VERMONT SUPREME COURT
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Case No. 22-AP-029

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

MAY TERM, 2022

In re J.P., Juvenile	}	APPEALED FROM:
(K.P., Mother* & K.W., Father*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	CASE NO. 56-4-18 Wmjv
		Trial Judge: Michael R. Kainen

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

Parents appeal the family division's order terminating their parental rights to their son J.P., who is four years old. We affirm.

The court made the following findings in its order. Immediately after J.P.'s birth in April 2018, the State filed a petition alleging that he was a child in need of care or supervision (CHINS). The petition alleged that mother had significant mental disabilities and a history of extremely dirty and unsafe housing and multiple dysfunctional relationships that involved domestic violence. Her two older children were found to be CHINS based on these factors and mother's rights to them were terminated by relinquishment. Father had a history of violence toward mother and there were multiple reports that he had placed children at risk. The court issued emergency and temporary care orders transferring custody of J.P. to the Department for Children and Families (DCF).

In June 2018, parents stipulated that J.P. was CHINS. DCF arranged for neuropsychological assessments of both parents. Father was found to have below-average intellectual and cognitive abilities. Mother was found to be in the mildly intellectually disabled range and had significant deficits in academic achievement and memory. The psychologist recommended extensive supports to assist parents in developing parenting skills, as well as individual psychotherapy for both parents and psychopharmacological treatment for mother. These recommendations were incorporated into the case plan, which had a goal of reunification with both parents and was approved by the court in November 2018.

Parents initially made some progress. They attended recommended services and apologized for past negative behaviors toward providers. Mother was attending therapy, although she attended every other week instead of weekly as recommended by the case plan. A permanency report filed in April 2019 stated that parents had been able to have more unsupported time with J.P. However, it noted that both parents needed to demonstrate a better

understanding of child development, address their own mental-health needs, and communicate with providers in a productive manner. The report noted that mother continued to struggle with her mental health. She had difficulty staying calm with J.P. and became anxious and overly defensive when providers tried to give her guidance. Both parents became easily overwhelmed when working on more than one or two parenting strategies at a time.

In a subsequent permanency case plan, the DCF case worker noted that parents struggled to adopt new strategies for soothing J.P. when he was fussy or needed a nap. They frequently resorted to giving J.P. a bottle to calm him. Parents had been instructed to use a crib for naps, but instead held J.P. while he was sleeping. Parents did not consistently write the time that J.P. ate or napped in the journal they used to communicate with the foster family. In March 2019, mother became upset with providers and threatened the Family Time coach during a visit, resulting in visitation being moved from the home to DCF's offices. She later apologized and in-home visits resumed.

In August 2019, DCF filed a petition to terminate parental rights and changed the case plan goal to adoption. The revised case plan had not been formally approved by the court up to that point. However, the court found that the parents were aware of the change in the permanency goal and were on notice that DCF believed they were stagnating in their progress, based on the filing of the termination petition and discussions that took place at the time.

Despite the change in goal, the DCF case worker continued to plan for reunification. In March 2020, DCF arranged for a parenting evaluation with a clinical psychologist, Dr. William Halikias. Dr. Halikias found that mother's difficulties were not explained by her mild intellectual disabilities alone. He noted that many individuals with mother's disabilities can parent. Rather, moderate mental illness in the form of anxiety, depression, and avoidant personality, best explained mother's history of social, adaptive, and parenting difficulties. Dr. Halikias reported that mother was highly susceptible to episodes of dysregulation. Mother also did not trust providers and withheld information or did not report accurately. Dr. Halikias opined that there were legitimate safety concerns about mother parenting alone. He concluded that, between the two, father should be viewed as J.P.'s primary caregiver. However, he recommended father be provided therapy to address behavior that was counterproductive, defensive, or perceived by others as threatening. Dr. Halikias believed J.P.'s primary attachment was to his foster parents, but he did have an attachment to parents, particularly father. The court adopted Dr. Halikias's observations as findings.

Parents received Family Time Coaching for fourteen months, which was much longer than the typical coaching session of six months. The service was eventually discontinued because parents were no longer making progress. Father understood coaching recommendations but chose to disregard them. Mother could not maintain what she learned. After DCF changed the case plan goal to adoption in 2019, mother stopped attending therapy and father, who had not been seeing a therapist, refused to begin. There were concerns about parents' ability to respond to J.P.'s medical needs. They incorrectly believed J.P. had a milk allergy and had been diluting his formula. Father frequently became aggressive or threatening during meetings. Both refused to engage in services.

The focus of reunification services was on mother being J.P.'s primary caregiver while father continued to work outside the home. Following the resumption of in-person visits during the summer of 2020, parents had J.P. three days a week for two hours a day, which later increased to five mornings a week. However, mother was unable to respond to J.P.'s cues and

was not sure what to do if he became upset. Both parents were resistant to concerns about how they would deal with J.P. when he became oppositional. Case workers observed that J.P. was upset when he left his foster parents' home to attend visits and was very happy to return.

The court noted testimony from a family support specialist, Leslie Albano, who had worked with mother for several years. Albano faulted the DCF case worker for sometimes failing to deescalate interactions with mother and for being overly insistent on structured naptimes and meal choices. Albano testified that mother had grown as a parent and that she was better able to use coping skills. The court found that mother had likely made some progress but found that Albano's rosy outlook about parents' abilities was not supported by other facts in the case.

The court also considered the testimony of Dr. Nicole Brisson, who operates a mental-health-counseling agency that specializes in working with individuals with intellectual and developmental disabilities. Dr. Brisson conducted a parenting assessment of mother and father. She opined at the hearing that they could parent successfully with support and could assume a parental role within six to eight months if DCF prepared a better plan. The court noted that Dr. Brisson did not speak to mother's therapist, the foster parents, or the Family Time coaches who had been working with parents, instead relying largely on parents' self-reporting. The court found that this likely skewed her conclusions, because the evidence showed that parents had worked to present a positive impression with previous evaluators. Dr. Brisson also used a variety of assessment tools that were not peer reviewed or generally accepted in the psychological community. The court rejected Dr. Brisson's opinion that parents could assume a full-time parental role within six to eight months as unrealistic and speculative.

The court found that parents had stagnated in their parenting ability because neither had been able to consistently demonstrate meaningful improvement in addressing the risk factors that led to J.P. entering custody. The court found that DCF had provided an individualized plan and services that accounted for mother's disabilities, but she and father were defensive and resistant to the plan, which hampered their improvement. Parents were unwilling to engage with providers or address their own mental health. Mother did not seek recommended developmental services. Most importantly, parents were unwilling or unable to follow recommendations for safely parenting J.P.

The court then assessed the best-interests factors set forth in 33 V.S.A. § 5114(a). It found that J.P. had a strong bond with his foster family, with whom he had lived since birth and who were willing to adopt him. He was well adjusted to his foster home and community. J.P. had some attachment to his biological parents, but his primary relationship was with his foster parents. The court found that mother and father were unlikely to be able to assume parental responsibilities within a reasonable time given their lack of progress with the case plan and failure to engage in services, and J.P.'s need for permanency. The court found that J.P.'s bond with parents was outweighed by the other factors. It therefore concluded that termination was in J.P.'s best interests.

On appeal, parents argue that the family division abused its discretion by overlooking testimony regarding their demonstrated parenting abilities and focusing on their compliance with the case plan. They point to testimony from witnesses who opined that with ongoing support, parents could meet J.P.'s basic needs and that father could be the primary caretaker if he did not have to be the sole breadwinner.

Our review of the court's termination decision is limited. In re J.M., 2015 VT 94, ¶ 8, 199 Vt. 627. "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 . . . parental rights." In re S.B., 174 Vt. 427, 429 (2002) (mem.).

The family division in this case applied the correct standard and its decision is supported by its findings and the record. The court first assessed whether there had been a change in circumstances sufficient to justify modifying the existing disposition order. See In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44 (explaining two-step analysis that family court must conduct in assessing petition to terminate parental rights after initial disposition). "A substantial change of circumstances is most often found when a parent's ability to care for a child has either stagnated or deteriorated over the passage of time." Id. (quotation omitted). We have expressly held that "[s]tagnation may be found if the parent has not made the progress expected in the plan of services for the family despite the passage of time." In re D.M., 2004 VT 41, ¶ 5, 176 Vt. 639 (mem.). While the "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," it does provide objective benchmarks against which the court can measure a parent's improvement. Id. ¶ 7.

The family division appropriately considered parents' compliance with the case plan, which recommended services and action steps for parents that were designed to address the issues that led J.P. to entering DCF custody. It found, and the record shows, that after a few months parents' progress plateaued. Mother stopped attending therapy in October 2019 and father never attended therapy. Parents had difficulty effectively communicating with providers and team meetings often became escalated. Parents withheld information, making it difficult to gauge their progress. Despite receiving fourteen months of Family Time Coaching, mother continued to be unable to read J.P.'s cues and was not sure what to do when he became upset. Multiple providers expressed concern about mother's ability to safely parent J.P. without father present, which he would be during the week while father worked. Father understood the advice given by providers but chose to disregard it. These findings support the court's conclusion that parents had stagnated.

The family division then considered the statutory best-interests factors, the "most important" of which is "whether the parent will be able to resume [or assume] parenting duties within a reasonable period of time," and concluded that they weighed in favor of termination. In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29; see also 33 V.S.A. § 5114(a) (listing factors). The court found that parents had never cared for J.P. on a full-time basis. They failed to access the services offered to them and had made no progress in the case plan since the early months of the case. The court found Dr. Brisson's opinion that parents could begin parenting J.P. within six to eight months to be unrealistic and speculative, noting that her assessment was based largely on parents' self-reporting and on assessment tools that were not widely accepted in the field. Meanwhile, J.P. was attached to his foster family, which he considered to be his home, and needed permanency now. These findings are supported by the record and in turn support the court's decision.

Parents argue that the court overlooked testimony indicating that, even if they did not comply with the case plan, they had the ability to parent J.P. However, most of the positive statements cited by parents regarding their parenting abilities came with significant qualifications. For example, when asked if parents were able to meet J.P.'s developmental

needs, the early interventionist testified, "I don't feel as though I can make a solid judgment on that. During my visits, while I was there, [parents] were able to provide sufficient care to support [J.P.]'s overall development." Psychologist Dr. Halikias opined that father could be J.P.'s primary caretaker but expressed concern about J.P. being with mother if father continued to work, as appeared to be the plan. The family engagement specialist who worked with the family during a portion of their Family Time Coaching plan testified that parents could meet J.P.'s basic needs, but not his more complex needs. The testimony was not a strong endorsement of parents' abilities.

Even the witnesses who were the most positive about parents' abilities, family support specialist Albano and Dr. Brisson, conceded that parents would need to engage in services and follow recommendations to be successful parents. Family support specialist Albano testified that she believed mother and father could parent J.P. if they continued to receive supports, mother attended therapy, and J.P. was enrolled in a full-time childcare program, which she conceded was "hard to find." Similarly, Dr. Brisson opined that the parents could assume a parental role within six to eight months with the help of "natural," meaning non-DCF, supports, which they did not currently have, and a new case plan containing detailed instructions for everything from nutrition to how to install a car seat. However, as the family division found, parents had a track record of failing to engage in any services or following provider recommendations. Given the other evidence in the record, it was not unreasonable for the court to find these witnesses' opinions about mother's and father's parenting abilities to be unpersuasive.

Parents are essentially arguing that the court should have given greater weight to the testimony that was favorable to them. The court had discretion to reject portions of the testimony that it did not find credible. See Fournier v. Fournier, 169 Vt. 600, 603 (1999) (mem.) ("The discretion to assess witness credibility includes the authority to reject some but not all of a witness's testimony."); State v. Norton, 134 Vt. 100, 103 (1976) (explaining factfinder "may accept or reject, in whole or in part, the testimony of any witness"). We therefore see no reason to disturb the decision below.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice