

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-113

AUGUST TERM, 2018

In re I.A., Juvenile	}	APPEALED FROM:
(J.A., Father* & H.B., Mother*)	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 151-10-16 Frjv
		Trial Judge: Mary L. Morrissey

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

Mother and father appeal the court’s order terminating their parental rights to their son I.A., born in October 2016. On appeal mother argues that the record does not support the court’s finding that foster father’s conduct did not play a role in parents’ inconsistent contact with I.A. Father separately argues that the court erred in concluding there was a change of circumstances due to stagnation. We affirm.

The Department for Children and Families (DCF) had an open case with mother and her children, of whom father is not the parent, from 2011 to 2013. In September 2014, DCF filed a petition alleging that those three children and mother and father’s child J.A. were children in need of care or supervision (CHINS). Initially, J.A. was placed in father’s conditional custody, but he was removed after J.A. made calls to police that father would not awaken and was drooling, and concerns were raised about father’s substance use and housing. In November 2015, mother and father moved in with mother’s father because they lacked housing. Mother’s father saw signs of both parents’ drug use. In April 2016, mother’s parental rights to her four children were terminated and father’s rights to J.A. were also terminated.

DCF filed a petition alleging I.A. was CHINS at the time of his birth in October 2016. The concerns at that time included parents’ substance abuse, parents’ lack of engagement with DCF, and parents’ lack of progress in addressing the issues that resulted in termination of their rights to other children. I.A. was placed with mother’s father, his wife, and their two older children. A condition of the placement was that mother and father move out. In January 2017, the parties stipulated that I.A. was CHINS. The disposition order had a goal of reunification or adoption. The case plan required father to, among other things, engage in substance abuse treatment, notify DCF if he enrolled in a pain management program, provide random urine screens, attend visits with I.A., maintain safe and suitable housing and employment, and meet with a domestic violence specialist for an assessment. Mother was required to meet the expectations of her pain-management program, engage in substance-abuse treatment and follow recommendations, provide

random urine screens and be negative for unprescribed substances, maintain safe and suitable housing and employment, and participate in team meetings.

DCF filed petitions to terminate parents' rights in September 2017. Following a hearing, based on all of the evidence, the court determined that there was a change of circumstances due to parents' stagnation. The court found that mother had not made progress towards the goals in the case plan until later than anticipated and her compliance with substance-abuse treatment was of short duration. Mother struggled with substance abuse for fifteen years and during most of I.A.'s life. She missed scheduled urine tests and attended treatment sporadically. In November 2017, she tested positive for cocaine. At the time of the final hearing, mother was engaged in treatment, but it was of relatively short duration. The court found that father was in treatment at the pain clinic and employed but had not made progress in addressing issues of domestic violence. The court also found that parents had not found a stable living situation. After parents moved out of mother's father's home, they obtained an apartment, but were evicted due to nonpayment of rent and moved into a motel. They had recently obtained an apartment, but the court found that it was too early to determine that it was a stable situation. Finally, the court also found that parents' contact with I.A. was extremely inconsistent prior to December 2017 and that parents had not progressed past unsupervised contact or demonstrated an ability to provide for I.A.'s needs.

The court found the following as to I.A.'s best interests. I.A. does not have a bond with parents due to the inconsistent contact with them and their lack of consistently providing for his needs. I.A. had a strong bond with his foster family and they are meeting his physical and emotional needs. I.A. is well adjusted to his current home and daycare. Given I.A.'s young age and time in custody, he has a strong need for permanence. Parents are not able to assume parenting him within a time frame that provides him with this stability. Parents do not play a constructive role in I.A.'s life. Therefore, the court concluded that termination was in I.A.'s best interests. Mother and father separately appeal.

When the termination of parental rights is sought and there is an existing disposition order, 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 change in 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 of circumstances to modify disposition order); id. § 5114(a) (requiring assessment of best interests when termination of parental rights is requested). In assessing the child's best interests, the court is guided by the statutory criteria. Id. § 5114(a)(1)-(4). 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.). 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).

On appeal, mother argues that the evidence did not support the court's finding that foster father's actions did not play a role in discouraging contact between parents and I.A. Mother argues that foster father was hostile during visits, which was a factor beyond her control and limited her contact with I.A. The evidence supports the court's finding that parents' lack of contact with I.A. was due to factors within their control. At the termination hearing, mother stated that foster father made parents feel uncomfortable during visits and he gave her "attitude" about missing visits. The court found foster father's testimony credible that he was upset with parents when they missed

visits and early on expressed frustration with them, but that he attended shared parenting meetings with DCF and learned about how to properly respond to parents' missed visits. The court found that comments made by foster father were not the reason for parents missing visits. "We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." *In re D.S.*, 2014 VT 38, ¶ 22, 196 Vt. 325 (quotation omitted). Here, the court did not err in accepting foster father's testimony over mother's.

Moreover, the evidence demonstrates that parents did not have consistent visits even when the visits were held at the DCF office and not at the foster father's home. In response to parents' request, DCF changed the schedule to accommodate parents' work schedules, but parents still missed visits. This evidence further supports the trial court's conclusion that their inconsistent contact was not caused by factors outside their control.

Father argues that the court erred in concluding that there was a change of circumstances due to stagnation. He alleges that he complied fully with his substance-abuse treatment, that missed visits were more limited than the court found because some were missed for legitimate reasons such as work, that the parties found housing, and that his lack of domestic-violence counseling was not relevant. The evidence supports the court's findings that father's progress had stagnated in these areas. The court credited father with participating in a pain-management clinic for two years, but also noted that his participation in counseling was inconsistent and his use of THC prevented him from progressing to less frequent contacts with the clinic. As to visits, the evidence supports the court's finding that parents' lack of contact was due to their own actions and precluded them from progressing in their parenting skills of I.A. The court acknowledged that there were different reasons for missed visits but found father's testimony that DCF did not try to accommodate his work schedule not credible. Indeed, father testified that he never asked DCF for help with gas vouchers or repairs for his car because he did not want to ask for help and that DCF would have held it against him. As to housing, father asserts that parents made progress towards finding stable housing. In February 2018, after the termination hearings concluded, father moved to reopen the evidence. The court granted the request and held a hearing at which mother and father presented evidence that they had obtained an apartment. The court's finding that, despite having a new apartment, parents' housing remained precarious was supported by parents' historic inability to consistently pay rent, the precarious and speculative state of parents' proposed budget, and the short time they had lived in the new apartment.

Finally, father asserts that his failure to participate in individual counseling, which was recommended after a domestic violence assessment, should not be considered lack of progress because there were no recent reports of domestic violence incidents and the court relied on hearsay in requiring that father undergo the assessment. The disposition plan, to which parents agreed, required father to meet with a domestic violence specialist. This requirement was supported by historical reports from mother and the maternal grandmother that father had been both violent and controlling of mother. During the assessment, father minimized violence that had occurred in front of the children in the past, denied being violent with mother, and blamed mother for past issues in their relationship. The domestic violence specialist recommended that father engage in individual counseling to work on his communication skills and to overcome his blaming mother for the violence in their relationship. Father did not follow through on this and, at the termination hearing, testified that he did not understand why he was required to engage in counseling because he had not been charged with assault and had not abused a spouse. To rebut father's denial of abuse, the

State entered a portion of the court's order from a prior termination decision finding that father strangled mother in front of the children. The trial court did not err in allowing the State to enter this rebuttal evidence. The trial court's conclusion that father's failure to acknowledge his domestic violence history during his hearing testimony, and his failure to engage in the recommended counseling as required by the case plan, contributed to the conclusion that father's progress had stagnated and was supported by evidence beyond the court findings in the prior proceeding, and he had ample opportunity to respond to those findings. Therefore, the court's determination that there was stagnation was not in error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice