

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. 2018-137

SEPTEMBER TERM, 2018

In re J.W., Juvenile
(B.W., Father*)

} APPEALED FROM:
}
} Superior Court, Franklin Unit,
} Family Division
}
} DOCKET NO. 90-5-15 Frjv

Trial Judge: Mary L. Morrissey

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

Father appeals the termination of his parental rights to daughter J.W., who is six years old. We affirm.

The Department for Children and Families (DCF) became involved with the family in 2012, while mother was still pregnant with J.W. For the first eighteen months of J.W.'s life, father and mother lived with J.W. as an intact family, although father was incarcerated twice during that time. Father testified that at some point during a later incarceration, he was served with a relief-from-abuse order that prevented him from having contact with mother or J.W.

In May 2015, DCF filed a petition alleging J.W. was a child in need of care or supervision (CHINS) based on allegations of substance abuse, domestic violence, mother's homelessness, and father's criminal behavior. J.W. was placed in DCF custody and has remained in foster care since that time. Following a contested hearing, in December 2015 the family court concluded J.W. was CHINS because mother would not adequately protect J.W. from father if the child was returned to mother's care. We affirmed the CHINS merits decision in July 2016. In re J.W., 2016 VT 78, 202 Vt. 424.

DCF filed a disposition case plan in March 2016. However, a disposition hearing did not take place until November 2016, by which time DCF had filed a petition to terminate both parents' rights. The court conducted a hearing on the termination petition in March 2017. After a day and a half, the court suspended testimony out of concern that no disposition plan had been adopted, as well as news that J.W. had been removed from her pre-adoptive home after the foster parents indicated they could no longer care for her. DCF subsequently withdrew the termination petition.

In May 2017, DCF filed another disposition case plan. Following a hearing, the court adopted the plan with amendments and issued a disposition order continuing DCF custody. The case plan had concurrent goals of reunification with either parent or adoption by November 2017. It emphasized the need for both parents to immediately demonstrate their ability to resume parenting, given that J.W. had been in DCF custody for two years. The recommendations for father included that he participate in parent education and family-time coaching, engage in

substance abuse treatment programming, comply with probation conditions including not using alcohol or drugs, and demonstrate an understanding of how his actions had impacted J.W.

Father began family-time coaching in June 2017. In July, after one session, he was incarcerated for violating probation conditions by testing positive for cocaine and failing to participate in required DOC programming. In November 2017, DCF filed renewed termination petitions for both parents. Father remained incarcerated until the day before the termination hearing in February 2018. Prior to the hearing, mother agreed to relinquish her rights if father's rights were terminated by the court.

The following evidence was presented at the termination hearing. During the brief period prior to father's July 2017 incarceration when he had supervised visits with J.W., the social worker observed him to have appropriate play and positive interactions with her, although he had difficulty managing J.W.'s defiant behaviors. He never progressed to unsupervised visits.

After father was incarcerated in July 2017, he requested that J.W. visit him at the correctional facility. The sole visit took place in December 2017 and lasted about fifteen minutes. J.W. was frightened, began crying, and asked to leave almost immediately. Father asked J.W. why she was doing this and said it was making him sad. He repeatedly asked for a kiss goodbye, causing the DCF caseworker to tell father that J.W. did not have to kiss him. As they were leaving, father yelled to J.W., "don't be kissing any boys," and "if anybody touches you, tell [the caseworker]." J.W. remained upset after the meeting and had nightmares. The parties agreed that no more visits would occur at the jail. Although the caseworker tried to talk to father about his comments to J.W. and his repeated requests for kisses, the conversation "didn't get very far."

Prior to the December 2017 visit, father had called J.W. every night. Afterward, J.W. kept hanging up on father and became upset when he called. Phone calls accordingly were reduced to three times per week. Father did not have any in-person visits with J.W. after December 2017.

Father has a lengthy criminal history, with over thirty-five misdemeanor convictions and at least seven felonies. His most recent conviction was for three counts of retail theft in September 2017, when he was forty-six years old. In March 2012, he received a sentence of six months to seven years for "DWI #4 or subsequent." Since J.W. was born, he has been incarcerated ten different times, for a total of two years of her life.

Father testified that he became addicted to opiates in 2012 after a car accident. He twice participated in intensive outpatient programming, from January 2017 to February 2017 and from April 2017 to June 2017. Although he was apparently able to remain sober during the first period, he tested positive two or three times during the latter period for unprescribed cocaine, THC, and benzodiazepine. Due to tensions with another client in the group, he was recommended to participate in individual counseling, but he did not do so.

Based on the above and other evidence, the court found that father had stagnated in his ability to parent J.W. by failing to remain sober or comply with his probation conditions. This resulted in his being incarcerated for nearly the entire period contemplated by the May 2017 disposition order and prevented him from meeting the expectations in that order and thereby demonstrating that he had the skills necessary to parent J.W.

The court then assessed whether termination of father's parental rights was in the best interests of J.W. in accordance with the factors set forth in 33 V.S.A. § 5114(a). It found that although father had maintained contact with J.W. since the CHINS petition was filed in May 2015, their recent contact had been minimal and difficult, and father had not played a role in J.W.'s daily

parenting for years. The court noted that father's sole recent in-person visit with J.W. had been a negative and frightening experience for her, and she displayed anger afterward. In contrast, J.W. had a strong connection with her foster parents, with whom she was placed in November 2017 after earlier unsuccessful placements. She referred to them as "Mom" and "Dad," unlike father, to whom she referred by his first name. She was well-adjusted to her new home, school, and community. The court found that father would not be able to resume parenting J.W. within a reasonable amount of time. J.W. had already been in DCF custody for thirty-three months and needed permanency. Father, meanwhile, had failed to meet any of the expectations of the case plan. He had demonstrated a lack of insight into J.W.'s emotional development, as evidenced by his behavior during the December 2017 visit, and significant work was needed before he could resume parenting. Finally, the court found that father did not play a constructive role in J.W.'s life, as he had not met her daily needs in years, his in-person contact had been sporadic, and phone calls with him appeared to be difficult for her. It therefore concluded that termination was in J.W.'s best interests.

On appeal, father's main argument is that the trial court erred in failing to consider the evidence presented at the first termination hearing in March 2017, which he claims would show that he was capable of parenting J.W. and played a constructive role in her life. We see no error. The February 2018 termination hearing was a new proceeding before a different judge and not merely a continuation of the March 2017 hearing because DCF withdrew its initial petition during the intervening time. Even if the court were aware of the prior evidence, it would have to be offered and admitted at the second termination hearing for the court to properly consider it. See Abbiati v. Buttura & Sons, Inc., 161 Vt. 314, 320 (1994) (stating general rule that "a court may not consider evidence outside of that introduced at trial"). Although the parties agreed at the time the first hearing was suspended that the evidence presented at the earlier hearing could be used in the future, neither father nor any other party attempted to introduce it at the termination hearing in February 2018.

Father also argues that the court's finding of stagnation was unsupported by sufficient evidence and that it erred in determining that termination was in J.W.'s best interests. When termination of parental rights is sought after initial disposition, the court must undertake a two-step analysis. First, it must find that a substantial change in circumstances has occurred to justify modifying the existing disposition order. 33 V.S.A. § 5113(b); In re B.W., 162 Vt. 287, 291 (1994). Second, it must find that termination of parental rights is in the best interests of the child, as measured by the standards set forth in 33 V.S.A. § 5114. In re B.W., 162 Vt. at 291. "As long as the court applied the proper standard, we will not disturb its findings unless they are clearly erroneous, and we will affirm its conclusions if they are supported by the findings." In re G.S., 153 Vt. 651, 652 (1990) (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" father's parental rights. In re S.B., 174 Vt. 427, 429 (2002) (mem.).

A change in circumstances "is most often found when the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. at 291 (quotation omitted). Father does not dispute the court's findings that since the May 2017 disposition order, he had made virtually no progress on the case plan recommendations due to his criminal activity, drug use, and resulting incarceration, and that his relationship with J.W. deteriorated over that period. These facts were sufficient to support the court's determination that father had stagnated in his ability to parent J.W.

We likewise reject father's argument that the court erred in concluding that termination was in J.W.'s best interests. The court carefully considered each of the statutory factors and its

findings as to each were supported by clear and convincing evidence. Father essentially argues that the court should have weighed the factors differently. However, father's disagreement with the court's reasoning and conclusion "do[es] not make out a case for abuse of discretion." Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.). Although father argues that he had a strong relationship with J.W. when she was younger, he does not dispute the court's findings that he had not played a role in J.W.'s daily parenting for years and that their recent interactions had been negative. Contrary to father's argument, the court's finding that J.W. was well-adjusted to her current foster home and community and was receiving extensive services that might not transfer to father's community is likewise supported by the record. The evidence also supports the court's conclusion that the most important factor, "the likelihood that the parent will be able to resume or assume parental duties within a reasonable amount of time," weighed against father. 33 V.S.A. § 5114(a)(3). The court found that J.W. was a young child who had been out of her parents' custody for nearly half her life and needed permanency. Father had failed to engage in any of the recommended services designed to help him resume parenting J.W. within a reasonable time and had failed to prioritize her needs over his own struggles with addiction and recurrent criminal behavior. As the court noted, father alone is responsible for the behavior that led to his incarceration and for the resulting consequences. See In re D.S., 2014 VT 38, ¶ 26, 196 Vt. 325.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice