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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-472

DECEMBER TERM, 2001

In re J.D., Jr., Juvenile	}	
	}	APPEALED FROM:
	}	
	}	Chittenden Family Court
	}	
	}	DOCKET NO. 592-11-97
	}	Cnjv
	}	
	}	Trial Judge: James R. Crucitti
	}	

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

The Commissioner of the Vermont Department of Social and Rehabilitation Services ("SRS") appeals an order of the Chittenden Family Court denying SRS's motion to modify disposition and terminate father's parental rights to J.D., Jr. We affirm.

J.D, Jr. is the son of J.D., Sr. and M.D. He was born in December 1995 and has been in foster care since 1997. While he was in foster care, his foster parents discovered that J.D., Jr. suffers from a number of allergies, including a potentially life-threatening allergy to peanuts. J.D. also suffers from asthma, which is exacerbated by smoke and pet dander. The foster parents' efforts in J.D., Jr.'s food preparation and environmental controls in their home led to a marked improvement in the boy's health. J.D., Jr.'s health needs require close supervision and are likely to remain with him for the rest of his life.

Beginning in September 2000, the court took evidence on SRS's initial petition to terminate father's and mother's parental rights to J.D., Jr. By that time, the parents were no longer together, and father was in a new relationship. On June 14, 2001, the court denied SRS's petition, finding that SRS had failed to establish that termination was in J.D., Jr.'s best interests by clear and convincing evidence. It found that father was presently able to parent his son and ordered the parties to work on a plan to transition J.D., Jr. to father's home prior to the beginning of the 2001 school year. Although the court found SRS had failed to establish by clear and convincing evidence that termination of father's rights was in J.D., Jr.'s best interests, it concluded that the agency had proved mother's rights should be terminated. The court nevertheless denied SRS's request because it found termination unnecessary in light of its order transferring custody of J.D., Jr. to his father. It concluded that J.D., Jr.'s best interests would not be served by any contact between mother and the boy, however. It left open the possibility of future contact should mother comply with the case plan the court initially approved. No party appealed that order; therefore its findings and conclusions are not now before us for review.

On August 13, 2001, SRS filed a motion to modify the court's June 14, 2001 order and requested a protective order and expedited hearing. The motion did not renew SRS's request for termination of J.D., Jr.'s parents' rights. Rather, SRS sought a delay in reunifying the child with his father, as well as a protective order setting forth conditions to ensure J.D., Jr.'s health and safety during and after the transition. The agency expressed grave concern that father had not taken all necessary steps to eliminate from his home peanut products as recommended by J.D., Jr.'s doctor and required by the transition plan. It was also concerned that father did not appreciate the seriousness of J.D., Jr.'s condition and therefore

would not adequately protect the child once J.D., Jr. was in his care.

The court convened a hearing on the motion on September 17, 2001 at which SRS requested that the court consider termination of parental rights. The parents objected to expanding the hearing when SRS's written motion did not explicitly request termination. The court found that father did not receive sufficient notice of SRS's intent to include termination as an option in its motion to modify. Nevertheless, it allowed SRS to present evidence in support of its oral termination request, and stated that it would permit the parents additional preparation time if necessary, including the right to present additional witnesses. Additional hearings were held on September 20 and 21, 2001.

On September 26, 2001, the court issued an entry order, without findings of fact, denying SRS's request for termination of parental rights. The court also entered a protective order, and directed the parties to work out a transition plan. SRS thereafter requested the court to issue findings of fact supporting its September 26 order. The court did so by order dated October 31, 2001, and set forth a protective order with detailed conditions for J.D., Jr.'s safe transition to his father's home. SRS then took this appeal.[(1)]

SRS first claims the court's October 31 order is erroneous because SRS believes the court did not engage in the analysis required of it when considering termination of parental rights. It asserts that the court's failure to offer any analysis of its findings of fact leaves this Court and the parties to guess at the basis for the court's decision. Father and mother respond that the court had no authority to consider termination of their parental rights at the September hearing in the absence of a written motion satisfying V.R.F.P. 3(a), but in any event the court's order is fully supported by the findings.

We agree that it was error for the court to entertain an oral request to terminate parental rights where V.R.F.P. 3(a) requires such requests to be submitted to the court in writing. See V.R.F.P. 3(a) (motion to terminate parental rights "shall be in writing and shall notify respondents and the court of the relief sought"). We have previously cautioned SRS to ensure that its requests to terminate parental rights meet the requirements of V.R.F.P. 3(a) to properly notify parents that termination is actually being sought and to allow them adequate time to prepare for the hearing. See In re T.R., 163 Vt. 596, 598 (1994). The court in this case was apparently mindful of the parents' needs, however, by allowing additional time for a hearing to contest the agency's oral motion. Considering that the court did not terminate the parents' rights, any error in entertaining SRS's oral request was harmless. See V.R.C.P. 61 (harmless errors not grounds for reversal).

We also agree with the parents that the court's October order was not so legally deficient as to require reversal. Whether to terminate parental rights is left to the juvenile court's discretion. In re D.M., 162 Vt. 33, 38 (1994). It must find clear and convincing evidence of a substantial change of material circumstances and that termination is in the child's best interests. Id. If the court's findings support its conclusions, we will affirm the court's decision. Id. We do not require the court to couch its order in the same terms used in the statutes governing termination, however, as long as the order shows the court considered the statutory criteria. In re C.L., 151 Vt. 480, 482-83 (1989).

In this case, the court concluded that SRS had failed to present sufficient evidence to support termination, stating that it relied on the evidence presented at the initial termination hearing as well as the supplemental evidence taken on September 17, 20 and 21. Based on our review of the record below, it is apparent that the court determined that SRS failed to show that a substantial change of material circumstances occurred since the June 14 order and that reunification with father remained in J.D., Jr.'s best interests. The record fully supports the court's discretionary decision, and we find no reason to disturb it. See In re D.A., ___ Vt. ___, ___, 772 A.2d 547, 551 (2001) (mem.) (Supreme Court will not substitute its judgment for that of family court).

SRS also claims that the court's findings of fact do not support its conclusion that reunification with father is in J.D., Jr.'s best interests. Instead, SRS argues, the October 31 findings compel a conclusion that father cannot resume his parental duties within a time frame that is consistent with his child's needs. We do not agree. Although the court found, among other things, that father was careless in failing to follow strictly the recommendations of J.D., Jr's doctor and the transition plan, it also found that he had followed through on many of those recommendations. For example, father purchased the appropriate bedding for J.D., Jr. and a special vacuum cleaner. Father removed two cats from his home as required and made efforts to notify the child's school and daycare of J.D., Jr.'s allergies. The court found that visitation always went well and that father interacted well with service providers. The court's conclusion is therefore appropriately

supported by its findings.

Finally, SRS contests as clearly erroneous the court's finding that father "has shown a continuing and significant dedication to reuniting with his son." We will not disturb the court's findings unless the party challenging them demonstrates that the record contains no credible evidence to support the findings. See Mullin v. Phelps, 162 Vt. 250, 260 (1994) (Court will not disturb finding unless appellant shows that no credible evidence exists to support it). Here, the record reflects sufficient evidence to allow the court to make the challenged finding, even if the evidence was conflicting.

In addition to the evidence of father's successful efforts to make his home safe for J.D., Jr., the court heard evidence that J.D., Jr. did not suffer an allergic reaction to peanuts while in father's care during unsupervised visits. There was evidence that father spoke to J.D., Jr.'s doctor on at least two occasions about the child's allergies, once to find out if coconut oil could trigger an allergic reaction. The court also heard evidence about how father worked with his employer to ensure he could maintain visits with J.D., Jr., even when that required him to rise at 2:00 am to get to work early rather than start at his regular time of 7:30 am. There was, therefore, evidence to support the court's finding regarding father's dedication to reunite with J.D., Jr.; consequently, the finding is not clearly erroneous, and we will not disturb it.

Affirmed.

BY THE COURT:

_____
Jeffrey L. Amestoy, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

1. In this appeal, SRS does not challenge the court's order related to mother's parental rights because the order on appeal did not address any issues related to mother.