

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-370

FEBRUARY TERM, 2018

In re K.C. & J.R., Juveniles	}	APPEALED FROM:
(M.C., Mother* & J.R., Father*)	}	
	}	Superior Court, Orleans Unit,
	}	Family Division
	}	
	}	DOCKET NO. 78/79-12-15 Osjv

Trial Judge: Robert R. Bent

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

Mother appeals the termination of her parental rights to six-year-old K.C. and three-year-old J.R. J.R.'s father also appeals the termination of his parental rights to J.R. We affirm.

The Department for Children and Families (DCF) has been involved with mother and her family since 2006, when DCF obtained custody of mother's older daughter J.C. due to mother's chronic homelessness, neglect of J.C., and substance abuse. Mother's parental rights to J.C. were subsequently terminated.

K.C. was born in June 2011. In December 2012, when K.C. was seventeen months old, DCF received a report from mother's probation officer that mother had tested positive for cocaine and THC and that she was breastfeeding K.C. Mother was incarcerated for violating her probation, and K.C. stayed with a friend of mother's. After mother was released, DCF helped mother obtain residential treatment at the Lund Center, which she completed in July 2013. In September 2013, DCF received multiple reports that mother was homeless, using drugs, and neglecting K.C. Mother's physician discontinued mother's suboxone prescription out of concern that she had begun to use heroin again. DCF requested and received custody of K.C. Mother was pregnant with J.R. at the time. She regained custody of K.C. in 2015.

In November 2015, DCF opened another family case after receiving a report that mother had left the children unsupervised while she was moving their belongings to a new apartment. K.C., who was then four years old, was locked out of the apartment on the second-floor balcony, and J.R. was in a playpen in the living room. On December 23, 2015, mother was pulled over for a traffic violation with both children in the car. A search of the car revealed numerous suboxone pills, some heroin and marijuana, and \$2661 in cash. Mother did not appear to be impaired. However, the next day mother submitted to a urine test at the request of her probation officer and tested positive for cocaine and opiates. She also admitted to buying buprenorphine off the streets to supplement her prescribed buprenorphine.

DCF filed petitions alleging that K.C. and J.R. were children in need of care or supervision (CHINS) and requesting they be transferred to DCF custody. The children were placed in foster care. In February 2016, mother stipulated to the merits of the CHINS petitions. The court

subsequently approved a case plan requiring mother to address her ongoing substance abuse dependency and mental-health problems, and to engage in parent education and family time coaching. The case plan also included goals for K.C.'s father, who stopped participating in the case after May 2016 and is not a party to this appeal. The case plan made no provisions for J.R.'s father, who has been incarcerated since the day after J.R.'s birth.

In October 2016, DCF moved to terminate parental rights. The court held an evidentiary hearing over three days in March, April, and May 2017. The court subsequently granted mother's motion to reopen the evidence, and heard additional testimony regarding a change in K.C.'s placement in July 2017. In a decision issued on September 14, 2017, the court made the following findings.

Mother lost her housing in North Troy after the children were taken into DCF custody and her Reach Up benefits ceased. She moved into an apartment in Newport Center with male roommates. She left that apartment during the summer of 2016 because her roommates were sexually harassing her. She was unable to find new housing and began "couch surfing." Mother had not had consistent housing since December 2016. Although she had worked in the past, mother was unemployed at the time of the termination hearing.

Mother's relationship with DCF was mostly amicable. She would often visit DCF workers to discuss her circumstances. Mother engaged in family-time coaching with the children and generally did well during her visits. Based on a psychological evaluation of mother from March 2017, the court found that mother had substantial psychological barriers to healthy parenting and a significant history of trauma. Mother reported that she had not relapsed into drug use since October 2016. However, the court found that she had not made substantial progress in addressing her mental-health issues as required by the case plan.

When the children were taken into custody, K.C. and J.R. were very aggressive with each other and demonstrated a substantial lack of socialization. To get attention, J.R. would make a high-pitched scream, bang his head on the floor, and stick his fingers down his throat. K.C. hit J.R. with his fists. K.C. was moved to a different foster placement in August 2016, and J.R.'s behavior began to improve. Over time, K.C. also became aggressive toward his foster mother and other children. K.C. exhibited anxiety about food; he would gorge himself and was protective of his food, covering his plate and guarding it. K.C. also spoke of "poison rocks" at his mother's that he was not supposed to touch.

J.R.'s visits with his mother generally went well. Afterward, however, he tended to become emotional and to demonstrate aggressive behaviors toward his foster mother and other children. He would also smear his feces and spit. During a period when mother was incarcerated and no visits took place for four or five weeks, these behaviors improved. Likewise, when K.C. returned from visits with his mother, he was very anxious and "everything [was] a fight."

After the termination hearing ended in May 2017, K.C.'s foster mother became unable to care for him and he was transferred to another foster placement. K.C.'s current foster parents indicated to DCF that they were not willing to adopt K.C. J.R.'s foster parents are willing to adopt him.

J.R.'s father has been incarcerated since J.R.'s birth on a conviction of aiding and abetting a felony aggravated assault. He has never met J.R. His minimum release date is in July 2018. He resided in Marshfield, Vermont, with his wife and two other young children before he was incarcerated. He believed he would be able to take J.R. into his home upon his release, and anticipated that he would be able to commence parenting J.R. without incident.

The court determined that all three parents had stagnated in their parenting capacity and that termination of parental rights was in the best interests of the children. K.C.'s father had stopped participating in the case in May 2016. Although the case plan lacked provisions for J.R.'s father, the court found this omission to be insignificant because he had never parented J.R. and remained unable to do so due to his incarceration. Because J.R. had significant behavioral issues, the court found it improbable that his father would be able to simply take over as his parent. It found that J.R.'s father played no constructive role in J.R.'s life and that there was no likelihood that he could assume the role of parent within the reasonable future.

The court found that mother had stagnated in her parenting ability because she had not made progress in her mental-health treatment and had not found stable and suitable housing or employment. Although mother played "some constructive role" in the children's lives and they liked visiting her, they had suffered significant dysfunction as a result of being in her care. K.C. did not have a pre-adoptive home, but J.R. was well-suited to his current foster family, who were willing to adopt him, and had made substantial gains in functioning since being placed in foster care. The court determined that mother would have to substantially improve her mental health and obtain employment and appropriate housing to resume parenting the children, and she was unlikely to do so within the reasonable future. The court concluded that termination was appropriate.

On appeal, mother argues that the court's finding of stagnation was erroneous because her lack of housing and failure to make progress in mental-health treatment were due to factors beyond her control. Although we agree that stagnation due to factors beyond a parent's control cannot support termination of parental rights, see *In re S.R.*, 157 Vt. 417, 421-22 (1991), mother's claim that DCF caused her stagnation is unfounded. Mother's substance abuse and neglect of the children led to the children being removed from her custody. Her subsequent loss of housing benefits was a direct consequence of her own behavior. DCF attempted to help mother obtain new housing, albeit without success. Mother then chose to leave her employment, further reducing her chances of finding suitable housing. These actions were within mother's control.

Mother's claim that DCF prevented her from making progress in her mental-health treatment also is without merit. She claims that DCF enrolled K.C. with the same therapist that she had chosen for herself, thus creating a conflict that required her to find another provider. However, mother did not even attempt to enroll in counseling with this provider until November 2016, after the termination petition was filed. Prior to that, mother had been enrolled with a different therapist, whom she stopped seeing in May 2016. Mother was slow to enroll with that therapist and her engagement was inconsistent. Mother was also inconsistent in attending substance abuse therapy sessions and had not managed to get take-home dosing. The psychologist who evaluated mother in March 2017 found that mother had likely minimized the severity of her mental-health issues, and that although she was currently managing her drug use, "she has not fully engaged in her substance abuse treatment, and is thus unlikely deriving therapeutic benefits to support her sobriety." While mother may have been prevented from seeing a particular provider, fully engaging in therapy and applying the lessons learned therein were matters within her control. See *In re D.M.*, 2004 VT 41, ¶ 6, 176 Vt. 639 (mem.) ("That [mother] was unable to engage in therapy for a period of time with a particular therapist because of circumstances that were admittedly out of her control is, ultimately, irrelevant to whether she made progress in improving her parenting skills.").

Mother also challenges the court's assessment of the best-interest factors, arguing that it should have given greater weight to her parental bond with the children, particularly since K.C. lacked an adoptive home. We agree that the court might have provided more detailed findings. However, "[o]ur 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 mother's parental rights." In re S.B., 174 Vt. 427, 429 (2002) (mem.). As mother acknowledges, "termination of residual parental rights does not depend on the existence of an alternative placement." In re E.B., 158 Vt. 8, 15 (1992). The court acted within its discretion in relying primarily on its conclusion that mother could not resume parenting K.C. within a reasonable amount of time, rather than on whether K.C. currently had a preadoptive home. Id.; see In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29 (explaining that most important factor is whether parent will be able to resume parenting within reasonable time, as measured from perspective of child). The record supports the court's finding that mother would not be able to resume parenting either child within a reasonable time. DCF had been working with mother since K.C. was one year old. Despite receiving services for over four years, mother remained unable to achieve the basic goals of obtaining suitable housing and income to support the children and addressing her own mental-health needs. The court's conclusion that termination of mother's parental rights was in the best interests of the children is supported by its findings, which in turn are supported by the record evidence.

We next consider the arguments made by J.R.'s father. He contends that his parental rights should not have been terminated where DCF made no effort to connect J.R. with him and the case plan made no provision for him to assume parental rights.

Despite his argument to the contrary, father has failed to show that his lack of contact with J.R. was due to factors beyond his control. Father did not have a relationship with J.R. because he had been incarcerated since the day after J.R.'s birth. Father's incarceration, and lack of contact with J.R., was the result of his own criminal behavior, a factor wholly within his own control. See In re D.S., 2014 VT 38, ¶ 26, 196 Vt. 325 ("[O]ur case law makes clear that a parent is responsible for the behavior that leads to incarceration and for the consequences that come with such incarceration.").

Moreover, father made minimal efforts to assert his parental rights. He was identified as J.R.'s father at the beginning of the case and accepted service of the CHINS petition in December 2015. The March 2016 disposition plan did not contemplate reunification with father, or contain a plan of services for father, because he was incarcerated at the time of the disposition hearing. Father was therefore on notice from early on that he was not a candidate for reunification, primarily due to his total absence from J.R.'s life. However, he did not appeal the disposition order, nor did he attend any hearings, in person or by telephone, until February 2017. Although he expressed interest in meeting J.R. when approached by an Easter Seals worker in July 2016, he never formally requested visitation. Indeed, he did not take any steps to engage in the CHINS proceeding until after DCF moved to terminate his parental rights.

Father argues that DCF wrote him off as a parent solely due to his incarceration. While incarceration alone does not necessarily justify termination of parental rights, it is a relevant fact for the court to consider. Id. ¶¶ 26, 29. The court must also consider:

the nature of the relationship between the parent and child before incarceration, the terms of the incarceration, the needs of the child, and the effect of incarceration on the parent's ability to remain involved with the child and to be in a position to resume parental duties within a reasonable period of time from the perspective of the child.

In re M.W., 2016 VT 28, ¶ 22, 201 Vt. 622. Here, the court found that father had never met J.R. and played no constructive role in J.R.'s life; that father had been incarcerated since J.R.'s birth

and would continue to be incarcerated until at least December 2017, when he would become eligible for furlough; that J.R. had substantial dysfunction which would make it difficult for father to simply walk into the role of a parent; and that, due to the above factors, father was unlikely to be able to assume the role of a parent within a reasonable amount of time. The record evidence supports these findings, which in turn support the termination order.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice