

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-019

MAY TERM, 2007

In re C.S., Juvenile	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Family Court
	}	
	}	
	}	DOCKET NO. 6-1-04 CnJv
	}	
		Trial Judge: Christina Reiss

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

Father challenges the family court's decision terminating his parental rights to his son, CJ.*
We affirm.

The family court found the following facts. CJ was born on March 14, 2003, which coincided with the date of father's release from prison. Upon his release, father visited CJ daily. But father was re-incarcerated on April 11, 2003, after less than a month out of prison, because he committed several felonies during that time. Father remained in prison as of the date of the termination hearing. In the interim, father had been incarcerated at several out-of-state facilities, but was eventually returned to incarceration in Vermont.

On January 5, 2004, the Department for Children and Families (DCF) filed a petition alleging that CJ was a child in need of care and supervision (CHINS). Mother entered an admission to the CHINS petition, conceding that "[her] substance abuse interfered with her ability to provide proper parental care to [CJ]," and the court ultimately found that CJ was CHINS on January 24, 2004. CJ was placed in the custody of his maternal grandparents. The DCF case plan focused on the goal of reunification between CJ and his mother. Regarding father, the case plan stated: "Due to father's inability to play a part in his son's life, [and] due to the length of his incarceration, [DCF] respectfully recommends that a [termination of parental rights (TPR)] petition be filed with regard to [father]."

* Mother voluntarily relinquished her parental rights and is not a party to this appeal. The family court referred to the child by his nickname, "CJ," which we use here for the sake of clarity.

DCF originally filed a TPR petition on November 22, 2004. Mother consented to the grandparents' permanent guardianship and ultimately voluntarily relinquished her parental rights. DCF withdrew its original motion and then filed a TPR with respect to father only. The court held an evidentiary hearing on December 1, 2006. In determining whether termination of father's parental rights was warranted, the family court noted that father had made efforts to maintain contact with CJ while he was incarcerated, including the most recent visit at the St. Johnsbury Correctional Facility in October 2005, although father acknowledged that he was not in a position to parent CJ. Still, father wanted continued visitation rights and shared custody of CJ upon his release from prison. CJ's maternal grandparents expressed concern about continued visitation between CJ and his father, primarily because mother would be the one to transport CJ to and from these visits, and it appeared that mother and father continued to work together to buy and sell drugs, even while father was incarcerated.

The family court considered that father had "a genuine interest in CJ and concern for his well-being." The court also noted, however, that father was serving a five-to-six year incarcerative sentence with the earliest release date being May 10, 2011. Father had an extensive criminal record, causing him to be incarcerated or under some level of correctional supervision continuously since he was approximately eighteen years old. Further, while incarcerated, father had accumulated some sixty-seven disciplinary reports including fourteen "majors." The court also considered that, at the time of the hearing, CJ was approximately three-and-a-half years old and thriving in his placement with his maternal grandparents. The court found that CJ was bonded with his grandparents and was physically and emotionally healthy. The court further found that his grandparents were "devoted and experienced parents and would like to adopt CJ."

The family court set forth the usual standard for termination of parental rights: (1) a finding of a substantial change in material circumstances warranting modification of the original disposition and (2) a determination of the best interests of the child. In re K.F., 2004 VT 40, ¶ 8, 176 Vt. 636 (mem.) (setting forth two-part standard). The family court concluded that it did not need to find changed circumstances with respect to father, however, because the initial disposition recommended termination of his parental rights, and that order was never challenged or appealed. See 33 V.S.A. § 5532(a) (providing that disposition order may be modified only on showing of changed circumstances). Accordingly, the family court went on to consider whether termination was in CJ's best interests under the factors listed in 33 V.S.A. § 5540, and concluded that it was. Specifically, the family court determined that father's interactions with CJ had been so limited that they did not counsel against termination of father's parental rights. The court emphasized that father's "re-incarceration was the result of his own conduct and cannot be attributed to the State" or to CJ's maternal grandparents, to the extent they prevented visits from occurring. The court further concluded that CJ was well-adjusted to the home, school and community that he currently was in (that is, while living with his maternal grandparents), and that the possibility of joint custody with father in the future could possibly undermine the stability CJ enjoyed in this respect. Regarding whether father would be able to resume his parental duties within a reasonable period of time, the court emphasized that father would not even be released from prison until May 2011 at the earliest, and that this was an unreasonable period of time from the perspective of CJ. Finally, the court determined that while father "has genuine love and affection for CJ and an interest in his welfare,"

father “has played an exceedingly limited role in CJ’s life and it is not clear that the role he played was a constructive one.” On the whole, the court concluded that the factors supported a finding that termination of father’s parental rights was in CJ’s best interests.

Father appeals. “We will uphold the trial court’s findings of fact unless they are clearly erroneous, and we will uphold the court’s conclusions of law if supported by the findings.” In re K.F., 2004 VT 40, ¶ 8.

At the outset, father argues that the family court was required to make a finding regarding whether there had been a substantial change in material circumstances. We need not decide whether the family court was required to make a finding regarding changed circumstances because the record supports the conclusion that changed circumstances existed. We have previously affirmed termination even though the family court did not make an explicit finding of a substantial change in material circumstances where “it [was] evident from the record that a material change in circumstances had occurred since the initial disposition order.” Id. ¶ 9.

Here, while circumstances may not have changed from father’s perspective, the family court must examine the question of changed circumstances from the perspective of the child. See 33 V.S.A. § 5532(a) (the family court’s order in a CHINS proceeding may be modified or terminated at any time “on the ground that changed circumstances so require in the best interests of the child”); In re S.W., 2003 VT 90, ¶ 7, 176 Vt. 517 (mem.) (“[T]he controlling standard under 33 V.S.A. § 5532(a) is the best interests of the child.”). Father is incarcerated and has been incarcerated for the vast majority of CJ’s life. Father will remain incarcerated until May 2011. Of CJ’s parents, mother has been the custodial parent and caretaker, and she was the only parent with whom DCF considered reunification. Mother has now voluntarily relinquished her parental rights. In light of father’s incarceration, mother’s decision has a significant impact on CJ’s circumstances and the issues surrounding his future placement. Cf. In re K.F., 2004 VT 40, ¶ 9 (concluding that, where reunification had been contemplated with mother but not with incarcerated father, mother’s decision to voluntarily relinquish her parental rights constituted changed circumstances). Sufficient changed circumstances existed in this case to permit the family court to examine whether termination was in CJ’s best interests.

Father’s remaining arguments go to whether the family court properly concluded that termination of father’s parental rights was in CJ’s best interests. Regarding his relationship with CJ, father argues that the disruption of the father-child bond was attributable to the State for incarcerating him outside Vermont and the maternal grandparents for their reluctance to facilitate visits while father was in prison. While it is true that visitation is possible in prison, the simple fact of incarceration is a substantial barrier, in and of itself, to the formation of a relationship with a child where no prior relationship exists. Thus, father’s unavailability was primarily due to his repeated criminal activity and resulting incarceration. These are not factors beyond father’s control. See In re K.F., 2004 VT 40, ¶ 12 (concluding that “father bears sole responsibility for his frequent incarceration” and, therefore, father had not demonstrated that the family court inappropriately “based its conclusion on factors beyond his control”).

Father also argues that it was inappropriate to conclude that his desire to share custody of CJ after father was released from prison was a factor supporting termination of his parental rights. In fact, the court did not conclude that father's interest in shared custody supported termination. Rather, in light of the scant evidence of what changes would occur with termination as opposed to without, the court determined only that there was no affirmative evidence that beginning shared custody in 2011 would not cause a disruption. Thus, this factor as a whole (the child's adjustment to his home, school, and community) weighed in favor of termination rather than against it. In addition, given the dearth of evidence relevant to this factor, there is no indication that it was given undue weight in the analysis. There was no error.

Finally, father argues that his lengthy incarceration and limited role in CJ's life were not, standing alone, sufficient to support termination. On this point, the family court stated: "A lengthy incarceration preceded by a limited parental role in a child's life may be grounds for a termination of parental rights." (Citing In re K.L. & A.L., No. 2005-130 (Vt. Aug. 2005) (unreported mem.)). These factors, however, did not stand alone. Rather, they were appropriately viewed in the context of an absence of evidence suggesting that father could assume a parental role and be a constructive presence in CJ's life. Ultimately, "[t]he most important factor in the court's [best-interests] analysis is the likelihood that the natural parent will be able to resume his or her parental duties within a reasonable period of time." In re K.F., 2004 VT 40, ¶ 10. Father does not contest the court's conclusion that such a development was not at all likely in light of father's lengthy incarcerative sentence.

The family court's determination that termination of father's parental rights was in CJ's best interests is supported by the court's findings, which in turn find support in the record.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice