

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-255

OCTOBER TERM, 2008

In re D.H., Juvenile

} APPEALED FROM:
}
} Windham Family Court
}
} DOCKET NO. 151-11-04 Wmjv

Trial Judge: John P. Wesley

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

Mother appeals from a family court order denying her request to modify a permanency plan providing for limited supervised contact with her son, D.H. She contends the court erroneously failed to enter a visitation order. We affirm.

This is the second appeal before the Court in this matter. In In re D.H., No. 2007-076 (June 20, 2007) (unreported mem.), we affirmed an earlier order denying mother's request to modify D.H.'s permanency plan calling for long-term foster care to a plan with the goal of reunification. The record, as there summarized, revealed that, in November 2004, shortly before his eleventh birthday, D.H. was taken into the custody of the Department for Children and Families (DCF) due to his extremely violent and threatening behavior toward mother. This had followed eight prior calls for police intervention during the previous eighteen months. D.H. was adjudicated a child in need of care or supervision (CHINS) in December 2004. He was placed in a residential program for adolescents at the Brattleboro Retreat, followed by a therapeutic foster placement through Laraway Youth and Family Services in Johnson. Successive case plans called for long-term foster care rather than reunification based on a parent-child relationship that D.H.'s clinical social worker described as "toxic." Mother had chronically abused drugs and alcohol, and both mother and son suffered from significant mental health and emotional disorders. Mother displayed virtually no insight into the damage that an extraordinarily chaotic home life had caused D.H., necessitating intensive residential treatment to deal with his extremely volatile behavior. Unsupervised visits were suspended due to mother's continued failure to participate in therapy or to understand and deal with D.H.'s aggressive behavior.

In its February 2007 order the court found no evidence of changed circumstances to warrant a modification of the permanency plan, and we affirmed. Id., slip op. at 2. Thereafter, in November 2007, the court provisionally approved a permanency plan that continued to call for long-term foster care and supervised visitation, subject to further review following a forensic evaluation by a court-appointed clinical psychologist. The psychologist submitted his report in February 2008, concluding that mother's significant mental health problems and irrational, angry, and confused behavior coupled with D.H.'s aggressive outbursts in her presence rendered this "one of the worst parent-child observations" that he had ever witnessed and "strongly cast doubt on the advisability of unsupervised parent-child contact at this time."

In April 2008, the court issued a brief entry order indicating that it would accept the plan's recommendations unless any party proffered facts sufficient to demonstrate a change of circumstances. Mother, in response, submitted a letter from her own therapist recommending that the therapist's sessions with mother be expanded to include D.H., with the goal of gradually allowing unsupervised time together. Following a hearing, the court issued a written decision in June 2008, concluding that mother had failed to demonstrate any change in circumstances sufficient to revise the plan. While acknowledging that mother had been more consistent in her efforts to maintain contact with D.H., the court found that D.H. remained subject to violent outbursts requiring careful monitoring, that mother demonstrated virtually no insight into these disorders, and that the clinical psychologist's recommendation was amply supported by the evidence and the court's own assessment of the testimony. While impressed by her empathy, the court noted that mother's therapist had no meaningful experience with D.H. or his interactions with mother. Accordingly, the court found that no change in circumstances warranted a modification of the plan. This appeal followed.

Mother's sole claim on appeal is that the court erred in failing to enter a visitation order. This was not, however, the issue before the court. The issue, as framed at the hearing and litigated by the parties, was whether a substantial change of circumstances warranted modification of the permanency plan to allow for unsupervised visitation. See *In re A.G.*, 2004 VT 125, ¶ 17 (court is permitted to consider modification of court-approved permanency-plan only upon a showing of substantial and material change of circumstances). Mother claims that the court "overlooked her request for a visitation order calling for consistent contact." The record shows, however, that there was no "request for a visitation order." On the contrary, mother argued simply for modification of the plan to allow for regular unsupervised contact, and the court carefully considered and addressed the argument, reviewing and evaluating the evidence and testimony of the expert psychologist, mother's therapist, the DCF caseworker, as well as mother herself. Mother also appears to focus on a statement by the court indicating that it was "doubtful the Court has the authority on this record to countermand DCF's determination that [D.H.'s] safety requires only supervised parent-child contact." Mother appears to argue that the court believed that it lacked authority over visitation issues. It is clear from the context, however, that the court assumed that it had such authority but concluded that mother had simply failed to carry her burden to show that a change of circumstances warranted an order of unsupervised visitation. See *id.* ("The party seeking modification bears the burden of demonstrating the requisite change of circumstances, and must show how the proposed change serves the child's best interests."). We therefore find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice