

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-174

AUGUST TERM, 2008

In re D.S., Juvenile

} APPEALED FROM:  
}  
} Windsor Family Court  
}  
} DOCKET NO. 117-11-06 Wrjv

Trial Judge: M. Kathleen Manley

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

Mother appeals from the family court's order terminating her residual parental rights to D.S. She argues that the court erred in evaluating whether she had stagnated in her ability to parent. We affirm the court's decision.

The record indicates the following. D.S. was born in March 2003. D.S. has a rare blood disorder, which requires ongoing medical attention. Mother failed to take D.S. to medical appointments, and the Department for Children and Families (DCF) substantiated mother for medical neglect. Between December 2003 and October 2005, DCF provided numerous services to mother in an effort to assist her in obtaining necessary medical care for D.S. and to address other identified areas of need. Mother has medical and emotional problems, the latter of which were caused in part by physical and emotional abuse that she suffered in her own childhood. Mother also has substance abuse issues and a lengthy criminal history. She has little if any work history.

In April 2006, DCF received reports that mother was using drugs and neglecting D.S.'s medical needs. Mother had also become homeless. Mother subsequently took D.S. to Florida, where they were similarly homeless. In September 2006, an arrest warrant issued for mother. D.S. was taken into emergency custody, and was adjudicated as a child in need of care or supervision (CHINS) in December 2006. A disposition report and case plan, which contemplated reunification with mother, were filed in January 2007.

Mother was incarcerated from approximately November 2006 until January 2007. She was released into a residential substance abuse treatment facility, and she was successfully discharged from this program. Mother then went to live with her mother, against the advice of DCF. Mother made little progress in addressing the goals of the case plan while living with her mother. She did not obtain a stable home, she did not enroll in any individual therapy to address the trauma of her childhood, she did not provide releases to DCF so they could verify her participation in certain programs, and the court found it questionable whether she was actually

engaged in any services for substance abuse treatment. Mother eventually agreed to participate in a halfway house program. Before she could do so, however, mother tested positive for drugs, violated her probation, and was subject to new criminal charges. She was incarcerated in May 2007, and in June 2007, she was sentenced to eighteen to forty-two months, all to serve. In late September 2007, DCF filed a petition to terminate mother's residual parental rights.

Mother remained incarcerated until October 2007, when she was furloughed to the Tapestry program in Brattleboro. The court found that mother had remained drug-free since being incarcerated, but that she had been reprimanded for several incidents at the Tapestry program in March 2008 and that she was not effectively engaged in looking for employment. Mother would not complete her minimum sentence until October 2008, at which time she would be eligible for parole or furlough. If mother was paroled or furloughed, the court explained, she would be subject to strict conditions, with the possibility of returning to jail until 2010 if she violated these conditions.

Turning to D.S.'s needs, the court found that in addition to suffering from a blood disorder, D.S. was also diagnosed with Reactive Attachment Disorder, disinhibited type. The court found that, consistent with D.S.'s diagnosis, D.S. needed to feel secure and safe, have predictable and consistent caretaking, and not live in a home where the primary caretaker was the cause of the chaos D.S. felt. D.S. has been in the same foster placement since August 2007. D.S. had a difficult transition from the prior placement, but adjusted well to the new family and was making significant progress. The court found that the loss of this foster family would be "huge" for D.S., in light of the losses that D.S. had already sustained, and that it could cause D.S. significant emotional damage. At this point in D.S.'s life, the court found, it was more important for D.S.'s emotional health that D.S. be able to continue in the stable, supportive home life with the foster family than maintain contact with mother.

Based on these and numerous other findings, the court concluded that DCF had demonstrated a substantial change in material circumstances, and that termination of mother's rights was in D.S.'s best interests. As to the change in circumstances, the family court explained that the key question was whether mother's improvement substantially conformed to the expectations at the time of the CHINS adjudication and the DCF case plan. In this case, it explained, the initial case plan identified areas of need to ensure D.S.'s safety and nurturing, the primary focus of which were mother's significant issues with substance abuse and her inability to provide for D.S.'s daily needs. In an effort to address these issues, DCF made treatment recommendations and provided services to assist mother in locating adequate housing, obtaining employment, and providing support for mother while she addressed both areas of concern. The court found that once mother was in a position to participate in services outside a correctional facility and residential treatment facility, she was slow to do so, despite the substantial supports in place to assist her.

By the time of the permanency case plan review in May 2007, the court explained, mother had made little progress, and in a continued effort to support mother in a goal of reunification, a revised plan of services was added to the case plan, which included a plan for mother to participate in a halfway house program with D.S. Mother's continued substance abuse, probation violations, and other pending criminal charges effectively ended her ability to engage in a plan of services. Thus, considered as a whole, the court concluded, these factors

along with mother's incarceration amply supported a finding of a substantial change in circumstances from that contemplated at the time of acceptance of the disposition case plan in January 2007 and the permanency case plan developed in May 2007. At the time the termination of parental rights (TPR) petition was filed, the court continued, mother was not in compliance with either plan, and her extended incarceration prevented any significant progress toward that goal. The court thus concluded that she had stagnated. It next considered the statutory factors set forth in 33 V.S.A. § 5540 and concluded that the termination of mother's rights was in D.S.'s best interests. This appeal followed.

On appeal, mother does not challenge any of the family court's factual findings. Instead, she argues that the court erred in evaluating whether there had been a substantial change in material circumstances. Mother asserts that the court neglected to consider her behavior between September 2007, when the TPR petition was filed, and late March 2008, when the TPR hearing was held, which she alleges was a material and highly prejudicial error. She maintains that although she may not have been in compliance with the goals of the case plan at the time the TPR petition was filed, she was in compliance by the time of the termination hearing, with the exception of the employment component. Mother also suggests that the court may have erred in stating that her contacts with D.S. were subject to limitations imposed by correctional facilities or residential treatment facilities. She argues that the Tapestry program would have allowed her greater contact with D.S. than that allowed by DCF.

Mother's claims of error are without merit. As we have often explained, when the termination of parental rights is sought, the family court must first find that there has been a substantial change in material circumstances, and second, that termination of parental rights is in the child's best interests. In re B.W., 162 Vt. 287, 291 (1994); 33 V.S.A. § 5532(a).<sup>\*</sup> A substantial change in material circumstances is most often found when "the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. at 291 (citation omitted). "Stagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child." Id. (quotation omitted). But "the mere fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances warranting modification of a previous disposition order." Id. (quotation omitted). On appeal, we will affirm the trial court's findings unless they are clearly erroneous, and we will affirm its conclusions if supported by the findings. In re B.S., 166 Vt. 345, 350 (1997).

In this case, it is evident from the record that the family court properly analyzed whether mother had stagnated in her ability to parent. As recounted above, the court found that up until May 2007, mother made slow and limited progress in meeting the goals of the case plan. Mother's subsequent criminal behavior and continued substance abuse then resulted in her re-incarceration, which in turn effectively ended her ability to engage in a plan of services. The fact that mother did not have any serious infractions at the Tapestry program until March 2008—a fact recognized and discussed by the family court—does not demonstrate that the court erred in concluding that mother had stagnated in her ability to parent. See In re D.C., 168 Vt. 1, 5 (1998) (reasoning that it is for the family court to "determine the credibility of the witnesses and weigh

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<sup>\*</sup> We note that 33 V.S.A. §§ 5532 and 5540 were repealed effective June 2008, subsequent to the court's April 2008 order. 2007, No. 185 (Adj. Sess.) § 12.

the evidence”). Certainly, mother is no longer in a position—due to her own criminal behavior—to effectively address the goals set forth in the case plan. Indeed, as the family court found, mother will not even complete her minimum sentence until October 2008, and she is subject to re-incarceration until 2010. The court did not err in considering this evidence, and its conclusion that mother had stagnated is well-supported by the record.

Finally, we reject mother’s assertion that the court erred in its discussion of her contact with D.S. The court’s reference to contact limitations resulting from mother’s incarceration and her stay in residential facilities formed part of the court’s best-interests analysis, which mother does not contest on appeal. In any event, the court found that mother had been consistent in her contact with D.S. Its decision that termination of mother’s rights was in D.S.’s best interests rested on D.S.’s immediate and pressing need for stability, and mother’s inability to parent D.S. within a reasonable period of time. We find no basis to disturb the court’s decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice