

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-319

JANUARY TERM, 2007

N.W. and H.W., Juveniles

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APPEALED FROM:

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Addison Family Court

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DOCKET NO. 92/93-10-04 Anjv

Trial Judge: Amy M. Davenport

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

Mother appeals the family court order terminating her parental rights with respect to her children, N.W. and H.W. On appeal, mother contends that the family court applied an incorrect parenting standard and violated her constitutional right to confront witnesses. We affirm.

On October 28, 2004, the State filed a petition alleging that mother=s children, N.W. and H.W., were in need of care or supervision (CHINS). The same day, the family court placed the children in the custody of the Department of Children and Families (DCF) for medical neglect by both parents. At the time, N.W. was three and a half years old and was not able to eat solid food. He had no language skills, could not dress himself, brush his teeth or use utensils. He did not like to be touched and would not make eye contact. H.W. was almost two years old and also did not eat solid food. He was very overweight at forty pounds and could not walk. Subsequent to being placed in DCF custody, both children were diagnosed with autism, a neurological/psychological disorder.

Before her children were taken into custody, mother knew there was something wrong with them, but she was reluctant to enlist the help of health-care providers. Mother did not feed the children solid foods because she was concerned they would choke. Her physician=s office referred N.W. for assessment by the Family, Infant and Toddler Center, but mother refused to cooperate. Even after mother agreed to a protective-services case plan in August 2004, she continued to refuse to implement suggestions from health-care professionals and canceled visits. This noncooperation led DCF to file the emergency detention order in October 2004. In December 2004, both parents stipulated that the children were CHINS. In March 2005, mother stipulated to a disposition case plan that required her to engage in individual therapy, attend and participate in the children=s doctor appointments, and demonstrate an understanding of the children=s needs, among other things.

In September 2005, DCF changed its goal to termination of parental rights. The hearing on the petition took place over four days in April 2006. On the second day of the hearing, father agreed to voluntarily relinquish his parental rights. The court heard his testimony while mother=s attorney was absent from the court room, and advised mother that she could leave as well. On June 12, 2006, the court granted DCF=s petition to terminate mother=s parental rights.

On appeal, mother argues that the family court=s findings and conclusions applied an incorrect standard

and that the court violated her constitutional right to confront witnesses. In reviewing a termination decision, we affirm the family court=s findings unless clearly erroneous, and the conclusions if supported by the findings. In re A.F., 160 Vt. 175, 178 (1993).

Mother contends that the family court=s findings applied an incorrect parenting standard that focused on whether she was a good parent, rather than an unfit parent. We disagree with this characterization of the court=s decision. The court made extensive findings regarding mother=s ability to care for her children and determined by clear and convincing evidence that termination was in the children=s best interest. To terminate parental rights, the court must engage in a two-step process: first, the court must find a substantial change in circumstances, and second, determine that the best interests of the children require termination. In re S.M., 163 Vt. 136, 138-39 (1994); see 33 V.S.A. ' 5540 (listing factors relevant to determining best interests of child). In this case, the court thoroughly analyzed both steps and supported its conclusions with findings, which were based on credible evidence.

The court acknowledged that mother loved her children and had a desire to parent them. The court also found that mother had made some progress. She was attending medical appointments with the children and courses on autism. During mother=s supervised visits, she was learning how to implement some of the parent educator suggestions, such as feeding the children solid foods, and sitting the children down to eat. Mother continued to have difficulty, however, in accepting instructions from professionals, particularly that related to the children=s autism. Mother did not intervene to redirect N.W.=s autistic behaviors, nor did she engage the children during visits.

Based on the testimony of three doctors, the court found that mother has significant deficits in judgment which directly impact her ability to parent her children. Especially because of the children=s autism, they require attention and cooperation of professional service providers, including doctors, therapists and teachers. The court found that mother=s tendencies to minimize her own conduct, externalize blame and overestimate her own ability to know what is right, combined with her pattern of isolating herself and her children, would make it impossible for mother to work with professionals to properly address the children=s needs. In addition, the court found that mother was unable to properly read the children=s cues indicating their needs.

The court=s extensive findings support its conclusion that there was a significant change in circumstances and that termination was in the children=s best interest. Change in circumstances is often demonstrated by stagnation. That mother made some improvement does not preclude a finding that she stagnated in her ability to properly care for her children. See In re S.M., 163 Vt. at 139-40. The court found that mother=s ongoing inability to provide her children with the level of care they need and her inability to work with service providers essential to her children=s development constituted changed circumstances. Further, the court examined the statutory factors and determined that termination was in the children=s best interest. Significantly, the court concluded that mother could not meet the children=s needs and resume parenting within a reasonable time period. See In re B.M., 165 Vt. 331, 337 (1996) (emphasizing that a parent=s ability to resume parenting within a reasonable time is the most critical factor in a termination case). The court=s conclusions were based on its findings, which were supported by credible evidence, and we affirm.

We also reject mother=s argument that the court violated her constitutional right to confront adverse witnesses. On the second day of the termination proceedings, father decided to voluntarily relinquish his parental rights. Father appeared before the court to go through a relinquishment colloquy, and mother=s attorney left the courtroom to attend to a different proceeding. At the time, the court explained to mother that neither she nor her attorney needed to be present because father=s testimony pertained to father=s case only. During the colloquy, father testified that he was relinquishing his rights because he felt it was in the children=s best interest and the children would be better off with their foster families. On the last day of the hearing, the court allowed the juvenile=s attorney to question one of the expert witnesses about father=s decision to relinquish his parental rights and his statement that the children are better off in the foster homes. Mother=s attorney objected, and the court allowed the questions, concluding that father=s testimony was under oath and

there was no reason to exclude it.

On appeal, mother contends that because father testified in the absence of mother=s attorney, his testimony violated mother=s constitutional right to confront adverse witnesses. Moreover, mother argues that father=s testimony played a key role in the court=s decision, specifically in the court=s decision to reject mother=s proposal that she be able to parent the children in partnership with father. In general, the constitutional right to confront witnesses applies in criminal, not civil, proceedings. In re J.R., 146 Vt. 185, 188 (1985). Although juvenile proceedings are civil in nature, we have explained that the parties Aare afforded the opportunity to cross-examine and rebut opposing witnesses.@ In re H.A., 153 Vt. 504, 510 (1990); see In re A.L., 163 Vt. 635, 637 (1995) (mem.) (holding that there is no federal or state constitutional right to confront witnesses in CHINS proceedings). This right is not absolute, however, and the trial court has discretion to control the orderly progress of the trial. In re H.A., 153 Vt. at 510.

We conclude that mother=s right to examine and rebut opposing witnesses was protected during the proceeding. This case is different from those where the court refuses to allow a party to cross-examine a witness or admits reports in lieu of in-person testimony. See In re Lee, 126 Vt. 156, 158-59 (1966) (reversing where trial court considered information received outside of the hearing). Here, mother=s attorney chose not to be present during father=s testimony. After the court described the content of father=s testimony, mother=s attorney also admitted that there were no grounds for excluding father=s testimony. Further, although her attorney did not cross-examine him at the time of his testimony, she had an opportunity to call him as a witness if she wished to examine his opinions further. Under these circumstances, we cannot say that mother=s confrontation rights were violated.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice