

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-037

JULY TERM, 2018

In re C.G., Juvenile
(D.G., Mother*)

} APPEALED FROM:
}
} Superior Court, Windsor Unit,
} Family Division
}
} DOCKET NO. 34-2-15 Wrjv

Trial Judge: Thomas J. Devine

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

Mother appeals an order of the superior court, family division, terminating her residual parental rights with respect to her son, C.G. We affirm.

C.G. was born in May 2008. At the time of his birth, mother had three other children from two previous relationships. Her oldest son from the first relationship was in foster care at that time as the result of his delinquent behavior. He sexually abused his half-sister, who was the younger of two children from the second relationship. C.G. was sexually abused by the older child from that relationship, who is approximately eleven years older than C.G. The relationship between mother and C.G.'s father ended during mother's pregnancy with C.G.¹ After this relationship ended, mother began a relationship with another man, whom she married and with whom she had a child. That child is approximately one year younger than C.G. Mother lived with this man from before C.G.'s birth until C.G. was about six years old. During this time, the man physically and emotionally abused mother and the children in the household, including C.G.

While the family was living in New Hampshire, the New Hampshire Division of Children, Youth and Families (DCYF) substantiated mother's second oldest son for having sexually abused C.G. and other children, which led to criminal charges being filed against the boy. Mother was encouraged to find a therapist for C.G. and not allow contact between her older son and C.G., but she delayed finding a therapist and continued to allow the contact. As a result, in March 2014, DCYF substantiated mother for neglect.

By early 2015, mother had left her relationship with her youngest child's father, and she and her children were living with her sister in Vermont. In February 2015, the Department for Children and Families (DCF) received a report that a convicted sex offender was living in the home. In a follow-up investigation, DCF learned that mother was still allowing her son who had been substantiated for sexually abusing C.G. to care for C.G. These facts, in addition to the fact that DCF had received reports that C.G.'s father was physically abusing C.G., led to DCF filing a

¹ C.G.'s father voluntarily relinquished his parental rights during the first day of the termination hearing.

petition on February 25, 2015 alleging that C.G. was a child in need of care or supervision (CHINS). That same day, pursuant to an emergency care order, C.G. was placed with a foster mother, with whom he has remained ever since.² After C.G.'s father entered an admission to the CHINS petition, both parents, each represented by counsel, attended a May 4, 2015 disposition hearing. At the disposition hearing, the family court approved a concurrent plan of reunification with mother or father or adoption. The target timeline for reunification was December 2015.

The disposition case plan identified three focus areas for mother: housing, parenting, and accountability. The plan required mother to maintain appropriate housing, demonstrate an understanding of how stability can benefit her children, provide an environment free of domestic abuse or exposure to sex offenders, engage in therapy to process her own past trauma as a victim of childhood sexual abuse by her father, undergo a parenting assessment and a mental health evaluation, engage in parent education, and demonstrate accountability by acknowledging how choices she made regarding inappropriate caregivers and lack of supervision put her children at risk.

By the time of the July 2015 post-disposition review hearing, mother had engaged in individual therapy. At the October 2015 permanency planning hearing, mother expressed her dissatisfaction with changing the permanency goal date to March 2016. That same month, she filed a motion to increase her visits with C.G. from the once-a-week supervised visitation that had been taking place. DCF opposed the visitation, stating that the agency was considering terminating mother's parental rights because she had not made measurable progress in her ability to provide a safe environment for C.G. and that a family forensic evaluation was needed to determine whether it made sense to increase visits between mother and C.G. In response to mother's motion, a hearing on the motion for increased visitation was continued from April 4, 2016 to May 19, 2016, at which time the court granted mother additional supervised visitation in a community setting.

In the spring of 2016, mother participated in a family forensic evaluation conducted by Dr. William Halikias, who reviewed the case file, interviewed several involved people, met with mother over the course of two days, conducted a series of psychological tests, and observed mother and her youngest daughter during a two-hour visit with C.G. After Dr. Halikias submitted his report, DCF decided to seek approval of a new case plan with adoption as the only goal. Mother sought a second forensic evaluation, which was conducted by Dr. Philip Kinsler in the fall of 2016. Like Dr. Halikias, Dr. Kinsler conducted a thorough records review. He also reviewed family time coaching notes and notes provided by mother's therapist, administered psychological tests to mother, and observed a visit with mother and C.G. that was joined by mother's new husband, whom she had married in June 2016.

Meanwhile, in June 2016, DCF filed petitions to terminate the parental rights of both mother and C.G.'s father. A termination hearing took place over three days in February, March, and June of 2017. As noted, on the first day of the proceeding, C.G.'s father voluntarily relinquished his parental rights. In January 2018, the superior court issued an opinion terminating mother's parental rights after concluding that there was a substantial change of circumstances due to stagnation of mother's ability to parent C.G. and that C.G.'s best interests warranted terminating mother's parental rights. On appeal, mother argues that: (1) the superior court erred in finding stagnation based solely on what the court described as her divided loyalty between C.G. and her

² Days before DCF filed the CHINS petition, the family division, in a domestic custody proceeding, awarded C.G.'s father custody of C.G. That custody arrangement was short-lived, however, as C.G.'s father and his attorney asked DCF to find another caregiver for C.G.

son who had abused C.G.; and (2) the evidence does not support the court's conclusion that termination of mother's parental rights is in C.G.'s best interests.

The family court has "broad discretion" in deciding whether to grant a petition by DCF to terminate parental rights. In re D.M., 2004 VT 41, ¶ 5, 176 Vt. 639 (mem.). We will affirm the court's decision if the findings are based on clear and convincing evidence and reasonably support the court's conclusions. Id.; see also In re A.M., 2017 VT 5, ¶ 34, ___ Vt. ___. Because parents have a fundamental right to care for their children, termination of parental rights should be invoked only "when there is no reasonable possibility that the causes and conditions which led to the filing of the petition can be remedied and the family restored within a reasonable time" from the perspective of the child. In re A.M., 2017 VT 5, ¶ 34 (quotation omitted); see also In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325.

"Termination of residual parental rights at a modification hearing requires a two-step analysis." In re B.M., 165 Vt. 331, 336 (1996). "[T]he court must first determine whether circumstances in the child's life have changed in a material way." In re D.M., 2004 VT 41, ¶ 5. A change of circumstances is most commonly found when there has been parental stagnation. Id. "The key question for the court when considering whether stagnation has occurred is whether the parent has made progress in ameliorating the conditions that led to state intervention." Id. ¶ 7. If the court finds a substantial change in material circumstances by clear and convincing evidence, it must examine the statutory best-interests criteria to determine whether termination is in the child's best interests. See In re B.M., 165 Vt. at 336; 33 V.S.A. § 5114(a). The most critical of those criteria is whether the parent will be able to resume care of the child within a reasonable period of time from the child's perspective. In re B.M., 165 Vt. at 336. The court's conclusion that a parent is unlikely to be able to do so must be supported by clear and convincing evidence. Id.

Mother first argues that the family court's sole reliance on the fact that she had not cut off all contact with her son who had sexually abused C.G. did not amount to clear and convincing evidence of a substantial change in material circumstances warranting a best-interests review. Mother asserts that, in contrast to other cases in which this Court has found a change of circumstances based on a failure to acknowledge past abuse, she has fully acknowledged that the abuse occurred. She further contends that her decision to maintain some degree of contact with her older son did not show a level of poor judgment sufficient to constitute a substantial change of circumstances, given the lack of any evidence indicating that, since the disposition order, she had allowed any contact between that son and C.G. She argues that, following her acknowledgment that she had had continued contact with that son, the court could have created a safety plan that would have allowed for future reunification while protecting C.G.

In finding changed circumstances, the family court initially credited mother for maintaining stable housing and employment, engaging in all of the services provided by DCF, participating in two forensic evaluations, signing releases, accepting feedback while participating in family time coaching, and making progress in therapy. Further, the court acknowledged that mother was in a stable relationship with a partner who was not abusive nor a substance abuser, that she had been parenting her youngest child without any reported incident other than past school tardiness, and that C.G. looked forward to visits with mother and had become more demonstrative in his affection towards her. Nevertheless, the court found stagnation by clear and convincing evidence. In the court's view, mother was unable to place C.G.'s needs above her own and thus keep him safe because, despite the passage of a significant amount of time in which C.G. had been in foster care and she had received services, she still had not fully acknowledged the reality of the past abuse C.G. had suffered due in part to her neglect. According to the court, despite mother's ongoing therapy and participation in services, she continued to vacillate between denial of, and

insight into, her role in C.G.'s abuse and subsequent transfer to state custody. In a related vein, the court also cited mother's lack of progress in learning about and understanding C.G.'s special needs as a victim of abuse.

In support of its finding of stagnation, the court noted that mother had not revealed to her therapist that after her son had been substantiated for abusing C.G. she continued to allow the older boy to have unsupervised contact with his younger sister and C.G. The court also cited the fact that mother falsely testified that she had broken off contact with her son who had sexually abused C.G. At the termination hearing, during her attorney's direct examination, mother testified that she had not spoken to her older son in over a year and that she had ended contact with him. When the attorney asked her what her plans were going forward with respect to him, she stated that she did not want to be around him because of "what he'd done to his brother and what he's done—what he's been doing—calling me all kinds of names and stuff, that's not right." After evidence later came to light at the hearing that in fact mother had been in regular contact with him, mother acknowledged that she had. The court also detailed several instances in which mother and her husband spoke openly in the presence of C.G. about their contact with mother's older son without recognizing the emotional impact it was having on C.G. The court cited credible evidence that mother's conduct in this regard triggered C.G.'s anxiety and regression.

Because mother had not been completely candid with her therapist about her past actions with respect to her son who had abused C.G., the court found the therapist's perceptions of mother's progress to be overly optimistic. The court also cited the testimony of the two experts who had conducted forensic examinations of mother. The court found credible the testimony of the State's expert that mother was a "work in progress" who did not have full insight into her role in C.G.'s abuse and that she would need possibly an additional year of parent psycho-education and therapy. As for mother's expert, the court was skeptical of his belief that mother had had an epiphany concerning her role in C.G.'s abuse and that reunification could safely occur within six months with continued therapy. In any event, the court noted that neither expert opined that mother was ready to care for C.G. at that time despite the years of services she had received and the significant amount of time that C.G. had been in foster care.

The family court correctly identified the most critical issue in this case as whether mother had gained sufficient insight into how her conduct had placed C.G. at risk of harm—to the point where she could safely parent him. The court further identified a secondary issue as whether mother had reached a fuller understanding of C.G.'s special needs in light of his complex trauma history, which resulted in him being diagnosed with Post Traumatic Stress Disorder. The court concluded that, notwithstanding mother's progress in other areas, she still had not made sufficient progress in these critical areas to safely parent C.G., despite the passage of nearly three years while C.G. remained in state custody.

We conclude that the evidence cited by the court supported its finding of stagnation. Mother's reliance on In re A.M. is unavailing. In that case, the court's finding of stagnation with respect to the father was based on a single incident in which the father allowed the children to have contact with the mother even though he knew DCF would be upset because the mother was restricted to supervised contact. In re A.M., 2017 VT 5, ¶¶ 20, 38 (stating that, apart from that incident, there was "no evidence to support a finding that father was stagnating with respect to achieving the case plan goals"). We rejected "the conclusion that father's lapse in this instance was so severe that it warranted immediate modification of the case plan from a goal of reunification with father to a goal of termination without any remedial response by DCF." Id. ¶ 40. Here, in contrast, there was substantial evidence, including expert testimony, that mother still did not consistently understand her role in C.G.'s abuse and the impact of the abuse on the boy, which

were the most critical considerations in determining whether reunification could take place. See In re D.M., 2004 VT 41, ¶ 7 (stating that disposition “case plan is not intended to be a mere checklist the parent must satisfy to ensure the automatic return of the children to the parent’s care,” but rather “the main concern must always be whether the individual parent has demonstrated the improvement contemplated at the time the children were removed from the parent’s care”).

Next, mother argues that the family court erred in determining that termination of her parental rights was in C.G.’s best interest. In support of this argument, mother again relies upon her consistent engagement in case plan services and her substantial progress in various areas of her life. Specifically, she argues that: (1) the court failed to give adequate weight to C.G.’s love for his mother and stepsister and his desire to return home; (2) the court improperly relied upon psychological testing in terminating her rights; and (3) her belated admission long after DCF abandoned reunification efforts that she had maintained contact with her son who had abused C.G. was not clear and convincing evidence of her inability to resume parenting C.G.

In considering C.G.’s best interests, the family court carefully reviewed each of the statutory factors. See 33 V.S.A. § 5114(a). Regarding the first and fourth factors concerning the child’s significant relationships, the court acknowledged C.G.’s love for mother and his stepsister, but it found that C.G.’s perception of his mother was shaped by his dysfunctional and abusive upbringing while in her care, which led to a “parentified” relationship in which he worries about mother and wants to take care of her. The court further found that although mother demonstrated a love and affection for C.G., she had not, on balance, played a constructive role in his life. Regarding the second factor dealing with C.G.’s adjustments to his home and community, the court found that C.G. had progressed and thrived in his foster mother’s care and in his school and community. As for the critical third factor—whether mother would be able to resume her parental duties within a reasonable period of time from C.G.’s perspective—the court stated that C.G. had been in state custody for three years, one third of his life, and yet mother’s insight into her role in C.G.’s abuse remained poor, despite years of receiving services and engaging in therapy. Given these circumstances, the court concluded that it was unlikely that mother would gain the insight needed to safely parent C.G. within a reasonable period of time from the child’s perspective.

We conclude that the evidence and the court’s findings and conclusions support the court’s determination that termination of mother’s parental rights is in C.G.’s best interests. We reject mother’s contention that the court failed to give adequate weight to the bond between C.G. and his mother and stepsister. The court considered that bond, but concluded that it was outweighed by mother’s lack of insight into C.G.’s past abuse and the trauma to the child caused by that abuse, which directly impacted mother’s ability to safely parent C.G. See In re D.S., 2014 VT 38, ¶ 22 (“We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence.” (quotation omitted)); cf. In re J.F., 2006 VT 45, ¶ 13, 180 Vt. 583 (stating that loving parental bond may be overridden by other factors when evidence demonstrates that bond has been destructive in nature and harmed children).

We also reject mother’s assertion that the court over-relied on psychological testing in terminating mother’s parental rights. We have disavowed “the use of psychological testing as the sole basis for an order terminating parental rights.” In re B.M., 165 Vt. at 340. But we have also acknowledged that “[s]uch tests, when relied upon by expert witnesses, may have a small place in the overall evaluation of a person’s parenting ability.” Id. at 338. That is exactly what occurred here. Both the State’s and mother’s experts administered psychological tests and testified about the results, but they also relied on, and testified about, the record evidence, their interviews with mother and other persons, and their own observations. Moreover, in terminating mother’s rights, the family court did not rely heavily on the results of the experts’ psychological testing, but rather

based its decision primarily on evidence concerning mother's conduct, particularly that conduct related to her lack of insight into her role in C.G.'s past abuse and the effect of that abuse. See id.

Finally, regarding mother's criticism that the court relied too heavily on her admission of having a divided loyalty between her sons, we discern no basis for reversing the court's decision. It is important to recognize that the court did not fault mother for wanting to maintain contact with her other son despite the bad things he had done. The court was more concerned that mother led her therapist, various evaluators, and even the court to believe she had completely cut off contact with him when in fact she was regularly engaged. This called into question mother's reliability in working collaboratively toward reunification. Moreover, the court was very concerned about mother's casual references to the offending son in the presence of C.G., with no apparent recognition of the impact those references had on C.G. These factors reinforced the court's conclusion that mother still did not fully comprehend her role in C.G.'s sexual abuse and the enormous impact that the abuse had on the child. The court concluded that this conduct, in conjunction with other evidence, created grave doubts as to whether mother would be able to safely parent C.G. if he were returned to her custody. Given this continuing situation after years of services to mother and foster care for C.G., the court concluded that mother would not be able to resume her parental duties within a reasonable time from C.G.'s perspective. The record supports this determination.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice