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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-319

JANUARY TERM, 2018

In re A.L., Juvenile (K.S., Mother* & R.L., Father*)	}	APPEALED FROM:
	}	Superior Court, Caledonia Unit, Family Division
	}	DOCKET NO. 22-2-17 Cajv
		Trial Judge: Robert R. Bent

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

Parents appeal from the termination of their parental rights with respect to daughter A.L. They raise numerous arguments. We affirm.

Parents have two children together including A.L., who was born in December 2015. A.L. was taken into the custody of the Department for Children and Families (DCF) shortly after birth. While A.L. was in custody, mother gave birth to parents' second child together. That child is also in DCF custody. Mother's rights with respect to three older children were terminated in 2008 and 2012. Father voluntarily relinquished his rights to one of his children approximately twenty years ago, and his rights with respect to the other were terminated around the same time.

In January 2016, parents stipulated that A.L. was a child in need of care or supervision due to the factors that gave rise to parents' previous terminations-of-parental-rights (TPRs). Parents agreed that they did not appear to have made significant changes in their lives since their respective prior TPRs. DCF filed a TPR petition at initial disposition. The State argued that mother suffered from such cognitive, intellectual, or learning deficits that she could not adequately parent A.L., who suffered from significant physical and potentially developmental challenges. It maintained that mother's deficits were longstanding and that they did not warrant efforts to develop a parent-child relationship under a reunification plan where parents would attempt to become primary caregivers, particularly given A.L.'s special needs.

Following hearings in May and June 2017, the court terminated parents' rights. The court made detailed findings about A.L.'s special needs. She was diagnosed as "failing to thrive" due to her poor feeding skills. A.L. is very sensitive to changes in her feeding environment, including changes in the person feeding her. A.L. had slowly gained eating skills, which her pediatric gastroenterologist attributed to her foster mother's diligence and persistence. The doctor deemed A.L. medically fragile and found it imperative that A.L.'s care provider understand her feeding needs, which would present an ongoing challenge. A.L. required close monitoring because her health could change quickly.

Two experts evaluated parents: Dr. William Nash, who was hired by the State, and Dr. Nicole Brisson, who was hired by parents. The court recognized that Dr. Nash did not have Dr.

Brisson's degree of expertise in the field of working with people with developmental disabilities. At the same time, Dr. Nash was more experienced as a forensic evaluator. The court found both experts somewhat partisan to various degrees on different issues, but not to such an extent that it discounted their testimony as a whole.

Dr. Nash was unsuccessful in interviewing father because, after providing an initial history, father took a break and did not return. Dr. Nash observed parents interacting with A.L. He noted father's extreme passivity and concluded that while father could perform basic care behaviors such as changing diapers or feeding, he needed specific instructions to do so. Otherwise, father sat passively watching A.L. without initiating any nurturing or play behaviors. Dr. Nash concluded that father had no apparent ability to understand A.L.'s emotional needs. As to mother, Dr. Nash observed that she needed prompting from Family Time coaches regarding feeding even though A.L. provided hunger cues. Dr. Nash found that mother had a degree of distractibility and a lack of flexible thinking necessary to safely care for a child with A.L.'s significant medical needs. The court found Dr. Nash's observations supported by other witnesses who testified after observing parents with A.L. When Dr. Nash previously evaluated mother in 2006, his report reflected that mother had "no idea" of how she lost custody of her children. Similarly, mother had no insight into why A.L. was in DCF custody and she denied having any issues or limitations that might cause DCF concern. Mother also denied needing any Family Time services, supervision, or other assistance.

Dr. Brisson concluded that both parents had learning disabilities. She did not find father passive. Dr. Brisson concluded that parents adequately met A.L.'s physical and developmental needs during her visits with them. She opined that if service providers were willing to assist parents in putting recommendations in place, parents could assume their parental duties within a reasonable time. The court found it notable that in her report, Dr. Brisson failed to mention A.L.'s significant health issues and the implications and demands that they raised. She also failed to recognize mother's expressed belief that that she did not need help, which substantially undercut Dr. Brisson's premise that mother could parent with supports. The court concluded that Dr. Brisson was unduly optimistic in her evaluation. While Dr. Brisson was knowledgeable in her field, the court did not find her ultimate conclusions credible regarding parents' ability to assume parental duties within a reasonable time. As set forth below, the court instead credited Dr. Nash's conclusions.

The court found that although mother's opportunities for learning had not been as well-tailored as they could have been, she still should have developed more parenting skills than those she presently possessed in figuring out what A.L. needed. In so concluding, the court was mindful that A.L. did not give hunger cues to the degree expected in other children her age and she was also on a feeding schedule, which made reading her hunger cues unnecessary. Although the court acknowledged mother's diligence in visiting with A.L. and the genuine love she felt for A.L., the court found Dr. Nash's conclusions credible. In particular, Dr. Nash opined, and the court credited his testimony, that mother substantially and significantly lacked the intellectual, emotional, or cognitive capacity to achieve the transition of A.L. from her foster mother. Even attempting such a transition would be devastating to A.L.'s development. Father presented as even less qualified to parent. He had a highly pathological history, and had a significant history of sexual and physical abuse. He could perform basic care behaviors but did not initiate such behaviors unless specifically instructed to do so. The court agreed with Dr. Nash that mother engaged in "magical thinking," that is, if her younger children were just returned to her, she could manage their care and would not need further assistance in her parenting skills.

Based on these and numerous other findings, the court considered the statutory best-interest factors. Citing mother's failure to acknowledge the need to improve her parenting skills and take supportive assistance, and the deficits, including cognitive deficits, that impair her ability to manage A.L.'s special needs, the court concluded that mother could not assume parenting duties for A.L. within a reasonable period of time. Considering A.L.'s interaction with parents and foster parents, as well has her adjustment to her home, the court found that A.L.'s most significant relationship was with her foster mother. While mother loved A.L., it was the foster mother who monitored A.L.'s health, administered her medications, and attended to her needs. Mother had demonstrated an inability to pick up on A.L.'s cues and she denied needing any parental training and assistance. A.L. was adjusted to life in her foster home and she was attached to the foster mother, the foster mother's adopted daughter, and A.L.'s younger sister who was also placed in the home. The court agreed with Dr. Nash that removing A.L. from her foster home would be detrimental to her development. Finally, the court concluded that mother played a constructive but limited role in A.L.'s life given the short duration of visits and mother's need to be prompted to respond to A.L.'s needs. Mother also struggled to retain techniques that would assist in A.L.'s development. For these and other reasons, the court concluded that termination of mother's rights was in A.L.'s best interests.

Turning to father, the court concluded that the statutory factors weighed in favor of terminating his rights as well. It found that notwithstanding the periodic affection that father had shown A.L., his passivity at visits, his inability to respond to A.L.'s needs unless prompted, his cognitive deficits, and his ongoing substance abuse issues, all coupled with A.L.'s special developmental needs and young age, showed that father could not resume parenting within a reasonable time. The other factors noted above with respect to mother further supported the court's termination of father's parental rights.

On appeal, parents argue that the court's findings do not support its conclusion regarding mother's inability to parent A.L. within a reasonable period. They assert that mother's bond with A.L. is strong and that she made progress in meeting A.L.'s needs. They also suggest that DCF's decision to conduct visits with A.L. at the DCF office, rather than at parents' home, hindered parents' ability to gain parenting skills. Parents question whether DCF communicated with mother regarding A.L.'s needs in an effective way given her disability. They also contend that the court erred in crediting Dr. Nash instead of Dr. Brisson. They further argue that the court failed to hold DCF responsible for failing to accommodate mother's disabilities under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. Had parents been provided with reasonable accommodations, they assert that they could learn to parent A.L. within a reasonable period.

In a related vein, parents argue that the State made assumptions about mother's abilities based on generalizations or stereotypes about disabled people, contrary to an advisory issued by the U.S. Department of Justice and the U.S. Health and Human Services Agency. See "Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act," https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html [https://perma.cc/5LFG-LTQZ] (stating that "decisions about child safety and whether a parent . . . represents a direct threat to the safety of the child must be based on an individualized assessment and objective facts" and "may not be based on stereotypes or generalizations about persons with disabilities"). According to parents, the court violated this advisory by failing to credit Dr. Brisson's testimony and failing to "hold DCF accountable" for implementing requested accommodations. They also contend that the court relied on generic concerns about cuing and thereby failed to consider A.L.'s special needs. Finally, parents argue that the court should not have relied on Dr. Nash's opinions in evaluating the best-

interest factors, particularly his opinion regarding the harm to A.L. if she was removed from her foster home.

When termination of parental rights is sought at the initial disposition hearing, the trial court must "consider the best interests of the child." 33 V.S.A. § 5317(d); see In re J.T., 166 Vt. 173, 177 (1997) (observing that parental rights may be terminated "at the initial disposition hearing if the court finds it to be in the best interests of the child to do so"). To determine a child's best interests, the court must consider four statutory factors. See 33 V.S.A. § 5114. The most important factor is the likelihood that the legal parent will be able to assume parental duties within a reasonable time. See In re B.M., 165 Vt. 331, 336 (1996). As long as the court applied the proper standard, we will not disturb its findings on appeal unless they are clearly erroneous; we will affirm its conclusions if they are supported by the findings. In re G.S., 153 Vt. 651, 652 (1990) (mem.).

We find no error here. First, many of parents' arguments turn on the court's assessment of the credibility of witnesses and the weight of the evidence. This includes parents' assertions that the court should have credited Dr. Brisson over Dr. Nash and that the court should not have relied on Dr. Nash's conclusions in evaluating the best-interest factors; their contention as to the weight to be afforded the strength of mother's and the foster mother's bonds with A.L.; and the court's assessment of the progress that parents made in acquiring parenting skills. The court explained in detail why it credited Dr. Nash's opinion over that provided by Dr. Brisson. It was entitled to rely on his expert opinion in assessing the best-interest factors. The court made numerous findings detailing the parent-child bond and the limited progress that parents made in demonstrating parenting skills, with particular focus on A.L.'s special needs. While parents disagree with the court's conclusions, it is the exclusive province of the trial court to weigh the evidence and determine the credibility of witnesses. In re A.F., 160 Vt. 175, 178 (1993); see also In re S.B., 174 Vt. 427, 429 (2002) (mem.) ("Our 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"). We do not reweigh the evidence on appeal.

As to DCF's decision to move parent-child visitation from parents' home to its office, the court found that DCF had been "unnecessarily cautious" in doing so. The move came after an Easter Seals worker heard father raising his voice at mother shortly prior to a visit at their home. While DCF was concerned about father's history of domestic violence, the court found no significant evidence that father was violent toward mother. The court's findings regarding parents' deficiencies during visitation do not depend on where the visitation occurred. We further note that the court in no way rested its decision on father's history of domestic violence.

We thus turn to parents' claims regarding the ADA. The court explained that during the course of these proceedings, DCF was provided with a copy of Dr. Brisson's report, which made certain recommendations for assisting parents. DCF considered whether to make changes to its efforts to help teach parents parenting skills, including through the Easter Seals Family Time program, which would provide both pre-and post-visit meetings. Parents did not want those services, however, and expressed that they did not need them. Thus, visits included only limited coaching. DCF concluded that the Family Time coaching program, with some extra care taken to provide hands-on opportunities to parents as opposed to oral discussions, met much of Dr. Brisson's recommendations. The court did not find that the parents' program matched Dr. Brisson's recommendations exactly, but found such little variance between what was recommended and what was done that the outcome would have been the same even if a program matching Dr. Brisson's exact recommendations had been implemented. The court also noted that parents raised no specific objections at the time to the program as delivered.

Parents now argue that the full implementation of Dr. Brisson's recommendations would have changed the outcome. Again, this argument attacks the trial court's evaluation of the weight of the evidence. Even putting aside the court's finding that DCF acted largely consistently with Dr. Brisson's recommendations and that parents did not want the extra assistance offered, we have made it clear that "ADA noncompliance is not a defense" to a TPR petition. In re B.S., 166 Vt. 345, 351 (1997). Instead, the court must focus on the best interests of a child, including whether the parents will be able to resume parental duties within a reasonable period of time. As we explained in B.S., "[t]he Legislature has not called for an open-ended inquiry into how the parents might respond to alternative [DCF] services and why those services have not been provided. Such an inquiry ignores the needs of the child and diverts the attention of the court to disputes between [DCF] and the parents." Id. (noting as well that "nothing in the ADA suggests that denial of TPR is an appropriate remedy for an ADA violation"). The court applied the appropriate standard here, and its conclusions are supported by its findings, which in turn are supported by the evidence. The record does not support parents' assertion that the court relied on stereotypes or generalities in reaching its decision. To the contrary, it engaged in a very detailed individualized assessment of both parents and of A.L. We find no grounds to disturb the court's decision.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice