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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-106

AUGUST TERM, 2017

In re Q.B., Juvenile	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 70-3-14 Cnjv
		Trial Judge: Michael S. Kupersmith (Ret.), Specially Assigned

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

Mother and father separately appeal the trial court's order terminating their parental rights to their son Q.B., born in November 2009. On appeal, mother argues that the court did not consider mother's present circumstances and that the court's finding concerning mother's relationship with Q.B. was not supported by the evidence. Father contends that the evidence does not support the court's finding that father was a "virtual stranger" to Q.B. and that the court erred in concluding that his progress had stagnated when there was no plan of services for father. We affirm.

In 2011, the Department for Children and Families (DCF) became involved with mother. Father was incarcerated at the time. Mother was in a relationship with a man who had a lengthy criminal history. Her boyfriend assaulted her when Q.B. was present and he was reincarcerated. In March 2014, DCF filed a petition alleging that Q.B. was a child in need of care or supervision (CHINS) due to mother's substance abuse, homelessness, and continued contact with her boyfriend. After a temporary care hearing, the court placed Q.B. in the conditional custody of a relative with whom mother would also live. On July 1, 2014, mother stipulated to a CHINS finding on the basis that at the time the CHINS petition was filed she had substance abuse issues that were negatively impacting her ability to parent. On that same day, Q.B. was returned to mother under a conditional custody order. Mother could not control his aggressive behavior and on July 31 the court placed the child in the conditional custody of a foster family.[1]

In September 2014, the court adopted a disposition plan with concurrent disposition goals of reunification with mother or adoption. Mother's case plan from September 2014 required her to engage in family-based services, have consistent contact with service providers, work on housing options, avoid drug use, not have contact between Q.B. and her boyfriend, and participate in mental-health and substance-abuse counseling. By February 2015, mother had made progress in recovery and Q.B. was again placed in her conditional custody. In late March 2015, mother

[1] The foster family was not acting as a licensed foster family for DCF. The family was familiar with Q.B. and mother requested that Q.B. be placed with the family.

reported that she could not control Q.B. and feared for her life. The court returned conditional custody of Q.B. to the foster family.

In July 2015, father filed a motion to modify the disposition case plan to include reunification with him as a case plan goal, and to transfer custody to him. Father was living in the state of Washington at the time. Following a two-day hearing in June and August 2016, in which father participated by telephone on the first day and did not participate on the second, the trial court declined to modify the disposition order or transfer custody to father. It based its determination on three sets of findings. First, although the Washington home study was favorable, there was some evidence that father was no longer going to be able to live in the home he had been living in, and father's failure to appear at the second day of the hearing left questions about that unanswered. Second, the court was concerned about the impact on the child of relocating, especially given his history of childhood trauma and his special needs associated with his Attention Deficit Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD) diagnoses. The court found that a complete change in home, school, and community would be disruptive to the child. Third, father had been essentially absent from Q.B.'s life since the child was three years old.

In the meantime, in December 2015, the minor child filed a petition to terminate parental rights. In its March 2017 order terminating parental rights, the court made the following findings.

When Q.B. first began residing with his foster family he had severe behavioral issues. He became angry and frustrated easily and became violent, hitting and kicking and throwing objects. In the fall of 2014, he began preschool and had difficulty with behavior and academics. He hit other children and swore at teachers and peers. He was diagnosed with ADHD and PTSD. When he entered kindergarten in the fall of 2015, he had a small classroom and his teacher provided him with extra attention. She continued to work with him throughout the summer and remained his teacher for his first-grade year—during which the termination hearing took place. By the time of the final hearing, Q.B. was far less physically aggressive and his profanity decreased. He improved academically. Foster parents worked closely with the school to help Q.B. regulate his behavior and he made remarkable changes. Q.B. has a strong bond with his foster parents and they have consistently met his needs for consistent care and emotional support.

Since July 2015, Q.B. has had visitation with mother weekly, alternating the location between where Q.B. lives and where mother is. Mother missed all but one visit in Q.B.'s location. Q.B. became anxious prior to visits with mother and his social and emotional abilities deteriorated. His foster mother reported that his behavior regressed for a period of time after visits. Mother declined to participate in mental health counseling and did not understand the impact of domestic violence by her boyfriend on Q.B. She had housing and employment instability.

Father resided with mother and Q.B. for the first four months of Q.B.'s life. He abused alcohol and was incarcerated from December 2011 due to convictions for domestic violence. He was released in June 2013 and was reincarcerated from October 2013 to June 2015. During the brief time of his release, he saw Q.B. occasionally on the street. In June 2015, he was released on parole to the residence of his brother in the state of Washington. He visited with Q.B. for a couple of hours before he left for Washington, and has not seen Q.B. since. After his move, he called Q.B. weekly for about five months. After that he occasionally spoke with Q.B. or texted the foster

parents. He has not sent Q.B. birthday or holiday cards or presents. He has not spoken to the foster parents or Q.B.'s teacher about Q.B.'s health, schooling, or activities. Father lives with his brother. He is employed and has a girlfriend, who has three children.

The court concluded that there was a change of circumstances for two reasons: Q.B.'s dramatic positive behavioral changes and parents' stagnation. The court found that father had not filled a parental role and had not demonstrated that he would. The court found that mother had not made any progress on her parenting abilities, had not demonstrated that she was able to meet Q.B.'s special needs, had not stabilized her life, and had not engaged in substance-abuse or mental-health therapy.

The court assessed Q.B.'s best interests and found the following. Q.B. had no meaningful relationship with father, who was a "virtual stranger" to Q.B. Father would not be able to assume parental responsibilities within a reasonable period. Mother did not have a positive bond with Q.B. Q.B. had a close and loving relationship with his foster parents. Q.B.'s teacher was an important person in his life. Mother made no progress towards resuming parental duties, and would not be able to parent within a reasonable period of time. The court concluded that termination was in Q.B.'s best interests. Mother and father filed separate appeals.

To terminate parental rights when there is an existing disposition order, the court must conduct a two-step analysis. In re S.M., 163 Vt. 136, 138 (1994). First, the court must find there has been a change of circumstances since the prior order, and then the court must determine whether termination is in the child's best interests. 33 V.S.A. §§ 5113(b) (requiring "change in circumstances" to modify existing disposition order), 5114(a) (listing best-interests factors). A change of circumstances "is most often found when a parent's ability to care for a child has either stagnated or deteriorated over the passage of time." In re S.W., 2003 VT 90, ¶ 4, 176 Vt. 517 (mem.) (quotation omitted). "Individual findings of fact will stand unless clearly erroneous, and conclusions of law will be upheld if supported by the findings." In re A.F., 160 Vt. 175, 178 (1993).

On appeal, mother first argues that the court's analysis of whether she would be able to parent within a reasonable period of time was flawed because the court based its determination on mother's past inability to cope with Q.B.'s behaviors and did not consider that since then Q.B.'s behaviors have improved dramatically. Mother claims that her unchanged parenting skills may now be adequate to manage Q.B.'s improved behaviors.

We conclude that the court properly considered whether mother presently had the ability to parent Q.B. within a reasonable period of time and its findings support the conclusion that she did not. The reasonable-period-of-time inquiry is forward looking, but past events are relevant to the question of whether a parent can resume parenting. In re B.M., 165 Vt. 331, 337 (1996). "Past circumstances that have affected the parent-child relationship will of course be relevant to whether a parent can resume a caregiving role." Id.

The court made the following relevant findings about mother's current ability to parent Q.B.: after living with mother in a unstable home situation, which included domestic violence and substance abuse, Q.B. had both ADHD and PTSD; mother was unable to manage Q.B.'s behaviors; Q.B.'s foster parents and teacher implemented suggestions made by Q.B.'s therapist and Q.B.'s

behaviors improved; Q.B. needs a safe and stable home where his high needs can be met; mother's parenting skills have not improved; mother did not understand the impact domestic violence had on her children; mother did not appreciate what would be required to care properly for Q.B.; mother had not stabilized her own life and still needed to complete counseling; and Q.B.'s behaviors regressed after visits with his mother. These findings all support the court's conclusion that mother will not be able to resume parenting Q.B. within a reasonable period of time.

We reject mother's suggestion that because Q.B.'s behaviors have improved in his foster home, she would now be able to care for him adequately despite the identified deficits in her parenting. The trial court did not err in failing to assume that Q.B.'s improved behaviors were independent of his current living situation, and that he would maintain those improvements while living with mother, despite the longstanding deficits identified by the court.

Mother next argues that the evidence does not support the court's finding that she lacked a positive relationship with her son. Mother points to evidence that she had visitation with her son and that he was "pretty happy" during his time with her. Notwithstanding this testimony, there was other evidence about the quality of mother's relationship with Q.B. Q.B. became anxious prior to visits with mother, and after visits with mother, Q.B. became angry and his behavior regressed. Mother lacked insight into how her instability and behavior had impacted Q.B. Mother had not spoken with Q.B.'s teachers, therapist, or doctor, and did not understand what would be required to care for Q.B. When there is conflicting evidence, "the trial court must weigh the evidence and resolve the conflicts." In re H.A., 153 Vt. 504, 516 (1990). This evidence is sufficient to support the court's finding that mother did not have a positive relationship with her son. In particular, the court did not abuse its discretion in inferring from Q.B.'s anxious and regressive behavior before and after visits that his relationship with mother was not positive. See In re B.C., 2013 VT 58, ¶ 22, 194 Vt. 391 (concluding that trial court could make reasonable inference regarding father's ability to parent from evidence).

In his appeal, father first argues that the court erred in finding that he was a "virtual stranger" to Q.B. Where factual findings are challenged on appeal, "our role is limited to determining whether they are supported by credible evidence." Id. ¶ 21 (quotation omitted). It is up to the family court to determine the credibility and weight of the evidence. Id.

Father points to the following evidence to demonstrate that the finding is erroneous: Q.B. once mentioned father to his teacher; Q.B. asked to telephone father; father visited with Q.B. in June 2015 and they played and hugged; and in July 2015, Q.B. said he missed his father. There was other evidence, however, that supported the court's findings that father was a "virtual stranger" to Q.B. and that Q.B. had "no meaningful" relationship with father. Father only lived with Q.B. for the first four months of Q.B.'s life and was then incarcerated for an extended period of time. Father's own testimony was that: he saw Q.B. a couple of times in 2013 and once in June 2015, but not since; over the previous two years he had "not a lot" of phone calls with Q.B. and those calls lasted five to ten minutes; he had not had an overnight visit with Q.B. since 2011; and he had not sent cards or gifts for birthdays or holidays. In addition, Q.B.'s foster mother testified that after December 2015, father stopped calling on a regular basis, that father did not call at all after

April 2016, and that father had not inquired about Q.B.'s school, therapy, or medical diagnoses. This evidence is sufficient to support the court's finding that father was a virtual stranger to Q.B.[2]

Father also challenges the court's finding of changed circumstances based on father's stagnation. Father asserts that stagnation is a measure of whether a parent has complied with the requirements in the case plan. Because the case plan in this case did not include any requirements for father, or offer him any services, father argues that there was insufficient evidence to show that his progress stagnated. Moreover, father contends that because the case plan did not outline steps father needed to take in order to resume parenting, and did not offer him services toward that goal, he was deprived of parental rights without notice.

The threshold change of circumstances "is most often met by showing stagnation in a parent's ability to care for a child," but stagnation is not the sole way to show changed circumstances. In re D.C., 2012 VT 108, ¶ 18, 193 Vt. 101. In this case, the case plan goal called for reunification with mother or adoption. Mother's stagnation was a sufficient changed circumstance to support the court's determination of a new disposition goal.[3] See id. ¶ 19 (voluntary relinquishment of parental rights by only parent who was subject of reunification efforts, as well as custodial grandmother's death, established changed circumstances that allowed court to consider termination petition under best-interests criteria). Having satisfied the threshold, the court could proceed to considering whether modification of the existing order was in Q.B.'s best interests. See 33 V.S.A. § 5113(b).

Father suggests that the failure to set specific case plan goals, and to provide him associated services, resulted in a deprivation of his parental rights without due process.

Following a CHINS adjudication, the statute requires DCF to develop a case plan, which can include a plan of services to describe the responsibilities of parents, among others, "including a description of the services required to achieve the permanency goal." 33 V.S.A. § 5316(b)(7). In termination proceedings, to comply with due process requirements the state must provide parents with notice that termination is being sought and "include the grounds on which termination is sought." In re H.A., 153 Vt. at 510. "In order for a notice violation to result in reversal of a modification order, prejudice must be shown by the party claiming a violation." Id.

In this case, the case plan, from September 2014, had a concurrent plan of reunification with mother or adoption. The plan stated that father was incarcerated, had several charges pending, and it was unknown when he would be released. It noted that father had not had any contact with DCF. The plan of services for father stated only that he should inform DCF when he was released from incarceration. The unappealed initial disposition plan did not contemplate reunification with father. He was on notice from the outset that, largely on account of his extended absence from the child's life, he was not a candidate for reunification.

---

[2] Because this finding is supported, we do not address father's argument that the erroneous finding deprived him of fundamental rights.

[3] We need not address whether Q.B.'s improved behavior could support a changed circumstances finding sufficient to warrant revisiting the disposition order.

When father did seek reunification, after he was released from prison and paroled to Washington state, the court held a two-day hearing—only one day of which father attended—and declined to modify the disposition goal. The court's order described the primary reasons the court was not inclined to add a case plan goal of reunification with father at that late date. Father did not appeal that order.

The necessary process was afforded to father. Father does not challenge the facts that he received notice of the petition to terminate, that the petition contained the grounds for termination, that he had notice of the termination hearing, and that he participated in the hearing with the assistance of an attorney. There is no merit to father's assertion that the court could not terminate father's rights without first providing father with a detailed list of what he was required to do to resume parenting. Father had the constitutionally required notice of the termination and the grounds for it. He was on notice throughout the entirety of these proceedings that the unappealed disposition orders called for reunification with mother or adoption. Having found a change of circumstances, to satisfy due process, the court could terminate if it found by clear and convincing evidence that termination was in Q.B.'s best interests. See In re D.C., 2012 VT 108, ¶ 22 (explaining that procedural due process satisfied if best if best-interests decision made by clear and convincing evidence). Here, the facts support the court's analysis of the best-interests factors.

Affirmed.

BY THE COURT:

_____

Beth Robinson, Associate Justice

_____

Harold E. Eaton, Jr., Associate Justice

_____

Karen R. Carroll, Associate Justice