

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. 2019-316

JANUARY TERM, 2020

In re B.L., Juvenile
(C.L., Father*)

} APPEALED FROM:
}
} Superior Court, Franklin Unit,
} Family Division
}
} DOCKET NO. 47-4-17 Frjv

Trial Judge: John L. Pacht

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

Father appeals the court's order terminating his parental rights to his daughter B.L., born in July 2016. On appeal, father argues that the evidence does not support the court's finding that father's progress stagnated. We affirm.

The court found the following by clear and convincing evidence. A petition to adjudicate B.L. a child in need of care or supervision (CHINS) was filed in April 2017.* At that time, mother was B.L.'s custodial parent and father was not involved in B.L.'s care. At most, father saw B.L. five times over the course of her life. The court granted custody of B.L. to the Department for Children and Families (DCF) and placed B.L. with her maternal aunt, who had already been providing care for B.L. B.L. was not doing well and was unable to engage with others. She grew and thrived in the care of her foster family. B.L. was with her foster family until September 2018 when mother and B.L. went to live at the Lund Center. The foster family continued to provide respite care for B.L. during this time and resumed acting as a full-time placement by April 2019. When B.L. returned to foster family's full-time care, her emotional regulation had regressed significantly. The court found B.L. needed consistency and stability.

In June 2017, the court found that B.L. was CHINS due to lack of proper parental care. In that order, the court found that mother was not able to address her own or B.L.'s needs and placed B.L. at risk of harm by failing to take medication as prescribed, failing to participate in mental-health counseling, using marijuana, and failing to administer medication to B.L. Father was assigned counsel at the outset of the CHINS proceeding. He did not participate in the merits hearing and the court's docket entries indicate that the hearing notices were returned.

The case plan had goals for father, including that he demonstrate an ability to meet B.L.'s emotional, physical, and medical needs; demonstrate an ability to live a safe and sober lifestyle;

* A CHINS petition was also filed in 2016 shortly after B.L.'s birth but it was withdrawn shortly thereafter.

demonstrate an understanding of safe and appropriate parenting; provide safe and stable housing; develop a relationship with B.L.; and connect with DCF to express interest in having contact with B.L. Father, who was incarcerated at the time, participated in the disposition hearing by phone and did not file any objections to the disposition plan. Following the hearing, the court issued the disposition order in November 2017 with a goal of reunification.

Father was incarcerated in August 2017 after pleading guilty to aggravated assault. He was sentenced to five to fifteen years and his minimum release date is in 2022. Father did not have contact with B.L. for sixteen months after being incarcerated. Mother went to the Lund Center in September 2018 and, around that time, initiated contact between father and B.L. through letters and telephone calls. In April 2019, mother decided she could no longer care for B.L. and voluntarily relinquished her rights. At that time, father contacted DCF, seeking contact with B.L. DCF declined to provide contact, determining that it was not in B.L.'s best interests. The court found that this was a reasonable conclusion given father's past lack of contact and B.L.'s need for stability and consistency. The State moved to terminate mother and father's parental rights in May 2019.

Following a hearing, the court made oral findings on the record. The court found that there was a change in circumstances due to father's lack of progress. The court found that father had not made progress in his ability to care for B.L. Due to father's serious criminal behavior during the pendency of the proceeding, father was incarcerated and therefore unable to provide safe and stable housing or to demonstrate an understanding of safe and appropriate parenting. Further, the court found that father had not developed any relationship with B.L. As to B.L.'s best-interests, the court found that B.L. had an extraordinarily strong relationship with her foster parents and was stable in her growth. B.L. did not have a relationship with father, and there was no likelihood that father would be able to assume parenting responsibilities within a reasonable period of time. Consequently, the court found that termination was in B.L.'s best interests. Father appeals termination of his parental rights.

To terminate parental rights when there is a prior disposition order, the court must conduct a two-step analysis. "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." In re M.P., 2019 VT 69, ¶ 24. A change of circumstances may be shown by demonstrating that "a parent's ability to care for a child has stagnated." Id. In assessing the child's best interests, the court must consider the statutory criteria. 33 V.S.A. § 5114. 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. Id.

Father argues that the court erred in determining that father's progress had stagnated. Father challenges several of the court's findings as unsupported by the evidence, and we address each in turn. Father first asserts that there was no basis for the court's comment that it was interesting father did not participate in the first CHINS proceeding in 2016 because it implied that father chose not to participate when the evidence demonstrates he did not have notice of the proceeding. There was no error. Father misconstrues the court's statement and fails to demonstrate that the finding is unsupported. The court mentions that there was a prior petition filed shortly after B.L.'s birth but its statement regarding father's lack of involvement referred to

the disposition case plan for this case. The court observed: “What is interesting from Exhibit 8, the disposition case plan, is that there’s almost no reference of father He did not seem to be involved in the care of the child at all up to the filing of the petition in April of 2017.” The evidence supports the finding that father was not involved in B.L.’s life before she was taken into custody. Father testified that he saw B.L. at most five times during her life and had not seen her since she was placed in DCF custody. He also acknowledged that he did not take any legal action to assert his rights.

Father next asserts that the evidence does not support the court’s finding that father exhibited a lack of understanding about B.L. Father argues that the only evidence of this is that father did not know B.L.’s birthdate. There was no error. During his testimony, father made several statements that indicated that he had little understanding about B.L., including that he did not know B.L.’s date of birth, he did not know how many CHINS petitions had been filed involving B.L., and he had only seen her five times during her life.

Father next argues that the court improperly faulted him for having no contact with B.L. between April 2017, when the CHINS petition was filed, and August 2017, when father was incarcerated. Father asserts that the lack of contact was because during that time B.L. was placed with her maternal aunt, who did not allow father contact. We conclude that the court did not abuse its discretion. The court’s findings recite that although father was not incarcerated during that four-month period, father did not have contact with B.L. The fact that father did not have contact during this time is not contested by father. The court does not make an explicit finding regarding the cause of this lack of contact. If blame upon father can be inferred from the finding, the evidence also supports that father was at least partially responsible for his lack of contact with B.L. during that time. Although father asserted that the maternal aunt, with whom B.L. was placed, did not allow contact with father, father also admitted that he did not ask DCF, who had custody, to allow him contact with B.L. during that time.

Finally, father argues that the court erred in not faulting DCF for failing to assist father with making progress towards the case plan goals. Father claims that DCF did not speak to Department of Corrections officials about father’s progress in addressing issues such as substance abuse, domestic violence, or mental health, and that DCF did not enable him to have contact with B.L. to develop a closer relationship. Essentially, father appears to assert that the court’s finding that his progress stagnated was in error because he did make some progress and his lack of progress in other areas was due to factors beyond his control. See In re S.R., 157 Vt. 417, 421-22 (1991) (recognizing that “stagnation caused by factors beyond the parents’ control could not support termination of parental rights”).

Here, the evidence supports the court’s finding that father’s progress stagnated and that that stagnation was not caused by factors beyond father’s control. It was father’s action that led to his conviction and incarceration. This incarceration in turn limited DCF’s ability to assist father and hampered father’s ability to achieve goals in the case plan. Moreover, it was father’s choice not to ask DCF for contact with B.L. before April 2019, when B.L. had been in custody for two years. Even if father made progress in some areas while incarcerated, he did not make progress on the important goals of developing a relationship with B.L. and on demonstrating an ability to meet her needs. Father bears responsibility for his lack of a relationship with B.L. and lack of progress towards being able to parent B.L. See In re K.F., 2004 VT 40, ¶ 12, 176 Vt. 636 (mem.)

(explaining that father bore sole responsibility for his incarceration and failure to have consistent contact). The court's findings are supported by the evidence and those findings in turn support the court's conclusions that there was a change of circumstances due to stagnation and that termination was in B.L.'s best interests.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice