

*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. 2020-033

JULY TERM, 2020

In re D.B., Juvenile	}	APPEALED FROM:
(L.R., Mother*)	}	
	}	Superior Court, Bennington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 112-10-15 Bnjv

Trial Judge: David A. Barra

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

Mother appeals the termination of her parental rights to seven-year-old daughter D.B. We affirm.

The record, viewed in the light most favorable to the State, reflects the following. D.B. was born in November 2012. In October 2015, the Department for Children and Families (DCF) filed a petition alleging that D.B. was a child in need of care or supervision (CHINS) based on an allegation that father had pushed mother while she was holding D.B.<sup>1</sup> The court transferred custody of D.B. to DCF in an emergency care order. After a hearing, custody was transferred to D.B.'s maternal grandfather under a conditional custody order (CCO). At DCF's request, in January 2016, the CCO was vacated and custody was transferred back to DCF. D.B. remained placed with her maternal grandfather.

After a contested merits hearing in March 2016, the court found D.B. to be CHINS. Two weeks later, mother removed D.B. from maternal grandfather's home and brought the child to her maternal grandmother's home in Massachusetts. The State charged mother with custodial interference and DCF placed D.B. with a foster family.<sup>2</sup>

In June 2016, the court entered a disposition order that approved the case plan goal of reunification with mother and continued DCF custody. The case plan called for mother to engage in substance abuse and mental health counseling, maintain stable housing, work cooperatively with service providers to improve her parenting skills, comply with her probation conditions, and not incur any more criminal charges, among other recommendations. In August 2016, the court transferred custody of D.B. to mother under a CCO. The CCO was revoked in September 2016 after mother was incarcerated in

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<sup>1</sup> Father's parental rights were also terminated as a result of this proceeding, but he did not appeal.

<sup>2</sup> Mother was later acquitted of the custodial-interference charge.

connection with probation violations following an altercation with maternal grandmother. DCF placed D.B. with maternal grandmother. In March 2017, the court conducted a permanency review hearing and approved a permanency plan continuing DCF custody, with goals of reunification with mother by the fall of 2017 or permanent guardianship with maternal grandmother by 2018. In August 2017, DCF filed a permanency plan with a goal of permanent guardianship with maternal grandmother. Mother opposed this goal change and a hearing was set in October 2017. Mother appeared thirty-five minutes late for the hearing, which was continued. Due to scheduling conflicts, the hearing did not take place until August 2018. At some point during this period, D.B. was removed from the care of maternal grandmother and placed with maternal grandfather due to grandmother's failure to make safe choices for D.B.

In August 2018, the parties agreed to give conditional custody to mother. At the time, mother had no new criminal charges, had maintained stable housing for a year, was employed, and was ensuring that D.B. attended school and that her medical needs were addressed. However, as the fall progressed, mother's housing became unstable. D.B. was absent from or tardy to school on many occasions and displayed difficult behaviors. Mother also was not compliant with work conditions required by the Economic Services Division.

In December 2018, DCF recommended vacating the CCO due to safety concerns and mother's failure to comply with the condition that D.B. attend school daily. Around the same time, D.B. came to school with a painful, swollen, bruised hand that required medical attention. The school principal was unable to contact mother for hours. Meanwhile, the child was sent to her after-school daycare provider. When contacted, mother informed DCF that the injury probably occurred when D.B. was jumping on the bed the previous evening. Mother stated that she did not want to expose D.B. to the emergency room and the urgent care was closed, so she did not seek medical attention. After talking to DCF, mother eventually agreed to bring D.B. to the emergency room. She was found to have a fractured finger and wrist.

As a result of this incident, DCF filed an emergency motion to vacate mother's CCO. The day before the hearing on that motion, mother was taken to the emergency room because she was exhibiting erratic behavior and was apparently under the influence of medication. D.B. was in mother's care at the time. Mother was arrested upon discharge from the hospital for disorderly conduct toward hospital staff. She was incarcerated after she attempted to flee the police station. The court subsequently granted an emergency care order transferring custody of D.B. to DCF.

D.B. was placed with a foster family with whom she continues to live. After she entered foster care, D.B.'s school attendance improved dramatically. Her ADHD medication was discontinued. Her behavior improved and she no longer had disciplinary issues at school.

After reentering DCF custody, D.B. had supervised contact with mother twice a week. The DCF case worker and visit supervisor testified that mother was frequently late for visits, sometimes by thirty or forty minutes. The visit supervisor testified that mother came "loaded" with toys for every visit. Mother told the supervisor that she was spending the money she would have spent on housing for D.B., and that buying toys was how she showed her love for D.B. After the foster family asked that no more toys be brought home, the supervisor created a space where D.B. could keep her toys and see them during visits.

Mother then purchased a doll that she knew D.B. wanted and told the child that the foster mother said she could not take it home. D.B. became upset and hid in a bathroom stall. Mother stated that D.B. deserved the toys because D.B. was traumatized from not living with mother. D.B. then became angry at mother, told the supervisor, “let’s ignore her,” and refused to interact with mother for the rest of the visit. The supervisor testified that at the end of other visits, mother told D.B. that she would not bring any more toys unless D.B. helped her pick them up. D.B. would look to the supervisor for guidance or ignore mother and keep playing.

In February 2019, the court held an evidentiary hearing on DCF’s motion to vacate the August 2018 CCO. After several of the State’s witnesses testified, mother agreed that custody should be transferred to DCF. The court vacated the CCO, reinstated the permanency goals set in March 2017, and ordered DCF to update the permanency plan.

A permanency hearing was held in April 2019. Just prior to the hearing, DCF filed a motion to terminate mother’s parental rights. Mother requested more visitation time at the hearing. DCF opposed mother’s request because, due to mother’s work schedule, increasing visitation would require pulling D.B. out of school early, which could hamper her progress. The court accepted this argument and left it to mother and DCF to work out more visitation time. It stated that mother’s attorney could file a motion to increase visitation if necessary. No motion was filed.

The termination hearing took place over three days in October 2019 and January 2020. After the first day of the termination hearing, DCF temporarily suspended visits because the visit supervisor was concerned about mother’s ability to manage the upcoming visit. Mother filed a motion to enforce parent-child contact. Visits were subsequently reinstated, and the parties agreed the motion was moot on the last day of the hearing. In a written decision, the court found by clear and convincing evidence that mother had stagnated in her progress toward reunification and that it was in D.B.’s best interests to terminate parental rights. This appeal followed.

When the State seeks to terminate parental rights after initial disposition in a CHINS case, the family court must engage in a two-step analysis: first, the court must find that there has been a substantial change in material circumstances; then, it must decide whether termination is in the child’s best interests based on the factors set forth in 33 V.S.A. § 5114(a). In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44. We will uphold the family court’s factual findings unless clearly erroneous and will affirm its conclusions if supported by the findings. Id.

The requisite 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. 287, 291 (1994) (quotation omitted). Here, mother argues that her stagnation was due to factors beyond her control. She argues that the court did not consider evidence that DCF refused to increase visitation during 2019 and caused her inability to obtain appropriate housing when it decided in December 2018 to no longer support reunification.

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 family court’s order was not based solely on the events that occurred after

D.B. left mother's care in December 2018. The court noted that mother's own behavior had led to two conditional custody orders being vacated over the previous four years. It further found that, regardless of the number of visits mother was allowed, the quality of mother's visits with D.B. had not improved over time. Mother seemed to think that parenting was simply a matter of giving D.B. a gift at each visit and did not demonstrate an understanding of what was required to parent a child. DCF's opposition to increasing the number of visits may have been out of mother's control, but changing her own behavior, implementing parenting lessons given to her by providers, and refraining from criminal activity that would interfere with her ability to parent D.B. were matters within mother's control. And while DCF's decision to change the case plan goal to adoption made mother ineligible to obtain housing through the family unification program, mother does not explain how this prevented her from obtaining suitable housing through other means.

"The key question for the court when considering whether stagnation has occurred is whether the parent has made progress in ameliorating the conditions that led to state intervention." In re D.M., 2004 VT 41, ¶ 7, 176 Vt. 639 (mem.). The court's findings regarding mother's stagnation are supported by the record, and in turn support its conclusion that mother had not improved in her ability to parent D.B. over the four years since DCF filed the CHINS petition.

Mother further argues that the court's decision must be reversed because the court did not make findings to support its conclusion that she had played "some constructive role" in D.B.'s life. We disagree. Although its findings were dispersed throughout the opinion, the court found that mother's interactions with D.B. were often positive, similar to that of a doting aunt, and that at two points during the life of the case, she had demonstrated sufficient progress to regain custody of D.B. on a conditional basis. As recently as August 2018, she was meeting D.B.'s medical needs and ensuring that D.B. attended school. However, mother had also twice failed to put D.B.'s needs above her own and to obtain the help she needed to provide for D.B., resulting in a loss of custody, and had failed to make progress toward reunification since D.B. was removed from her care in December 2018. These findings were sufficient to explain its determination that mother had played some constructive role in the child's life and demonstrated emotional support and affection, but that these positive factors were "outweigh[ed] [by] the negatives." See In re J.L., 2007 VT 32, ¶ 9, 181 Vt. 615 (mem.) (holding that court's findings, which were dispersed throughout opinion, demonstrated court had considered statutory factors and as whole were adequate to support termination).

Moreover, although the court's discussion of the remaining statutory factors is quite brief and does not expressly reference or repeat all of its relevant findings on each issue, the decision as a whole shows that it considered the appropriate factors. The court found that mother never progressed to a healthy relationship with D.B. and failed to put the child's needs above her own; D.B. had a positive relationship with her foster parents and she was thriving in their care; D.B. had adapted well to her new home, school, and community; and mother would not be able to resume parenting D.B. within a reasonable time in light of D.B.'s need for permanency, which was immediate. Mother does not challenge these findings, which are supported by the evidence, and which in turn support its conclusion that termination was in D.B.'s best interests.

Finally, mother claims that the court erred by failing to find that D.B.'s need for adoption outweighed the benefits of continued parent-child contact. The statute does not require the court to make such a finding. See 33 V.S.A. § 5114(a) (listing factors court must

consider); see also In re D.B., No. 2009-010, 2009 WL 2413620, \*3 (Vt. May 29, 2009) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo09-010.pdf> [<https://perma.cc/TH3Y-MKL4>] (rejecting same argument). Accordingly, we see no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice