

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-281

NOVEMBER TERM, 2008

In re R.D.W., Juvenile	}	APPEALED FROM:
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	}	
	}	Addison Family Court
	}	
	}	
	}	DOCKET NO. 4-2-07 Anjv
		Trial Judge: Helen M. Toor

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

Mother and father appeal separately from a family court order terminating their residual parental rights to the minor R.D.W. Father contends that the court erred by: (1) relying on its personal opinions rather than the evidence in finding that father had not made substantial progress under the case plan or obtained appropriate housing; and (2) finding that termination was in the best interests of the child. Mother contends that the court abused its discretion in finding that she could not resume parental responsibilities within a reasonable period of time because her inability to do so was attributable in material part to failures on the part of the Department for Children and Families. We affirm.

The record evidence may be summarized as follows. R.D.W. was taken into custody by DCF in February 2007, when he was six and a half years old, based on allegations of truancy and medical neglect. He had missed forty out of fifty-seven days of school, for which his parents had failed to adequately account, and lacked required vaccinations despite repeated efforts by his school to explain their necessity. Father's confrontational behavior with school officials had required the school to obtain a no-trespass order and install additional security at the school door.

R.D.W. was adjudicated a child in need of care or supervision (CHINS) pursuant to a stipulation and was initially returned to his parents. At a disposition hearing in March 2007, the parties agreed to a case plan requiring that R.D.W. attend school regularly and be taken to a pediatrician if ill, that the parents provide their social security numbers to DCF to facilitate their obtaining services, that father undergo a substance-abuse assessment and follow all treatment recommendations, and that the parents provide a safe and healthy home environment that was violence free. A revised plan in May 2007 also required father to maintain employment, refrain from making threats to DCF, and complete the substance-abuse assessment; the parents were also to attend to R.D.W.'s dental needs, which were substantial; his teeth were in a state of severe decay reflecting years of neglect, and ultimately required extensive fillings, extractions, and caps.

In July 2007, DCF intervened to place R.D.W. in foster care based on a suspicion of physical abuse. By then the parents had failed to obtain complete vaccinations, although father had finally consented to a substance-abuse evaluation, which revealed a .10 blood alcohol level; a twelve-week outpatient treatment program and periodic testing were recommended. Mother agreed to a visitation schedule but father refused to do so until October, and therefore did not see R.D.W. for the next three months. Between October and December 2007, father tested positive for alcohol on three visits with the child, resulting in the termination of visitation. During several of the visits, father expressed violent views toward DCF.

Revised case plans in August and November 2007 continued prior expectations that father obtain employment and added requirements to secure suitable housing and attend appointments to obtain health benefits, food stamps, and other services. In January 2008, DCF changed the case plan goal from reunification to termination, and a termination of parental rights petition was filed that month. By then, father had failed to follow through on the goals of receiving substance-abuse counseling and testing or of securing employment. He had failed to maintain visitation with the child due to his continued alcohol abuse. The parents had failed to obtain stable housing, generally living in a camper with a few cots and no working toilet at various campgrounds. They lived briefly in an apartment in Orwell but were quickly evicted, and in a tent on a farm where father had done a few odd jobs. Mother had made no effort to obtain dental care for the child after he was returned to the parents and had failed to sign up for Medicaid, food stamps, or other health and economic benefits. Based on a forensic evaluation and other testimony, the court found that mother failed to acknowledge father's serious alcohol-abuse problem. She had rejected the assistance of a domestic-violence specialist with DCF, remained subject to father's control, and was unable to independently advocate for or ensure the child's safety and welfare at home. Repeated calls to the police reporting loud arguments between the parents and evidence of physical injury to mother suggested domestic violence, although none was substantiated.

Following a three-day termination hearing in April 2008, the court issued a written decision granting the petition. The court concluded that there had been a substantial change of circumstances based on the parents' lack of progress since the CHINS adjudication; the court found that father had "almost completely failed to show any progress under the case plan since February of 2007." Although mother had made some progress in terms of maintaining employment and regular visitation with the child, the court found that she had failed to demonstrate any ability to maintain a safe and healthy home environment for the child. She had failed to acknowledge father's substance abuse and had shown no ability or inclination to put the child's interests above her own or father's.

In considering the best interests of the child, the court acknowledged that R.D.W. had good relationships with both parents, but also found that he had adjusted very well to his foster home and community. His foster family operates an organic dairy farm and has several other children and R.D.W. has fit in well. He attends school regularly, where he has made great strides, and has adjusted to his new life. As for the critical question of whether either parent could resume parental responsibilities within a reasonable period of time, the court found that, despite sixteen months of sustained assistance, neither parent had demonstrated an ability to provide a safe home for R.D.W., and there was no likelihood that they could do so within a reasonable time. Father's failure to obtain substance-abuse treatment and to recognize the child's health and educational needs all raised serious doubts as to the safety of the child in his care. Although mother had been more consistent in visitation, she had refused to acknowledge father's substance abuse or need for treatment and consistently deferred to his decisions in meeting such critical needs as housing, medical and dental care, and education. The court found

that mother had shown no ability to address the child's basic needs by herself, despite more than a year of assistance, and would not be able to do within a reasonable time. While acknowledging the affection between both parents and the child, the court concluded that neither had shown an ability to make R.D.W. a priority in their lives, having either refused or struggled to take "the smallest steps forward with basic necessities of parenting." Accordingly, the court concluded that a termination of parental rights was in the best interests of the child. These separate appeals followed.

Father asserts that, in finding a substantial change of circumstances, the trial court improperly relied on its "personal opinions." Father cites that portion of the court's decision where it summarized a social worker's testimony that people in poverty "tend to be focused on the present and have trouble with long-term planning" and that they "tend to be responsive and crisis-driven rather than proactive" and "mistrustful of government." The court found "however, that most parents faced with clear written plans for the steps they must take, with lawyers to advise them, and clear directives that they are at risk of losing their child if they do not act, are able to respond to such clear signals and work to protect their family," and further observed that "being in poverty does not necessarily lead to neglecting children's healthcare or failing to get them to school."

As we have elsewhere observed, in evaluating the welfare of a child a court may "draw upon its own common sense and experience in reaching a reasoned judgment." Payrits v. Payrits, 171 Vt. 50, 53 (2000). The court's findings here reflect nothing more, nor less, than its reasoned judgment that father's economic circumstances did not justify or excuse his failure over a lengthy period of time, and with the assistance of DCF, to meet the goals and expectations of the case plan. We discern no improper injection of bias or cultural stereotypes in the court's findings. Nor do we detect an inappropriate injection of personal views or bias in the court's finding that a tent and camper which father parked at various campgrounds failed to satisfy the case plan goal of appropriate permanent housing.

Father further contends that the evidence did not support the court's conclusion that termination was in the best interest of the child. He relies on countervailing evidence showing a mutual affection between father and the child, and a clinical psychologist's testimony that termination would be hard on the child, who had expressed a wish to go home.<sup>1</sup> The trial court acknowledged these portions of the psychologist's report, but also noted the expert's testimony that the child was highly resilient and had expressed great affection for his foster home and family. The court ultimately found that each parent's demonstrated inability to resume parental responsibilities within a reasonable time supported an order of termination.

The trial court is in the best position to weigh the evidence and the credibility of witnesses; "[o]ur role is not to second-guess the family court or 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.). Evidence of the child's placement preference, and of continued affection between parent and child, are proper factors for the court to consider but do not necessarily trump substantial evidence showing that termination is warranted based on other statutory factors. See id. (concluding that court "may consider an older child's preference" while emphasizing that "the most important of the statutory factors is the third one—whether the parents will be able to resume their parental duties within a reasonable period of time"); In re

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<sup>1</sup> We note, however, that despite the child's statement to the forensic evaluator, he has informed the court, through counsel, that he agrees with DCF's position that the judgment should be affirmed.

M.B., 162 Vt. 229, 237 (1994) (holding that evidence that father loved child and wanted custody would not have controverted extensive evidence that he was incapable of providing stable home environment). In light of the findings and the record evidence here demonstrating father's inability to resume parental responsibilities within a reasonable period of time, we discern no sound basis to disturb the court's judgment that termination is in the best interests of the child.

Mother contends that it was improper for the court to find that she could not resume parental responsibilities on her own because her failure to separate from father was attributable to DCF's failure to recommend such a separation or to implement its recommendation that she receive counseling. While the assistance that DCF provides a parent may be a factor in determining whether the State has met its burden of showing that a parent is unlikely to be able to resume parental responsibilities within a reasonable time, In re J.T., 166 Vt. 173, 180 (1997), we find no basis here to conclude that DCF's actions were a material cause of mother's troubles or inability to separate from father. Mother relies on the testimony of the clinical psychologist who performed a forensic evaluation of the family, to the effect that she recommended to the parents that they try living separately. The expert testified that father's reaction was to deny that he would let DCF split them up, and mother agreed that it would not be good to split up and was unwilling to do so. The expert also indicated that, had she been consulted earlier, she would have recommended separate counseling for mother.

None of these statements demonstrate that DCF's failure to implement separate counseling for mother was a material cause of her failure to separate from father, particularly in light of mother's steadfast opposition to the idea and demonstrated unwillingness over time to acknowledge father's substance-abuse problem, recognize the child's pressing health and education needs, and assume control to assure that these needs were being met. We find no merit to the claim that DCF contributed materially to mother's inability to resume parental responsibilities within a reasonable time, and thus no basis disturb the judgment terminating mother's parental rights.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice