2022 VT 52

No. 22-AP-164

In re B.E. & M.E., Juveniles

Supreme Court

On Appeal from
Superior Court, Windham Unit,
Family Division

October Term, 2022

Elizabeth D. Mann, J.

Sarah Star, Middlebury, for Appellant Father.

Jared C. Bianchi, Bennington County Deputy State's Attorney, Bennington, for Appellee State.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **EATON, J.** Father appeals the family division's order extending the expiration date of a conditional custody order (CCO) giving him legal custody of minor children B.E. and M.E. with certain limitations and requirements. Father argues that the court failed to find that there had been a change in circumstances justifying extension of the order as required by 33 V.S.A. § 5320a(a). He contends that without such a finding, the court lacked authority to issue an extension, and the CCO should have been vacated and the children returned to his full custody without conditions. We agree, and therefore reverse and remand for the court to vacate the CCO.

¶ 2. Parents are married and have two sons, B.E. and M.E. B.E. was born in July 2015 and M.E. was born in September 2017. In April 2021, the State filed a petition alleging that B.E. and M.E. were children in need of care or supervision (CHINS) based on reports that mother was abusing cocaine and other substances and B.E. had missed forty-five days of kindergarten. At the

time of the petition, father had been arrested for domestic assault and was subject to a condition prohibiting him from contacting mother or the children or going to the family home.

¶ 3. The court issued an emergency care order transferring custody of the children to the Department for Children and Families (DCF). Father's conditions of release were subsequently modified to permit him to have contact with the children with the permission of the family court. In May 2021, the parties agreed that the children should be placed with father in the family home subject to conditions, and that mother would vacate the home. The court issued a temporary order giving father conditional custody of the children. The order required father to ensure that the children attended school and received medical and dental care. It also required him to complete a parenting class, sign releases to DCF, maintain safe and stable housing, work with service providers including Easterseals for economic and parenting supports, continue to participate in medically assisted substance-abuse treatment, and not allow unsupervised contact between the children and mother.

¶ 4. In July 2021, the parties stipulated to the merits of the CHINS petition. In September 2021, the court issued a disposition order that continued custody with father under similar conditions as the temporary CCO, except that the court removed the condition prohibiting father from allowing unsupervised contact between the children and mother. By that point, parents had reunited and mother was living in the home. The CCO stated that it would expire on March 2, 2022, and that the court would hold a review hearing in December 2021.

¶ 5. At the December 2021 hearing, the State and DCF informed the court that parents had made excellent progress and that they expected the CCO to expire in March 2022. The children were attending school, although B.E. was frequently a few minutes late. Both children were up to date on their medical and dental appointments, and parents were ensuring that their basic needs were met. Father had completed a parenting class, had maintained safe and stable housing, was cooperating with DCF and service providers, and was maintaining sobriety and participating in treatment.

¶ 6. However, in early January 2022 the State requested a status conference based on DCF's concerns that both children had recently missed several days of school, B.E. had not shown up for his most recent pediatric visit, and mother had tested positive for cocaine twice in December. At a hearing later in January, a DCF case worker told the court that the children were caught up on their medical visits but B.E. continued to arrive late to school and mother was not engaging in substance-abuse treatment.[1]

¶ 7. At a subsequent hearing in February 2022, the State indicated that it wanted to extend the CCO, which was due to expire the following month. Parents opposed the request. The court ordered that the existing CCO would remain in effect pending an evidentiary hearing.

¶ 8. The court held a hearing on the State's motion to extend the CCO in May 2022. A representative from Easterseals testified that she had worked with parents to obtain economic and nutritional assistance, to acquire academic supports for the children, and to improve the children's school attendance through various strategies. She stated that the children were caught up on their medical and dental appointments, which had been a primary area of concern early in the case. She did not feel that the family needed further engagement with Easterseals. A DCF case worker testified that although the parents had made progress, it would be beneficial to extend the CCO into the next school year to ensure "everything stays on track." She testified that B.E. had begun taking the school bus, which had significantly improved his timely attendance at school. She testified that father had been cooperative and had generally complied with the CCO conditions. She said that her main concern was ensuring that the children continued to attend school on time. Mother and father each testified and stated that they intended to keep using the strategies that had helped improve the children's school attendance.

¶ 9. At the close of the hearing, the court made oral findings that the parents had actively engaged with DCF and Easterseals and had made "very positive progress" in getting the children

[1] It appears that father complied with his substance abuse treatment condition throughout the pendency of the case, and no concerns were raised regarding father's sobriety.

caught up in their medical, dental, and physical-therapy needs. However, it expressed concern that there was not yet a track record of parents being able to maintain regular school attendance without significant support from Easterseals. It found that vacating the CCO would be "imprudent" and stated that it would continue supervision into the new school year. It accordingly issued an order extending the CCO for a further six months, until November 12, 2022. On the written order, the court checked a box indicating that the CCO was being extended "because reasonable progress toward reunification is being made and additional time is in the children's best interest." This appeal followed.

¶ 10. On appeal, father argues that the family division lacked authority to extend the CCO without first finding that there had been a change in circumstances sufficient to justify modifying the existing order. This is a question of law that we review without deference to the trial court. See In re A.M., 2019 VT 79, ¶ 8, 211 Vt. 198, 222 A.3d 489. As discussed below, we agree that a finding of changed circumstances was required to extend the CCO in this case and that the court's failure to make that finding requires reversal of its order.

¶ 11. "A CHINS case is a legislatively created proceeding in which the family division of the superior court is vested with special and limited statutory powers." Id. ¶ 9. "We strictly construe the family court's grant of authority, and we do not infer jurisdiction where it does not explicitly exist." Off. of Child Support ex rel. Lewis v. Lewis, 2004 VT 127, ¶ 7, 178 Vt. 204, 882 A.2d 1128. "Generally, unless statutory authority exists for a particular procedure, the juvenile court lacks the authority to employ it." In re J.S., 153 Vt. 365, 370, 571 A.2d 658, 661 (1989).

¶ 12. At the disposition phase of a CHINS case, the family division is authorized to issue a CCO returning legal custody of the child to the custodial parent subject to conditions set by the court. 33 V.S.A. § 5318(a)(1). An initial CCO to a parent can last for up to six months. See id. § 5320a(a) (stating presumptive duration of CCO to parent is "no more than six months" from date of disposition order or CCO, whichever is later). At issue is whether the family division has

authority to extend the duration of a CCO to a parent without a finding of changed circumstances if it finds that the parent is making progress toward reunification but additional court supervision is in the child's best interests. We resolve this question by looking to the language of the statute. "When interpreting a statute, our primary goal is to effectuate legislative intent as expressed in the words of the statute itself." In re C.L.S., 2021 VT 25, ¶ 10, 214 Vt. 379, 253 A.3d 443. If the statutory language is clear on its face, we consider the plain meaning of the language to represent the Legislature's intent. In re D.K., 2022 VT 36, ¶ 11, __ Vt. __, __ A.3d __.

¶ 13. The relevant statue here is 33 V.S.A. § 5320a, which governs the duration of CCOs to parents and nonparents. Subsection (a), which pertains to parents, provides in relevant part:

> Whenever the court issues a conditional custody order transferring custody to a parent either at or following disposition, the presumptive duration of the order shall be no more than six months from the date of the disposition order or the conditional custody order, whichever occurs later, unless otherwise extended by the court after hearing. At least 14 days prior to the termination of the order, any party may file a request to extend the order pursuant to subsection 5113(b) of this title. Upon such motion, the court may extend the order for an additional period of time not to exceed six months.

33 V.S.A. § 5320a(a). We agree with father that subsection (a)'s reference to 33 V.S.A. § 5113(b), which allows the family division to modify an existing order "on the grounds that a change in circumstances requires such action to serve the best interests of the child," makes clear that the court must find a change in circumstances before it may modify a CCO to a parent to extend its expiration date. This requirement is consistent with 33 V.S.A. § 5318(d), which states that a disposition order such as a CCO "is a final order that may only be modified based on the stipulation of the parties or pursuant to a motion to modify brought under section 5113 of this title." It is also consistent with the Legislature's stated goals of achieving safety and timely permanency for children and preserving the family unit. See id. § 5101(a)(3)-(4). When a court initially grants a CCO to a parent, it indicates an expectation that the parent will be capable of resuming a full parental role, without any further intrusion by the State, within six months if the parent complies

with the conditions of the order. Section 5320a(a)'s requirement that the court find changed circumstances before a CCO to parent can be further extended "balances the state's interest in ensuring children are safe with 'the right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference.' " In re D.K., 2022 VT 36, ¶ 15 (quoting Paquette v. Paquette, 146 Vt. 83, 92, 499 A.2d 23, 29 (1985)).

¶ 14. The family division appears to have mistakenly relied upon subsection (b)(2) of § 5320a, which allows the court to extend an initial CCO to a nonparent for six months if it finds that "that reasonable progress has been made toward reunification and that reunification is in the best interests of the child but will require additional time." This provision allows the court to give a parent additional time to make progress toward reunifying with children who are in the conditional custody of a noncustodial parent or relative before it makes a permanent disposition order, which could be guardianship or adoption. See 33 V.S.A. § 5320a(b)(1). The provision plainly does not apply here because father is a parent and the children were already in his care. While it may have been beneficial to continue court oversight to help father maximize his progress, that is not the relevant standard set by the Legislature. A finding under § 5320a(b)(2) cannot justify the extension of a CCO to a parent if there is no finding of changed circumstances.

¶ 15. The State does not appear to dispute that the statute required a threshold finding of changed circumstances before the court could extend the CCO to father. However, it argues that we should affirm the order anyway because the facts found by the court were independently sufficient to show changed circumstances. It is true that we have upheld modification orders that lacked express findings of changed circumstances where the facts met the required standard. For example, in In re I.B., 2016 VT 70, ¶¶ 12-13, 202 Vt. 311, 149 A.3d 160, we held that the family division's failure to expressly find a change in circumstances was not reversible error because the court's findings that the level of stress, substance abuse, and domestic violence in the home had escalated since the child had returned to his parents' care were sufficient to warrant modification

of the existing disposition order. Similarly, we held in In re D.C., 2012 VT 108, ¶ 16, 193 Vt. 101, 71 A.3d 1191, that the family court's failure to make an express finding of changed circumstances was harmless error because the father's relinquishment of his parental rights and the child's grandmother's death established changed circumstances by clear and convincing evidence. See also In re C.L., 151 Vt. 480, 483, 563 A.2d 241, 244 (1989) (declining to reverse for lack of express finding of changed circumstances because mother's failure to make any progress in substance-abuse treatment or other case-plan goals constituted changed circumstances sufficient to modify disposition order).

¶ 16. However, the court's findings do not support such a conclusion here. The court found that father had made excellent progress on all fronts but that it would be beneficial to continue court oversight into the upcoming school year to ensure that the children's newly improved school attendance continued. Unlike the cases cited by the State, the court did not find that there had been an obvious and significant change in parents' or children's lives or in father's progress toward the case-plan goals. Cf. In re I.B., 2016 VT 70, ¶ 12 (finding escalation of substance and domestic abuse); In re D.C., 2012 VT 108, ¶ 16 (finding relinquishment of parental rights by father, who was sole subject of reunification efforts, and death of grandmother, who was potential alternative placement for child); In re C.L., 151 Vt. at 483, 563 A.2d at 244 (finding total stagnation by mother in achieving case plan goals). Absent any such findings, we are unable to independently conclude that the required standard was met.

¶ 17. The State claims that the changed circumstance in this case "was that the CCO was expiring but the parents still had work to do that required court oversight." The expiration of the CCO was not by itself a change in circumstances sufficient to justify extension, because that event occurs in every case in which a CCO has been issued. Treating it as a circumstance that meets the standard would effectively render that standard meaningless, and we will not interpret a statute in such a manner. See Robes v. Town of Hartford, 161 Vt. 187, 193, 636 A.2d 342, 347 (1993) ("We will not interpret a statute in a way that renders a significant part of it pure surplusage."). Further,

as noted above, the court did not find that father's progress was interrupted or had been unexpectedly slow since it issued the initial CCO. To the contrary—all the court's findings indicate that father had steadily worked to improve the conditions that led to state intervention and had demonstrated that he could meet the children's needs and keep them safe.

¶ 18. The State argues that even if the court erred in failing to expressly find changed circumstances, we should remand the matter for it to make further findings instead of simply reversing. We conclude that reversal is necessary here because the CCO in this case should have already expired. As we recently explained in In re D.K., § 5320a permits the family division to issue a CCO for one six-month period and extend it once for up to six months. 2022 VT 36, ¶ 16. In other words, a CCO may last for a total of one year. The original CCO was issued on September 2, 2021, meaning that it could be in effect, if properly extended, until September 2, 2022. Instead, the court extended the CCO until November 12, 2022. Because such an extension is prohibited by § 5320a, as explained in In re D.K., we hold that the court's order must be reversed and the existing CCO vacated.[2]

Reversed and remanded for the family division to vacate the May 19, 2022, conditional custody order.

FOR THE COURT:

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Associate Justice

[2] The State asserts that father is also challenging the initial disposition order and argues that father failed to preserve the claim or to timely appeal from that order. We interpret the cited portion of father's brief to be an elaboration of his arguments concerning the extension of the CCO, rather than a challenge to initial disposition, and therefore do not address the State's arguments.