voucher. The family court issued an emergency care order on August 29, 2014. J.R. and Z.R. were placed with a foster family with whom they have lived ever since. Mother's two older daughters were in the custody of others due to her inability to care for them.

Following a contested hearing in November 2014, the court found J.R. and Z.R. to be children in need of care or supervision. In December 2014, the court approved a case plan with concurrent goals of reunification with mother or adoption. Father told the DCF worker who prepared the plan that he was not seeking custody of the children, but wanted them reunified with mother and intended to "co-parent" with her.

Mother was observed by DCF workers to be nurturing, attentive, and appropriate with the children during her interactions with them. She initially made progress toward the case plan goals by securing permanent housing, participating in the HUB program, and engaging in substance abuse outpatient treatment. By the spring of 2015, mother had progressed to in-home, unsupervised visits, and began to have overnight visits with the children. However, overnight visits were suspended in July 2015 after DCF received a report from a family member that mother

and father were using illegal drugs in the home. Mother denied that she had done so, but did not deny the allegation as it related to father.

Mother's housing was dependent upon a Section 8 voucher that had to be renewed each year. Father was prohibited from living in the home under the terms of the lease. Mother risked permanently losing her voucher if she violated any Section 8 rules. Mother told DCF several times that she intended to apply for a waiver to allow father to live with her, but never did so. Mother was repeatedly warned by DCF workers not to allow father to reside in the home due to the risk of losing her housing. Despite these warnings, father frequently stayed in mother's home.

Father made little progress toward his case plan goals. He did continue in the HUB program, but did not engage in any formal substance abuse treatment. He was incarcerated at the time of the disposition hearing in December 2014 and again in August 2015. He attended about half of his visits with the children, and attended DCF meetings sporadically. Father struggled with severe mental health issues and was homeless and unemployed throughout the period the children were in DCF custody. Mother acknowledged that when father was around, she focused upon his needs to the detriment of the children. Mother reported to a service provider that the children had been exposed to domestic violence, although she did not identify when or by whom.

J.R. enjoyed being with her parents during visits, but she would cry in the corner at daycare afterwards and had nightmares. J.R. informed school personnel that she did not want to attend overnight visits in her mother's home. Soon after she entered foster care, J.R. was referred to a therapist due to self-harming behavior, anxiety, aggression, toileting issues, and difficulty separating from her foster mother, among other issues. DCF asked mother to discuss J.R.'s behaviors with her therapist, but mother did not do so. When there was a break in therapy, DCF directed mother to reconnect J.R. with her therapist. Mother took no action, so J.R.'s foster mother reenrolled J.R. in therapy instead. J.R. has made progress while living in her foster home. Her toileting issues and aggression have ceased, although she continues to need attachment therapy.

The court held permanency hearings in March, May, and September 2015, and extended the permanency goal date three times to give mother more time to work toward reunification. Mother failed to attend well-child checkups for the children in August 2015. By September 2015, she still had not met the requirements for take-home Suboxone dosing, most recently because she failed to report for a dose. This meant that she had to report to the program in person each day, making it difficult for her to see to the children's daily needs. She remained compliant with other aspects of the program.

In December 2015, mother was again permitted to have unsupervised contact with the children in her home. She signed an agreement that father would not be in the home during these periods. When DCF made an unannounced visit to mother's home during one of her unsupervised visits with the children, they discovered father was in the home. DCF removed the children, and future visits were supervised. The next day, mother told the DCF caseworker that she did not know why it was a big deal that father was in the home. For several days after that, mother did not return calls or texts from DCF.

In January 2016, the DCF caseworker informed mother that DCF was filing a petition for termination of parental rights. Mother told the DCF worker that she had always intended to live

with father and parent the children with him. She admitted that she had stated otherwise to DCF. She also acknowledged that father was frequently in the home and that his presence in the home jeopardized her housing voucher.

Mother has two older daughters who are in the custody of family members and visit her on weekends. During the termination hearing, DCF received a report that one of the daughters had told her teacher that father was in the home the previous weekend and had yelled at mother. She said that she hoped father would not hit mother like he has in the past. She indicated that she felt unsafe in father's presence.

The court held a three-day termination hearing in January 2017 and issued a written order in April 2017. The court first determined that modification of the disposition order was warranted because both father and mother had stagnated in their ability to properly care for J.R. and Z.R. It found that father had been "extremely inconsistent" in visitation with the children and in keeping DCF advised of progress on his case plan. His serious mental health problems had hindered his ability to meet the expectations of the plan. He remained homeless, and his continual presence in mother's home jeopardized her housing. He also skipped half of the termination hearing.

The court found that mother had made some progress, but her overall ability to care for the children had not improved, as she continued to make father a priority over the children and to struggle with organizing her life. She had failed to return to employment or to seek job training, and thus had not met DCF's requirement that she become financially secure. She knowingly risked losing her housing and her ability to reunify with J.R. and Z.R. by allowing father to live with her. She also had not secured take-home Suboxone dosing, without which she would be unable to ensure the children's daily needs were met.

The court next considered the best-interests factors set forth in 33 V.S.A. § 5114. It found that mother was able to meet the children's needs during visits, but it was doubtful whether she could do so full-time. Although father seemed to love the children and they enjoyed spending time with him, he did not visit them very often, and they did not have a stable relationship. The children had little connection to mother's older children and extended family. By contrast, the children were thriving in the care of their foster parents and had, unprompted, begun referring to them as "mommy" and "daddy."

The court found that neither mother nor father would be able to resume or assume parental duties within a reasonable amount of time. The court found that mother played a "minimally constructive role" in the children's lives, but her inability to manage her own life made it doubtful that she could play a constructive role as a full-time parent. Father had even less of a role in the children's lives. The court concluded that termination was in the best interests of the children, and granted the petition.

We review the family court's decision to terminate parental rights for abuse of discretion. In re S.B., 174 Vt. 427, 429 (2002) (mem.). "We will uphold a termination order if the court's findings are not clearly erroneous and support the court's conclusions." In re A.D.T., 174 Vt. 369, 375 (2002).

On appeal, father argues that the family court erred in terminating the parents' rights on the basis of father's continuing presence in mother's home when there was no evidence that he posed a risk to the children's safety.\* We conclude that the court's termination order in this case did not purport to rest on a conclusion that father's presence posed a direct risk to the children's safety. The controlling statutes require the court to conduct a two-step analysis. First, it must find that there has been a substantial change of circumstances that justify modifying the disposition order; second, the court must find that termination of parental rights is in the best interests of the child. In re B.W., 162 Vt. 287, 291 (1994); 33 V.S.A. §§ 5113(b); 5114. In evaluating whether the best interests of the child require termination of parental rights, the court must consider four statutory criteria: (1) the child's relationships with persons significantly affecting those interests; (2) the child's adjustment to his home, school, and community; (3) the likelihood that the parent will be able to resume parental duties within a reasonable period of time; and (4) whether the parent has played and continues to play a constructive role in the child's welfare. 33 V.S.A. § 5114(a). If the court found that a parent posed a risk to a child's safety, that would of course be relevant to a termination decision, but such a finding is not required under the statutory framework.

Here, DCF presented substantial evidence to show that father had stagnated in his ability to parent the children: he attended only half the visits with the children, he attended DCF meetings sporadically, he had not found suitable housing or made much progress on treating his mental health issues, he had been incarcerated at least twice, and he continued to stay in mother's home despite DCF's warnings that it would jeopardize her housing and therefore her ability to reunify with the children. The evidence supported the court's findings that father played a minimal role in the children's lives and that he would be unable to assume parental duties within a reasonable period of time, as well as its conclusion that termination of father's parental rights was in the children's best interests.

To the extent that the court's findings concerning mother's stagnation rested in part on her continuing to allow father to live in her home, the court's findings describe at least two ways in which her doing so undermined her compliance with the case plan and the children's best interests. First, maintaining stable housing was a critical component of mother's case plan. By apparently allowing father to continue to live with her despite a restriction in her lease prohibiting that, mother was at risk of permanent loss of her access to Section 8 housing. The trial court was within its discretion in considering this fact. Second, the trial court found, based on substantial evidence, that when father is around, mother takes care of father to the detriment of the children without noticing that she is doing so. One of mother's most persistent weaknesses in pursuing reunification was her repeated failure to follow through in attending to specific needs of her children. The trial court did not abuse its discretion in considering this factor.

Father also argues that he was not given notice that he and mother were expected to end their relationship in order to reunify with the children, and that his situation is analogous to that of the father in In re A.M., 2017 VT 5. In A.M., we reversed the family court's determination that there had been a substantial change in circumstances warranting modification of the disposition order. The father had substantially complied with all case plan goals and was on his way toward reunification until an incident in which he included the mother, who was only allowed supervised

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\* Father articulated these arguments in his brief, and mother joined them by reference. We refer to these arguments as "father's," but acknowledge that mother joined them as well.

visits, on his unsupervised visit with the children, after which DCF essentially stopped working with the father and pursued termination. Id. ¶¶ 38-40. We held that because “DCF never advised father that its support for reunification with father was contingent on father and mother not getting back together,” it was unfair to penalize him for including her in the visit. Id.

The circumstances in this case are quite different. Here, father was not the subject of reunification efforts and had made virtually no progress toward any of his case plan goals during the time the children were in custody. Mother was on more than ample notice that complying with the terms of her lease and maintaining focus on the children’s needs were critical components of her case plan. She repeatedly affirmed that she would not allow father to live in her home or be present during unsupervised visits, and then fell through on those commitments. There was no requirement that mother and father discontinue their relationship. However, both parents were warned that if they intended to co-parent, it would have to take place someplace safe and appropriate outside mother’s home due to the conditions of mother’s lease. This requirement was justified by the potentially devastating consequences for mother and the children if father was caught in her home, i.e., permanent loss of mother’s Section 8 voucher and homelessness. It was, in part, mother’s and father’s disregard of this requirement and their failure to understand the corresponding risks to their children that led to the termination petition—not the fact of their ongoing relationship. As described above, there was also ample other evidence that both parents had stagnated in their ability to parent the children, warranting modification of the disposition order.

Finally, father argues that the “biased and inflammatory” evidence presented at the hearing regarding father’s mental health “did not support the finding that the children would be traumatized by returning to a home where he was present.” Father is correct that the family court found the testimony of Dr. Nash, a psychologist who evaluated father’s mental health, to be only partially credible. However, the court accepted Dr. Nash’s opinion that J.R. exhibited trauma behaviors when she first went into foster care which had since improved tremendously, and that placing her back with her parents, where the behaviors first developed, would itself cause her trauma. “We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence.” In re A.F., 160 Vt. 175, 178 (1993). Father has not shown that the court abused its discretion in crediting this portion of Dr. Nash’s testimony. There was ample evidence in the record regarding J.R.’s behavioral issues, and father offered no evidence to rebut Dr. Nash’s opinion.

For her part, in addition to joining father’s arguments, mother argues that the family court erred in concluding that she plays a “minimally constructive” role in the children’s lives because it failed to distinguish between her ability to play a constructive role as a custodial versus noncustodial parent, and it failed to make findings on the risk to the children of severing her bond with them. The court was not required to sustain mother’s role as a non-custodial parent. See In re G.F., 2007 VT 11, ¶ 20, 181 Vt. 593, 598 (“We have repeatedly rejected the claim, however, that the court must consider less drastic alternatives to termination once it has determined the parent to be unfit and unable to resume his or her parental responsibilities.”); In re M.B., 162 Vt. 229, 238 (1994) (“Public policy . . . does not dictate that the parent-child bond be maintained regardless of the cost to the child; [§ 5114] recognizes that severance of that bond may be in the child’s best interest.”). Even in the face of a parent-child bond, the court was within its discretion

in concluding that the children's need for permanency outweighed the potential harm associated with terminating mother's parental rights.

Finally, mother argues that the court lacked essential information regarding J.R.'s potential therapeutic needs because DCF did not call J.R.'s current therapist to testify. At the hearing in January 2017, J.R.'s former therapist, who worked with J.R. from January 2015 to October 2016, testified that J.R. would continue to need therapy regardless of what happened at the termination hearing. The information provided by J.R.'s former therapist was sufficiently up to date to support the court's finding that J.R. would continue to need attachment therapy. Cf. In re C.B., 162 Vt. 614, 614 (1994) (holding that September 1992 disposition report did not support finding that as of May 1993, eight months later, mother was suffering from severe substance-abuse problem). Mother does not identify what information the new therapist would provide, or how it would alter the court's decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice