

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-252

JANUARY TERM, 2018

In re J.G., Juvenile (J.G., Mother)	}	APPEALED FROM:
	}	
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
	}	DOCKET NO. 45-5-15 Cajv
		Trial Judge: M. Kathleen Manley

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

Mother appeals the superior court's order terminating her parental rights with respect to her son, J.G. We affirm.

A few days after his birth in May 2015, J.G. was placed in the custody of the Department of Children and Families (DCF) due to mother's lengthy history of, and ongoing, substance abuse, which had led to her voluntarily relinquishing her parental rights to her three older children within the previous year.¹ At birth, J.G. was diagnosed as having neonatal abstinence syndrome as the result of mother receiving methadone during her pregnancy to treat her addition to opiates.

In August 2015, the superior court accepted a stipulation that J.G. was a child in need of care or supervision (CHINS). The stipulation contained the following language as the basis for the CHINS adjudication:

Mother has a longstanding history of substance abuse, and is struggling with recovery. During her pregnancy with infant, she tested positive for cocaine, THC, and prescribed methadone. Mother was on [a] BAART [opioid treatment] program at time of pregnancy. Her three other children were removed from her care and placed in DCF custody due to identical concerns. In June 2014, she was seen at NVRH [Northeastern Vermont Regional Hospital] for an overdose of heroin and later entered Brattleboro Retreat for mental health and substance abuse issues, followed by a step down program. She was not pregnant at the time.

¹ J.G.'s biological father has not had any involvement with the child and did not participate in the proceedings below. DCF's termination petition regarding father is pending. Mother is still married to a man with whom she has not had any contact for several years. Since the summer of 2014, mother has been in a committed relationship with A.V., who, like mother, has had a long history of substance abuse.

Throughout the summer of 2015, mother struggled with the use of non-prescribed substances, including Wellbutrin, cocaine, and THC. In June 2015, mother and A.V. were hospitalized after overdosing on a sleeping medication. She and A.V. had a contentious relationship that resulted in police being called to their home on several occasions, including twice in late October 2015. In November 2015, A.V. was charged with felony assault of mother. As the result, A.V. was not able to participate in family-time coaching for five months.

Meanwhile, in October 2015, DCF filed a disposition plan that recommended concurrent goals of reunification with mother and adoption. The plan anticipated that mother would achieve reunification by April 2016. Towards that goal, the plan recommended that mother: (1) actively engage in ongoing substance-abuse treatment by attending substance-abuse counseling, providing urine samples, and refraining from taking any non-prescribed substances; (2) follow through with parent-child contact programs; (3) provide open and honest information to DCF about her sobriety; (4) engage with a mental-health counselor; (5) maintain safe and appropriate housing; (6) sign releases for all service providers; (7) meet at least monthly with the DCF social worker; (8) participate in case-plan reviews and court hearings; and (9) set up a meeting with DCF's domestic violence specialist. Although mother initially contested the disposition plan, she eventually agreed to a plan adopted in a December 2015 order that continued DCF custody and set forth an expanded contact schedule allowing for unsupervised time and overnights if she did not test positive for any non-prescribed substances within forty-five days of the order. Unfortunately, in January 2016, mother tested positive for cocaine, THC, and non-prescribed Wellbutrin, and the following month she tested positive for THC and benzodiazepines.

Mother began Family Treatment Court in October 2015, but she was terminated early from the program in March 2016 due to her ongoing positive urinalysis results, escalating negative behavior toward court personnel, and her general lack of progress in the program. DCF referred mother to a Dialectical Behavior Therapy (DBT) program, which she attended sporadically from the summer of 2016 until November 2016, at which time she ceased attending. She reengaged in a DBT program at the end of March 2017, shortly before the termination hearing.

Following a twelve-month case-plan review in April 2016, mother filed a motion for a conditional custody order (CCO) and DCF filed a petition to terminate mother's parental rights. The stated bases for DCF's petition were J.G.'s age and length of time in DCF custody, mother's ongoing struggles with substance abuse, her lack of progress in addressing mental-health concerns, and her volatile relationship with A.V. The court decided to first address mother's request for a CCO. In August 2016, following a four-day hearing, the court issued an order creating a transition plan that would return J.G. to mother's care under a CCO if certain conditions were met and no motions to modify that schedule were filed based on good cause. The plan required mother and A.V. to provide releases to DCF for all service providers, to remain in therapy, to continue with an opioid-treatment program, to provide urine samples as requested, to refrain from using non-prescribed drugs or marijuana to the degree it impairs their ability to parent or continue their recovery, to remain sober, to report any relapses or physical aggression towards each other to DCF within two days, and to demonstrate that they are capable of conducting a relationship without physical violence or protracted verbal conflict. The order also outlined specific transition periods during which contact with both mother and A.V. would be expanded.

On August 14, 2016, two days after the transition order issued, police conducted a controlled purchase by a confidential informant of Ritalin tablets from mother and A.V. In mid-

September, mother and A.V. were arrested on charges of felony sale of a depressant/stimulant/narcotic, which subjected them, if convicted, to a potential sentence of up to five years. The charges were still pending at the time of the termination hearing.

On October 4, 2016, DCF learned that mother had tested positive for cocaine. DCF attempted to confirm the positive test but found that the release mother had signed was no longer valid. Mother told personnel at the treatment program not to discuss the positive test with DCF until she had a chance to discuss it with them. The positive result for cocaine was confirmed after it was sent out to a lab from more precise testing.²

On September 27, 2016, DCF filed a motion to modify the transition plan as the result of mother's arrest. Approximately two weeks later, DCF filed an emergency motion to suspend visitation based on mother's recent positive drug test. In October 2016, the superior court issued an ex parte order temporarily suspending unsupervised visits with J.G. and the implementation of the next phase of the transition plan. On December 20, 2016, following hearings in November and December 2016, the court suspended the transition plan until the criminal charges were resolved and ordered that all contacts with J.G. be supervised.

Meanwhile, in late October 2016, mother and A.V. moved from St. Johnsbury to White River Junction to reside in a mobile home purchased by A.V.'s father. Mother and A.V. began another medication-assisted treatment (MAT) program in that area. They had no positive tests for opiates in the program, but on March 31, 2017, one of mother's urine samples was considered to be diluted because of its low temperature. She was discharged from the program when she declined to take another test. In February 2017, mother did not show up at a lab to provide a urine sample, as requested by DCF.

Also in February 2017, DCF learned about an incident in which mother was injured during a public altercation with another woman, as observed by an eyewitness. Mother told police that she was injured when she jumped out of a car driven by a man with whom she was arguing. She refused to identify the man to the police. The superior court did not find credible mother's recitation of the incident. The court also noted that at a shared parenting meeting two days later A.V. was observed to have scratches down the side of her face.

A hearing on DCF's previously filed TPR petition was held over four days in April and May 2017. Following the hearing, the superior court granted DCF's petition based on its conclusions that there were changed circumstances and that J.G.'s best interests compelled termination of mother's parental rights. See 33 V.S.A. § 5113(b) (stating that court may modify

² Mother does not explicitly challenge the superior court's findings regarding the October 2016 positive test for cocaine, but states that she testified the test was clean and that her testimony was bolstered by the program counselor's testimony that mother did not sign for the test and was not given an opportunity to retest. Mother also points out that she took a drug test with Easter Seals later that same day and it came back negative. In fact, mother did not testify that she was told that the test was clean; rather, she testified that she was never aware that the test was negative. For her part, the counselor testified that there is a form for clients to sign off on in-house positive tests, and that, to her knowledge, mother did not do so on that occasion. Mother does not dispute the court's finding that the October 2016 in-house test was positive for cocaine and that the positive test result was confirmed by a lab.

order “on the grounds that a change in circumstances requires such action to serve the best interests of the child”); see also In re D.S., 2016 VT 130, ¶ 6 (“The family court generally undertakes a two-step analysis in termination-of-parental-rights cases, first determining whether there has been a substantial change in material circumstances from the initial disposition order, and, if there has, whether the best interests of the child require termination of parental rights.”). After setting forth detailed findings, the court first concluded that there was a substantial change in material circumstances based on stagnation in mother’s ability to assume care for J.G. See id. (stating that substantial change in circumstances is most often found when parent’s ability to care for child has stagnated and that stagnation may be found when parent has failed to make progress in plan of services despite passage of time). The court then examined the statutory best-interests criteria and concluded that termination of mother’s parental rights was in J.G.’s best interests. See 33 V.S.A. § 5114(a).

On appeal, mother argues that: (1) a finding of stagnation in this case was not possible because she satisfied all of the goals set out in the disposition plan and remedied the circumstances that were at issue at the time of the CHINS adjudication; and (2) the court’s best-interests analysis was based on amorphous missteps unconnected to her ability to parent. Regarding the first issue, mother argues that the superior court’s finding of stagnation is untenable, given that she had found appropriate employment and housing, that all of her hands-on counselors indicated she was tackling her past drug issues and her counseling needs, that both she and A.V. were engaged in DBT, and that her drug-testing records over an eighteen-month period prior to the termination hearing show no indication that she had relapsed in her battle against opiate addiction. According to mother, against the overwhelming evidence of the positive steps she has taken toward reunification, DCF could point only to her illegal sale of a few Ritalin pills, problems with drug testing, and multiple phone calls to police while she and A.V. were still living in St. Johnsbury.

We conclude that the evidence supports the superior court’s finding of stagnation. Mother does not acknowledge the superior court’s emphasis on her failure to meet time frames for reunification that were based on the fact that J.G. was taken into DCF custody at birth with special needs and had spent his entire life in foster care. At the time of the termination hearing, J.G. had been in DCF custody and placed with the same foster family for approximately two years. Although mother had maintained contact with J.G. throughout that time, that contact had never reached the point where she had him for two consecutive unsupervised overnights. The court commended mother for remaining free of opiates but noted that she continued to struggle with substance abuse issues in general. In addition to there being instances of positive tests for nonprescribed substances, the court found that mother had a pattern of quitting programs when confronted with questionable tests. The further found that mother continued to struggle with self-regulation, as demonstrated by multiple incidents in early 2017, and that her volatile relationship with A.V. had delayed unsupervised contact with J.G. for a period of time in early 2016.

By April 2016, when reunification was expected to take place pursuant to the original disposition order, J.G. had already been in DCF custody for nearly a year, but mother was not ready to assume care of the child. The August 2016 transition order gave mother another chance to achieve reunification, with an aim of working toward a CCO by December 2016. Within a month of the transition plan order, mother and A.V. were arrested for selling prescribed medications, which resulted in a felony drug charge against mother that was still pending at the time of the termination hearing. The overnight visits, which were crucial to establishing mother as J.G.’s primary caregiver, were suspended and only supervised contacts were allowed. The court

found it very significant that the transition plan, which had been put in place in the summer of 2016 to achieve a quick transition to reunification in light of J.G.'s extended time in state custody and his need for permanence, had been suspended and another seven months had passed leading up to the termination hearing. In short, the court found stagnation based on mother's continuing substance abuse and struggles with self-regulation, which caused delays in reunification with a child who had spent two years—his entire life—in state custody and foster care. See In re S.W., 2003 VT 90, ¶ 6, 176 Vt. 517 (mem.) (“[T]he change in circumstances that will result in a finding of stagnation is the failure of the expectation that parental ability will improve in a reasonable time after the CHINS adjudication.”). On this record, the court's finding of stagnation was within its discretion. See In re A.G., 2004 VT 125, ¶ 19, 178 Vt. 7 (“The decision of whether a substantial change of circumstances has occurred is a matter within the sound discretion of the court.”(quotation omitted)).

Next, mother argues that the evidence does not support the superior court's conclusion that termination of her parental rights was in J.G.'s best interests. According to mother, the evidence demonstrated that J.G. was bonded with her and that she and her extended family provided him with love and support. In mother's view, termination of her parental rights was error, given the superior court's findings that J.G. and mother were bonded, that mother loves him, that he has a good relationship with A.V., that he enjoys his time with her, and that she plays a constructive role in his life. She faults the court for stating that the time for mother to demonstrate she can parent J.G. had long passed, arguing the that best-interests analysis must be forward-looking.

We conclude that the record supports the superior court's best-interests analysis. The court examined each of the statutory best-interests factors. Regarding J.G.'s relationships with others, the court acknowledged that J.G. was bonded with mother, but found that he is also closely bonded with his foster mother, who had been his primary caregiver his entire life. The court further acknowledged that mother played a constructive role in J.G.'s life, in that she loved him and had been diligent in her efforts to see him. The court concluded, however, that mother's constructive role in J.G.'s life did not outweigh the fact that he had spent his entire life with a foster family who had been his primary caregivers. The court emphasized that the most important factor was mother's failure, due mostly to her own conduct and despite numerous services provided by DCF, to reach the point of being able to parent J.G. within a reasonable time from the child's perspective. See In re B.M., 165 Vt. 331, 336-37 (1996) (stating that whether parent will be able to resume parental duties within a reasonable period of time from child's perspective is most critical factor in termination cases). The court stated that, given a chance through the transition plan to move toward reunification despite the length of time J.G. had been in state custody, mother was unable to put herself in a position to accomplish that goal and was still struggling with issues of substance abuse and self-regulation.

We reject mother's argument that the court's consideration of whether she would be able to resume parental duties within a reasonable period of time was not forward-looking. While the court must consider a parent's prospective ability to parent, that does not mean that past events and circumstances are irrelevant to whether the parent can resume parental duties within a reasonable period of time. Id. Here, the court cited mother's continuing struggles, as evidenced by relatively recent events concerning drug testing and self-regulation, to address issues that had prevented her from taking primary responsibility for J.G.'s care. Pointing to J.G.'s need for permanency after spending the only two years of his life in state custody with the same caregivers, the court concluded that mother would be unable to resume her parental duties within a reasonable

period of time from J.G.'s perspective. We find no basis in the record to overturn this determination.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice