

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-266

NOVEMBER TERM, 2017

In re A.S. and D.N., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	
	}	DOCKET NO. 58/59-3-15 Cnjv
		Trial Judge: Dennis R. Pearson

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

Mother appeals the termination of her parental rights to minors A.S. and D.N. We affirm.

Mother, who is thirty-three years old, has struggled with drugs and addiction for more than twenty years. Mother has four children: A.S., who is thirteen; D.N., who is seven; and two other children aged sixteen and four. In March 2015, the Department for Children and Families (DCF) filed petitions alleging that the three youngest children were children in need of care or supervision (CHINS). The petitions alleged that mother, who was the primary custodial parent, was engaging in intravenous drug use in front of the children. This appeal only concerns A.S. and D.N., as termination of parental rights was not sought for the youngest child due to his age and some ongoing parent-child contact.

Following the temporary care hearing in March 2015, A.S., whose father is deceased, was placed with a foster family with whom she has lived ever since. D.N. was initially placed in her father's care under a conditional custody order. In August 2015, D.N.'s father gave D.N. to the Burlington police, stating that he was "done." Custody of D.N. was transferred to DCF. After three unsuccessful foster placements, D.N. eventually went to live with her attorney. She has remained in that placement since November 2015. D.N. has not seen her father since he relinquished custody, with the exception of one or two supervised joint therapy sessions in September 2015. At the final session, father told the therapist in D.N.'s presence that he was no longer interested in having custody of D.N. Father did not make any further efforts toward reunification.

When the children were taken into custody, D.N. had a significant ear infection and A.S. was undernourished. Neither had been to see a doctor or dentist for a long time. There were signs that A.S., then ten years old, was abusing unlawful substances. These issues have been resolved since the children entered foster care. The children also had behavioral issues that have largely been resolved, although both children continue to participate in therapy.

Mother was on probation when the CHINS petitions were filed. The events that led to the petitions constituted a violation of her probation, which led to a warrant being issued and her

eventual arrest and incarceration in November 2015. Mother intentionally had no contact with A.S. or D.N. between April and November 2015 because she was avoiding arrest. She only attended one DCF meeting during this time and did not participate in any recommended services.

Mother did appear at the CHINS merits hearing in June 2015, however. Mother admitted that A.S. and D.N. were in need of care and supervision because she was unable to adequately exercise her parental responsibilities due to household instability and her continuing addiction struggle with unlawful drugs. In September 2015, the court approved case plans with concurrent goals of reunification with mother or, in D.N.'s case, father, or adoption.

At a post-disposition review hearing after mother's arrest in November 2015, mother indicated that she hoped to be released for community treatment in December 2015. Instead, mother's probation was revoked, and she began serving her underlying sentence. At the permanency planning hearing in February 2016, mother was still incarcerated. DCF filed new case plans with a goal of termination of parental rights and adoption for both children. Mother contested the plan modification. In May 2016, DCF filed petitions to terminate parental rights for both children.

After she was incarcerated in November 2015, mother was released to the community three times for residential substance abuse treatment. Each time, she relapsed into drug use and was reincarcerated. Her current maximum sentence ends in March 2019. Mother has applied to be released to outpatient residential programs. None of them would allow the children to reside full-time with mother, although some visitation would be possible.

Mother had a few brief telephone contacts with the children during the first half of 2016. However, mother has had no contact with either child since then, even during the time when she was on community release, except for one supervised visit with D.N. and D.N.'s therapist in September 2016 at the corrections facility. Mother claimed at the termination hearing that she continually tried to arrange for contact with the children throughout this period but was stymied by DCF and the foster parents. The court did not find this claim to be credible.

The termination hearing was held over two days in May and June 2017. Mother attended the hearing and testified. The court issued its decision in July 2017. The court attributed the delay between the filing of the petitions and the termination hearing in part to efforts by DCF and the court to give mother additional time to successfully re-enter the community and recover from addiction.

In its decision, the court found that mother's ability to parent had stagnated. The court ruled that mother's continuing failure to meet basic parenting expectations, including finding stable housing and employment to support her children, achieving successful addiction treatment and prognosis, and demonstrating the emotional commitment and skills to be a full-time parent, were not due to factors beyond her control. Instead, her repeated violations of probation and furlough and continued incarceration were her own responsibility.

The court then considered the best-interests factors set forth in 33 V.S.A. § 5114. The court found that the children no longer had a meaningful parental bond with mother and that she did not play a constructive role in their lives. Each child was well adjusted to her foster home and school, and was consistently receiving the attention, support, and parental care that she needed. The court found that mother would not be able to resume parenting within a reasonable amount of time. Based on the children's needs and behaviors when they were taken into custody, the court found that mother's parenting as of March 2015 was inadequate. Mother still faced a further period of incarceration. Even under the best-case scenario for community release, she would not be able

to resume parenting the children on a full-time basis. The court found that she would be unable to meet the children's needs for stability, structure, and security while she remained under the supervision of the Department of Corrections, which would be well into 2019. It therefore concluded that termination of parental rights was in the best interests of the children. The court also terminated the rights of D.N.'s father, who did not appeal.

On appeal, mother argues that it is "doubtful" whether the family court correctly interpreted the third best-interests factor. The court described that factor as follows: "whether the record evidence establishes clearly and convincingly that the parent is presently unable to resume the care and custody of the child within a reasonable period of time, i.e., prospectively or going forward, and measured from the child's perspective given her age and present developmental status." Mother argues that the court's use of the word "presently" calls into question whether the court considered her ability to improve as a parent.

Mother's argument is without merit. The statute requires the court to consider "the likelihood that the parent will be able to resume or assume parental duties within a reasonable period of time," 33 V.S.A. § 5114(a)(3), as measured from the perspective of the child. *In re C.P.*, 2012 VT 100, ¶ 30, 193 Vt. 29. The court correctly applied this standard. As noted above, in the same sentence as the word challenged by mother, the court explicitly stated that it was considering whether the evidence established that mother would be able to resume parenting "prospectively or going forward." The court then went on to assess the likelihood that mother could resume full-time care of A.S. and D.N. within a reasonable period of time. It found that even if mother were released into the community for treatment, she would not be in a position to parent the children. It found that her continued incarceration and likely supervision by the Department of Corrections into 2019 would prevent her from meeting the children's needs "within the relevant timeframe that matters to" the children. The court's conclusion was supported by its findings, which were in turn supported by the record.

Mother also argues that the court misapprehended the testimony of D.N.'s therapist and therefore incorrectly assessed the nature of the parent-child bond. In describing mother's September 2016 supervised visit with D.N., the court stated:

While [mother] after-the-fact perceived that visit as having been very positive, [D.N.]'s therapist believes (and the court finds the opinion credible and persuasive) it is more likely that [D.N.] was then trying to work out, with her own mother present, the 6-year-old child's own understanding that she was ready to break with her mother, and to demonstrate that she was ready for, and needed assurances of continued stability.

Mother argues that there was nothing in the record to show that the visit was a failure, and that D.N.'s therapist did not express an opinion that D.N. was ready to break with her mother.

On appeal, the family court's findings of fact will stand unless clearly erroneous. *In re A.F.*, 160 Vt. 175, 178 (1993). "When findings are attacked on appeal, our role is limited to determining whether they are supported by credible evidence." *Id.* The finding challenged by mother is not clearly erroneous. First, the court did not describe the visit as a failure. Second, although D.N.'s therapist did not express her opinion in precisely the words used by the court, her testimony supports the court's finding. The therapist used play therapy with D.N., a common practice with children of that age in which children express their trauma through play, movement, and art. The therapist stated that during the September 2016 supervised visit with mother, D.N.

“used some animal figures or dolls during that visit while she was playing to play out some adoption themes.” When asked if there was any therapeutic significance to D.N.’s playing out these adoption themes during the visit, the therapist opined that D.N. was “expressing to everyone how confusing that was for her to have both [her foster mother] and her biological mother in the room, not quite knowing what to do.” She further testified that D.N. was likely “feeling confused that, I think, she was looking forward to seeing her biological mother, but it also triggered other feelings for her of abandonment and worry and anxiety.” This testimony, which the court found to be credible, supports the court’s description of the therapist’s opinion regarding what D.N. was attempting to express through her play. The court’s finding, in turn, supported its assessment that mother no longer played a constructive role in D.N.’s life.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Karen R. Carroll, Associate Justice