

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-221

JANUARY TERM, 2018

In re C.W., Juvenile

} APPEALED FROM:
}
} Superior Court, Addison Unit,
} Family Division
}
} DOCKET NO. 9-1-15 Anjv

Trial Judge: Samuel Hoar, Jr.

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

Mother appeals the court's order terminating her parental rights to her son C.W., born in November 2013. On appeal, mother argues that the court erred by (1) finding there was a change of circumstances due to stagnation and that mother would not be able to parent in a reasonable period of time, (2) admitting testimony from a therapist about a particular assessment tool and admitting the results of mother's urine screening tests, and (3) crediting DCF's version of events over testimony in mother's favor. We affirm.

C.W. and his two older sisters came into the custody of the Department for Children and Families (DCF) in January 2015 due to parents' addictions to heroin and their drug-seeking behaviors. In March 2015, parents stipulated that they were unable to safely parent due to their drug addiction and related issues and that C.W. and his siblings were children in need of care or supervision (CHINS). The plan called for concurrent goals of reunification and adoption. Among the goals for mother were to obtain safe housing, communicate with DCF, participate fully in substance-abuse treatment, and participate with family-time coaching. In March 2016, DCF filed to terminate parental rights. The court held hearings over several days between November 2016 and April 2017, and made the following facts.

C.W. was born with a low birth weight and when he came into custody he had delays across multiple dimensions. He was later diagnosed with post-traumatic stress disorder. He was placed with his father's cousin and spouse in March 2015. He thrived in their household and has close relationships with the extended family. He improved steadily in their care, but continued to experience "significant episodic gastrointestinal issues" that seemed related to changes in schedule and routine.

Mother had inconsistent progress in meeting the case plan goals. Mother completed substance-abuse treatment in February 2015, but relapsed almost immediately. DCF arranged to have her enter the Lund Family Center's residential program, but she had to complete treatment first and she left before entering the building. In the summer of 2015, mother completed a residential substance-abuse treatment program. With DCF assistance, she was accepted into a program at the Lund in August 2015 and C.W. began transitioning into her care there. At that point, C.W. did not recognize her as his mother.

Mother made some progress in developing her parenting skills and by October 2015 C.W. was spending four nights a week with mother at Lund. During the transition period, C.W.'s gastrointestinal issues emerged requiring a careful and gradual transition. In early November, mother tested positive for alcohol. She also began having contact with father even though he had been identified as a trigger for addiction behavior. She lied to Lund staff to get off-premises passes to see him and, while with him, she used heroin. Her urinalysis produced two positive tests during that time, one for morphine and one for heroin. Mother also claimed to be unable to produce urine samples on multiple occasions. Samples that she did produce frequently showed abnormal creatinine and specific gravity levels. Mother was not honest about her substance use or her contact with father. Mother's parenting progress deteriorated and C.W. was "struggling" in his placement at Lund.

Based on mother's dishonesty and positive tests, in January 2016, DCF removed C.W. from Lund and returned him to the full-time care of his foster parents. In March 2016, DCF filed a petition to terminate parental rights and separated C.W.'s case from his sisters' cases.

DCF continued to be concerned about mother's sobriety. That spring, she missed some urinalysis tests and produced multiple abnormal results. The court found that there was insufficient evidence to find that the results indicated opiate use or intentional attempt to avoid detection of use, but that the results were a legitimate cause for concern by DCF. It was not until November 2016 that mother finally admitted that she had used heroin in November and December of 2015 and had been adamantly dishonest about it until then. In July 2016, mother agreed to a hair-follicle test to confirm use or abstinence. Mother did not submit to a test until the end of August. The test confirmed that mother had been abstinent from opiates since the end of May.¹

As to her parenting skills, mother progress was slow. In July 2016, Easter Seals first identified the goal for mother to move beyond being a playmate to being a parent, specifically by setting and enforcing limits. C.W. did not always respond well and his post-visit behavior difficulties increased. At the termination hearing, the Easter Seals worker testified that mother was in the "early stages" of reunification.

The court found that C.W.'s need for permanency was "acute," and noted he had been in DCF custody over two thirds of his life. He has a strong attachment to his foster family and the court credited the testimony of C.W.'s therapist that removing him would be detrimental to him.

The court found that mother's progress had stagnated. Although mother had made some progress, she had fallen short of expectations in the disposition plan. The court specifically found that mother's lack of progress was due to factors within her control. The court concluded that termination was in C.W.'s best interests. Mother loved C.W., but had not progressed in her parenting skills to move beyond supervised visits. C.W. has a strong and healthy relationship with his foster family. He is adjusted to their home. Mother played a constructive role in C.W.'s life, but it has been limited. Mostly importantly, mother was not able to resume parental duties within a reasonable period of time. C.W.'s need for permanency was acute and the time required for

¹ Mother engaged in substance-abuse counseling. She continued to work with Lund and Easter Seals. She regained her driver's license and found employment. By January 2017, mother had secured housing and demonstrated a long period of sobriety. In February 2017, C.W.'s sisters were placed with mother under a conditional care order.

mother to begin parenting was too long from C.W.'s perspective. Therefore, the court granted the petition to terminate.² Mother appeals.

When there is an existing disposition order to terminate parental rights, the trial court must conduct a two-step analysis. In re B.W., 162 Vt. 287, 291 (1994). The court must first find that there has been a substantial change in material circumstances; second, the court must find that termination of parental rights is in the child's best interests. Id.; see 33 V.S.A. § 5113(b) (requiring "change in circumstances" to modify existing order). In assessing the child's best interests, the court is guided by the statutory criteria. 33 V.S.A. § 5114. The most important factor is whether the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.).

Throughout mother's brief, she argues that the court erred in ignoring or discounting mother's evidence and witnesses and in crediting DCF's account of events. On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993). "When findings are attacked on appeal, our role is limited to determining whether they are supported by credible evidence." Id. The family court has the discretion to determine the credibility of witnesses and to weigh the evidence. See Id. (explaining that family court has discretion "to determine the credibility of the witnesses and to weigh the evidence"). The court was not required to explain why it did not find certain evidence persuasive, but in this case, the court did address mother's allegations that DCF acted improperly, finding that DCF acted appropriately in this case and provided mother proper support.³ The court acted within its discretion in this case in crediting certain witnesses over the testimony or evidence of other witnesses.

Mother first argues that the court erred in finding that there was a change of circumstances based on her stagnation because she claims that she successfully completed all of the requirements of the case plan. The evidence supports the court's finding that mother's progress had stagnated.

"Stagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child," and a parent's progress in aspects of her life does not preclude a finding of changed circumstances. In re B.W., 162 Vt. at 291 (quotation omitted). Since the prior disposition order in May 2015, mother has had inconsistent progress. While she made progress eventually in achieving sobriety, she had relapses and she had a long period of time where she lied about her behavior. Further, mother failed to progress past supervised visits with C.W. and was in the beginning stages of developing her parenting skills. These findings support the court's determination that mother's progress had stagnated.

Mother next contends that the court erred in finding that she would not be able to resume parenting within a reasonable period of time and points to certain evidence she claims demonstrates that she is ready to assume her parental duties immediately. Whether a parent will be able to assume parental duties within a reasonable period of time is the most important factor

² Father was incarcerated during most of the proceedings. At the termination hearing, he admitted that he was not in a position to parent in the near future. The court concluded that father had failed to make any progress towards meeting the goals of the case plan and that termination of father's parental rights was in C.W.'s best interests. Father did not appeal.

³ On appeal, mother asserts that DCF had a bias for foster parents. Mother fails to demonstrate any error in the court's conclusion that DCF acted appropriately in this case and without bias.

in determining the child's best interests. In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325. "The reasonableness of the time period is measured from the perspective of the child's needs, and may take account of the child's young age or special needs." Id. (quotation omitted).

Here, credible evidence supported the court's determination. The court found that mother had not progressed beyond supervised visits, was just beginning to develop necessary parenting skills, and required more time to be able to parent C.W. full time with her other two children. Importantly, the court also found that C.W. had been in custody for a large majority of his young life and had an urgent need for permanency. The evidence supports the court's decision that mother would not be able to gain the skills needed to parent in a reasonable time as measured from C.W.'s perspective.

Mother's final argument is that the court erred by preventing her from engaging in Daubert questioning of two scientific premises, one concerning a therapy tool used by a State expert and one on the use of her urinary analysis results as substantive evidence, rather than as the simple screening tool. The admission of scientific, technical, or specialized testimony is controlled by Vermont Rule of Evidence 702, which states that an expert may testify to an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." See State v. Kinney, 171 Vt. 239, 248 (2000) (discussing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and recognizing "the gatekeeper function of the trial court to determine that novel scientific or technical evidence is sufficiently reliable and relevant before it is admissible").

The relevant facts regarding the therapeutic tool are as follows. The State presented testimony from C.W.'s therapist, who testified concerning the Neurosequential Model of Therapeutics (NMT). She explained that it was an assessment tool for determining brain functioning and developing clinical recommendations. She stated that the NMT assessment tool was widely accepted and well respected and that there was a certification program required to use it. She was in the certification program, having completed ten out of twelve modules, and had used the tool in fifteen assessments. She stated that she used it as one part of her overall assessment of C.W. Mother's attorney objected to testimony about the results of the assessment, claiming that there was an insufficient foundation under Rule 702.

The court concluded that the therapist was sufficiently qualified to administer the test and the therapist's testimony provided enough information to establish that the tool was reliable and reasonably relied upon. Mother's expert testified on redirect. He questioned the impartiality of C.W.'s therapist in administering the assessment and her ability to use the assessment without completing all of the training. He also questioned whether the NMT was a tool that should be used in a custody proceeding. Nonetheless, he did not question the validity of the tool itself. He testified that it was a valid tool for making treatment recommendations. He also stated that he found value in the NMT and used NMTs regularly. This evidence is sufficient to support the court's decision that the NMT was sufficiently reliable to be admissible. See State v. Cameron, 2016 VT 134, ¶ 19 (explaining that trial court's evidentiary rulings are reviewed under an abuse-of-discretion standard).

The following facts relate to the urinalysis reports. The State sought to admit the results of mother's urinalysis. Mother objected and conducted a voir dire of the lab manager. The lab manager explained that the tests were FDA approved. Mother sought to demonstrate that the results could not be used to prove substance abuse or intentional sample tampering. She questioned the expert about the difference between a screening test and a confirmatory test and whether there

were standards for administering a confirmatory test. The court concluded that the results were admissible. The court explained that mother's arguments about the use of the data in the reports went to the reliability and weight of the results, not the validity of the testing method. The court did not abuse its discretion in admitting the testing results insofar as there was sufficient evidence to demonstrate that the tests were administered using a reliable method. To the extent mother sought to demonstrate that the tests were not a reliable method for demonstrating drug use or sample tampering, that was a question of reliability not admissibility.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice