

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. 2018-292

JANUARY TERM, 2019

In re R.D.C., Juvenile	}	APPEALED FROM:
(E.R., Father*)	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 156-5-16 Cnjv
		Trial Judge: Alison S. Arms

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

Father appeals the termination of his parental rights to two-year-old daughter R.D.C. We affirm.

R.D.C. was born in May 2016 following a brief sexual relationship between father and mother. Father learned that mother was pregnant early in the pregnancy but did not believe he was the father. He asked mother to participate in genetic testing to confirm paternity. She refused. Father had no further involvement with mother for the duration of her pregnancy.

On the day R.D.C. was born, the Department for Children and Families (DCF) filed a petition alleging that she was a child in need of care or supervision (CHINS) due to concerns over mother's substance abuse, mental-health issues, and prior history of abuse and neglect of her older children. At the temporary-care hearing, the family court transferred custody of R.D.C. to DCF and ordered genetic testing. The results indicated that father was R.D.C.'s father. Father began having regular visits with R.D.C. soon afterward.

In August 2016, the court determined that R.D.C. was CHINS. In October 2016, the court approved a disposition plan with concurrent goals of adoption or transfer of custody to father within three months. The plan called for father to obtain safe and appropriate housing, participate in parent education and other support services as directed by DCF, sign all releases, obtain employment to help him meet R.D.C.'s needs, and keep DCF informed regarding his housing and employment situation.

In January 2017, DCF filed petitions to terminate both parents' rights. In July 2017, after a hearing, the court granted the petition to terminate mother's rights but denied the petition as to father. The court found that father had progressed in his ability to care for R.D.C. and had engaged in all aspects of the case plan. Father had maintained at least part-time employment throughout the CHINS proceeding and was looking for a better job that would permit him to provide for R.D.C. He had not yet obtained suitable housing, but DCF did not refer him for a housing voucher until around the time the termination petition was filed and made no other efforts to assist him.

The court concluded that under these circumstances, the State had not met its burden of showing a substantial change in circumstances that warranted modification of the case plan as to father.

In September 2017, after a contested disposition hearing, the court adopted an updated case plan with concurrent goals of reunification with father or adoption by March 2018. The case plan required father to obtain safe and appropriate housing; provide DCF with the address and names of people living in the home and allow announced and unannounced home visits; participate in parent education, including an intensive family-based services program (IFBS), and other support services as directed by DCF; maintain employment that would allow him to meet R.D.C.'s needs; contact R.D.C.'s occupational and physical therapists; attend all of her medical appointments; keep DCF informed regarding his housing and employment situation; continue to attend all family time with R.D.C.; and keep an open dialogue with DCF regarding her well-being.

In November 2017, a post-disposition review hearing was held. Father had been approved for a Section 8 housing voucher in August 2017 but was still searching for an apartment. DCF did not know where father was residing. Father reported living with his pastor and friend but would not share their names with DCF or allow DCF to visit the residence. In November 2017, father was referred to the IFBS program, which is typically an in-home service to support current parenting. His participation was delayed due to a lack of information about his housing situation. He had attended a medical appointment with the foster parents but appeared not to share the doctor's concern regarding R.D.C.'s right-sided motor weakness. Father had consistently attended supervised visits, which took place on Tuesdays, and accepted feedback and was engaged with staff.

A further post-disposition review was held in December 2017. Father was working full-time and anticipated obtaining housing by mid-December 2017. He had started the IFBS program, but it was discontinued because the work could not be done in father's existing home. In an entry order following the hearing, the court identified the following priorities for reunification: father was to obtain housing, which DCF would assess for safety, and then begin overnight visits with R.D.C. to see how he did in getting R.D.C. to daycare and appointments. Father's parent-child contact was expanded to include an additional six hours of unsupervised time on weekends, with dates and times to be agreed upon with the foster parents.

In February 2018, the State filed a second petition to terminate father's parental rights. The termination hearing was held over two days in May and June 2018. Following the hearing, the court issued a written decision granting the petition.

The court found that father had missed or was late for several visits with R.D.C. in recent months, in part because he did not communicate with DCF and the foster parents about scheduling. He returned R.D.C. from several visits with soiled diapers and diaper rash. Father also failed to acknowledge that R.D.C. was lactose intolerant and continued to give her milk, resulting in gastrointestinal distress and diarrhea.

After father finally obtained an apartment in March 2018, he began work with the IFBS program. He met with the IFBS worker seven times during April and May 2018. The IFBS worker noted that father initially lacked basic supplies in his home for R.D.C., such as diapers and a drinking cup, though he later obtained these items. She also observed that R.D.C. only used a few words such as "Daddy" and "rice" during interactions with father, and that father's engagement with R.D.C. was limited. Father did not have a set routine for R.D.C. during his visits. He informed the IFBS worker that he fed R.D.C. when she let him know she was hungry. He believed she did not need naps, though he was willing to allow them after discussion with the IFBS worker.

The IFBS worker helped father research daycare facilities and provided him with other child-care resources, but father did not follow through with developing a plan for R.D.C.'s care while he was at work.

During one visit in May 2018, the IFBS worker noticed that R.D.C.'s left eye was swollen shut. R.D.C.'s eye had been in that condition when she came into father's care that day from the foster family. Father said he did not know what happened and he did not ask the foster family. He told the IFBS worker that he had tried to contact the pediatrician by telephone but received no answer. He did not know the name of R.D.C.'s pediatrician. He told the IFBS worker that he planned to ask his mother, who worked in the medical field, what to do about R.D.C.'s eye. Father's mother works in a nursing home.

The foster family testified that they had informed father prior to the visit that R.D.C. had been bitten by an insect and asked father to arrange for R.D.C. to see the pediatrician that day. Father agreed to do so. When the foster parents picked up R.D.C. at the end of the visit, R.D.C. had not received medical care and the condition had worsened. They took her to a walk-in clinic where she was diagnosed with an allergic reaction to an insect bite. Father did not contact them to check on R.D.C. after this incident.

Father only attended four of R.D.C.'s thirty-five medical appointments during the year preceding the second termination hearing, despite being informed of the times of the appointments. He did not support the decision to have tubes implanted in R.D.C.'s ears, even though she made dramatic developmental gains after the surgery. He did not communicate with the foster family regarding R.D.C.'s occupational and physical therapy. He also did not attempt to contact R.D.C. on her second birthday.

In May 2018, DCF twice attempted to schedule overnight visits in father's home. The first planned visit was cancelled because father was unavailable to attend a required safety-planning meeting. The second planned visit was cancelled after father failed to obtain medical attention for R.D.C.'s eye.

The court concluded that father had stagnated in his ability to parent R.D.C. The court noted that it had taken father most of the two years R.D.C. had been in DCF custody to obtain an appropriate living situation. As a result, he had not yet meaningfully participated in parent-education services. He also had not demonstrated that he was able to care for R.D.C. overnight or on a daily basis. The court found that father's progress toward improving his parenting skills and providing stability for R.D.C. had been far too slow and did not substantially conform with the expectations of the case plans.

The court then assessed the best-interests factors. It found that while father had a loving relationship with R.D.C., he was currently unable to assume parental duties and would not be able to do so within a reasonable time. Specifically, it noted that father had only recently obtained suitable housing, had shown an inability to comprehend the basic aspects of caring for a toddler, had only cared for R.D.C. for short periods and never overnight, and had failed to appreciate her medical needs, including her lactose intolerance. It accordingly concluded that termination of father's parental rights was in R.D.C.'s best interests.

Father's sole argument on appeal is that the court erred in finding stagnation because his lack of progress on the case plan was due to factors beyond his control. Before it may modify an existing disposition order and terminate a parent's rights, the court must first find by clear and convincing evidence that there has been a substantial change in material circumstances. 33 V.S.A. §§ 5113(b), 5318(d); *In re R.W.*, 2011 VT 124, ¶ 14, 191 Vt. 108. The court may find the requisite

change in circumstances where the parent’s ability to care for the child has stagnated or deteriorated. In re J.G., 2010 VT 61, ¶ 10, 188 Vt. 562 (mem.). “Stagnation can be shown either by the passage of time with no improvement in parental capacity to care properly for the child or where the improvement is so insignificant that it is unlikely the parent will be able to resume parental duties in a reasonable time.” Id. (quotation omitted). On appeal, we will uphold the family court’s findings unless they are clearly erroneous and will affirm its conclusions if supported by the findings. In re R.W., 2011 VT 124, ¶ 15.

We have recognized that “stagnation caused by factors beyond the parents’ control could not support termination of parental rights.” In re S.R., 157 Vt. 417, 421-22 (1991). However, the record does not support father’s argument that his stagnation was due to factors entirely beyond his control. The trial court acknowledged that father had diligently pursued housing, but was unable to find suitable housing until early spring of 2018, and it recognized that this delayed father’s ability to engage in IFBS services to work on improving his parenting skills. But the court did not rely on these factors in concluding that father’s progress had stagnated. Instead, it wrote, “even discounting these issues, Father’s lack of progress is significant.” The court emphasized that even putting aside his housing challenges, father had not demonstrated an ability to attend to R.D.C.’s needs, had failed at times to make commonsense observations of her needs, and had failed to comprehend basic aspects of parenting a toddler. It also emphasized the myriad ways that father had failed to understand R.D.C.’s medical needs. It was these considerations, and not father’s delays in securing housing or in participating in particular programming, that undergirded the trial court’s stagnation analysis. These factors, which were within father’s control, were sufficient to support the court’s finding of stagnation by clear and convincing evidence. See In re D.B., 161 Vt. 217, 220 (1993) (explaining that even if parent’s general parenting skills improve, stagnation may be found if improvement does not substantially conform with expectations of case plan).

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice