VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 2021-070

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

SEPTEMBER TERM, 2021

In re A.B., Juvenile	}	APPEALED FROM:
(T.B., Father*)	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	CASE NO. 397-10-17 Cnjv
		Trial Judge: Kirstin K. Schoonover

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

Father appeals the termination of his parental rights with respect to his three-year-old daughter A.B. We affirm.

The family court made the following findings in its order, which it issued after an evidentiary hearing that took place over three days in December 2020 and January and February 2021. Mother voluntarily relinquished her parental rights at the beginning of the hearing and is not a party to this appeal.

A.B. was born in October 2017. Shortly after her birth, the Department for Children and Families (DCF) filed a petition alleging that A.B. was a child in need of care or supervision (CHINS). The petition stated that mother had been substantiated in 2015 for sexual abuse of her three older children and subsequently lost custody of those children. DCF was concerned because mother had failed to disclose to her therapist that she was pregnant and had not undergone any type of assessment to determine her risk to reoffend. At the time, father was incarcerated, having recently pleaded guilty to possession of cocaine and resisting arrest. The court granted custody to DCF and A.B. was placed with the foster family with whom she has resided throughout this proceeding.

Both parents were present at the contested merits hearing, which took place over three days in December 2017 and February and April 2018. The court determined that A.B. was a CHINS due to mother's criminal activity and history of relationships with men who were engaged in criminal behaviors, which placed A.B. at risk of harm. The court noted that although

mother was not then engaged in a relationship that caused concern, mother was awaiting sentencing on federal drug charges, which could lead to her incarceration.

After father was released from incarceration in November 2017, he visited A.B. twice a week for three hours at the DCF office. Father also began attending Family Time Coaching in January 2018 with mother. Both parents needed to be prompted to address safety during visits. After father began a new relationship in the spring of 2018, they frequently argued in front of A.B. At times, father had difficulty soothing A.B., but he rebuffed efforts by DCF staff to help. He sometimes left visits early. DCF eventually decided to separate visits due to the friction between parents.

In late May 2018, parents reconciled, and visits were again combined. However, they continued to have arguments in front of A.B. and were resistant to coaching. As a result, Family Time Coaching was terminated in June 2018. Father began having supported family time visits instead.

Father and mother moved into an apartment together in August 2018, but father moved out after about a month and went to live with a girlfriend for the rest of 2018 and 2019. He told DCF that the residence was not suitable for A.B. because he lived with another individual who did not want DCF involvement.

Father did not visit A.B. throughout September 2018 because he did not want to visit at the same time as mother. In October 2018, he moved to modify visitation to separate visits. DCF agreed with father's position and at some point after October 2018, the parents began having separate visits.

The court held a two-day contested disposition hearing in October 2018 and January 2019. In February 2019, it issued a disposition order adopting a case plan which called for concurrent goals of reunification with either parent by August 2019 or adoption. The plan required father to participate in family time with A.B.; attend medical visits; obtain appropriate housing; attend individual counseling to address his history of substance abuse, relationship issues and past criminal behaviors; stay sober; and submit to urinalysis requested by DCF, as well as other requirements. Parents appealed the disposition order and merits adjudication, and this Court affirmed. See In re A.B., No. 2019-102, 2019 WL 3761638 (Vt. Aug. 7, 2019) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo19-102.pdf [https://perma.cc/RHJ3-ULQ8].

Father refused to submit to urinalysis requested by DCF until the court issued its disposition order. Afterward, DCF sought monthly urinalyses, but father did not comply with many of these requests. He called to state that he was working or simply failed to appear. A June 2019 test showed that father had used cocaine. Father did not believe that he had a drug problem or was an addict, but admitted that he had relapsed into cocaine use during May and June of 2019.

Father and mother apparently reunited in early 2019 and began working to expand their parent-child contact schedule. In April 2019, however, they separated again, and father moved for custody of A.B. At the hearing on the motion, he withdrew his request. He subsequently informed DCF that he wished to relinquish his parental rights. DCF encouraged father to contact

his attorney. His relapse occurred during this period, and for three months, he had no contact with A.B.

Father resumed contact with A.B. in July 2019. The court found that at times, father and A.B. enjoyed their visits, and she knew he was her father. However, father frequently missed visits even though DCF tried to arrange the visits around his work schedule. He struggled to bring diapers. He allowed A.B. to watch videos on his phone. During some visits he took multiple phone calls and did not engage with A.B. A.B. often screamed and wanted to leave early. She would not let father change her diaper or comb her hair. Father was often unable to soothe A.B. and DCF would contact the foster mother to calm her down. A.B. often refused to get into the car to visit her father. Despite these behaviors, father believed the visits went well.

In September 2019, DCF moved to terminate father's parental rights. At that point, father did not have stable housing. He had attended counseling for one year in 2018 and 2019, but then stopped, despite the recommendation that he continue. He was inconsistent in attending visits with A.B.

In January 2020, father obtained stable housing for the first time. However, it took DCF over a month to assess and approve the suitability of the home, and in March 2020, in-person visitation paused due to the COVID-19pandemic. DCF offered virtual visits, but father missed nearly all of them, stating that he did not find them to be productive. In June 2020, in-person visits resumed several times a week. Mother was often present. Father was frequently on his phone during visits and continued to be inconsistent in his attendance. A.B. has never slept at father's residence. She has not met any of father's family since she was an infant.

A.B. has asthma and requires an inhaler. At the time of the termination hearing, father had never administered the inhaler. When A.B. needed it during visits, mother, or others, would administer it. A.B. also has a rare blood condition and a history of urinary tract infections that require careful monitoring. Father did not attend medical appointments and did not know who A.B.'s pediatrician or dentist were.

Father has an extensive criminal history. He was on parole but was recently released early due to good behavior. He works multiple jobs, up to seventy-five hours per week. Father had not taken any steps to set up daycare for A.B. He believed his friends would watch her while he worked.

Based on the above findings, the court concluded that father had stagnated in his capacity to care properly for A.B. The court acknowledged that father and A.B. had a bond and that father had been successful in obtaining early discharge from correctional supervision. However, it found that father had been inconsistent in his commitment to A.B. and had allowed others to shoulder most of the parenting responsibility. Father failed to consistently attend visits, complete parental education classes, attend counseling, submit to requested urinalysis, or involve himself in A.B.'s medical care. The court concluded that father's stagnation was a change in circumstances warranting modification of the disposition order. See 33 V.S.A. § 5113(b).

The court then considered the criteria set forth in 33 V.S.A. § 5114(a). It concluded that: A.B.'s bond with father was far less significant than her bond with her foster mother and half-sister; A.B. was well-adjusted to her community in the St. Albans area and a move to live with

father in Burlington would be disruptive; father would not be able to assume parenting responsibilities within a reasonable amount of time and had no clear plan to do so; and father was not a significant source of support or affection in A.B.'s life. It therefore concluded that termination of father's rights was in A.B.'s best interests. This appeal followed.

Father argues that the termination decision must be reversed because several of the trial court's findings and conclusions are unsupported by the evidence and because the delays in reunification were caused by factors beyond his control. When reviewing a termination-of-parental-rights decision, we will uphold the family court's factual findings unless clearly erroneous and will affirm its conclusions of law if reasonably supported by the findings. In re J.M., 2015 VT 94, ¶ 8, 199 Vt. 627. "Our role is not to second-guess the family court or to reweigh the evidence, but rather to determine whether the court abused its discretion in terminating . . . parental rights." In re S.B., 174 Vt. 427, 429 (2002) (mem.).

Father first challenges the court's finding that he was unavailable to parent A.B. at the outset of the case. The court's finding—that father was unable to care for A.B. when she was first taken into custody in October 2017 because he was serving time on drug charges—is supported by the record and is not clearly erroneous. However, father argues that A.B. should have been transferred to his care once he was released from custody a month later, and faults DCF for failing to assess his residence until April 2018. Father did not raise this claim in his appeal from the CHINS merits decision; he is therefore barred from raising it now. In re C.L.S., 2020 VT 1, ¶ 16, 211 Vt. 344 ("Parties are generally precluded from collaterally attacking a final CHINS merits determination at a later stage of the proceedings.").

Next, father argues that the court erred in finding that Family Time Coaching terminated in June 2018 as a result of parents arguing in front of A.B. and resisting advice from the coach. Father argues that he did not need parent education and the court subsequently removed the Family Time Coaching requirement from the case plan. While it is true that the court did not order father to continue the program in its February 2019 disposition order, the case plan submitted to the court in June 2018, which was admitted as an exhibit at the termination hearing, states that Family Time Coaching was discontinued as of June 26, 2018 "[d]ue to the parents[']unwillingness to follow the family time coahing [sic] protocol." This supports the court's finding about why father's original participation in the program ended.

Father argues that the court failed to acknowledge his testimony that the arguments during visits were instigated almost solely by mother and that he never escalated the arguments. The court's finding that parents argued in front of A.B. during visits was supported by father's own testimony and the testimony of the DCF social worker. The court was not required to accept father's characterization of who was at fault for the arguments, particularly where there was conflicting evidence from the DCF social worker, who disagreed that mother was the person who always provoked the arguments.

Father next challenges the court's findings about his refusal to participate in urinalysis prior to the February 2019 disposition order. Father argues that he did sign the releases DCF requested, and also told DCF to talk to his parole officer, who had stopped requesting urinalysis months before. The court's finding that father initially refused to sign releases for DCF to obtain his urinalysis results is not clearly erroneous. Both the June 2018 case plan and father's testimony at the February 2018 CHINS merits hearing indicate that father had refused DCF's

pre-disposition request for releases. Father also argues that the court erred in faulting him for failing to comply with the monthly urinalysis tests requested by DCF because DCF typically requested the tests at the last minute and it was unreasonable to expect father to choose between work or urinalysis. Father points to no evidence in support of this claim, however, and the court's finding that father did not participate in many of the requested tests is supported by the record.

Father also challenges some of the court's findings regarding his visits with A.B. He argues that A.B.'s tantrums and refusal to let him change her diaper or comb her hair were normal toddler behavior and should not have been held against him. The court's findings about A.B.'s behaviors, and father's responses to them, are supported by testimony from the DCF workers. Contrary to father's assertion, the court did not hold father responsible for ordinary toddler behavior, but rather was concerned with his apparent inability to effectively address negative behaviors when they occurred. We also reject father's argument that the court erred in relying on the testimony of A.B.'s pediatrician that A.B.'s sleep issues correlated to visits with father, as the court was entitled to decide how much weight to give this evidence and father did not present any evidence to the contrary. In re S.B., 174 Vt. at 429. Finally, father takes issue with the court's finding that he was "often on the phone" during visits because the DCF worker did not quantify the number of times that this happened. However, the DCF worker testified that she observed multiple visits where father took multiple phone calls. This testimony was sufficient to support the court's findings.

Father further argues that it was erroneous for the court to fault him for not attending virtual visits with A.B. because he found virtual visits with a three-year-old to be unproductive. He notes that he always worked to support himself and his older child, E.B., and that his work ethic should be a point in his favor. He objects to the court's mentioning that he was terminated from one of his jobs in December 2020, arguing that he found another job right away and the court only included this detail to portray him in a bad light. He contends that there have been no problems with A.B.'s inhaler since he was made aware of when she needed it.

In essence, father disagrees with the court's assessment of the weight of the evidence and his credibility. As explained above, our role is not to second-guess the court's assessment of the evidence, but to ensure that its findings and conclusions are supported by the record. Id. We reject father's contention that the court unfairly emphasized rare or minor instances of conduct that reflected poorly on him in determining that he had stagnated in his parenting ability. The court's finding of changed circumstances was not based merely on these instances. Rather, it was primarily based on father's pattern of inconsistent attendance at visits with A.B. and his apparently wavering commitment to parenting her, as well as his failure to engage with most aspects of the case plan. Father does not challenge these findings, which are supported by the record and in turn support the court's conclusion that father had stagnated in his progress toward reunification.

Finally, father argues that his lack of progress was caused by factors outside of his control, including multiple hearing delays, DCF's failure to set up separate visits or assess his home for home visits in a timely fashion, and the limitations on visits caused by the COVID-19 pandemic. Father is correct that "stagnation caused by factors beyond [his] control could not support termination of parental rights." In re D.S., 2016 VT 130, ¶ 7, 204 Vt. 44 (quotation omitted). He has not shown that such factors were present here, however. Father fails to explain

how the hearing delays affected his progress toward reunification. If anything, father was afforded extra time to strengthen his parenting skills and relationship with A.B. We are similarly unpersuaded by father's argument that the brief delays in setting up separate visits each time the parents broke up or DCF's failure to assess the suitability of his apartment before the COVID-19 pandemic arose caused his stagnation. As to the former, DCF was not responsible for the ups and downs of parents' relationship. As to the latter, given that father had never had A.B. in his care for more than four hours at a time, it is unlikely that he would have transitioned to full-time parenting within the month or so before the pandemic required suspension of in-person visits. And while the pandemic and resulting visitation restrictions certainly were not father's fault, it was father's choice not to participate in the remote visits offered during this time. We therefore reject father's assertion that the court's finding of stagnation was based on factors beyond father's control.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice