VERMONT SUPREME COURT
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Case No. 22-AP-223

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

JANUARY TERM, 2023

In re B.F., Juvenile	}	APPEALED FROM:
(T.T., Mother*)	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	CASE NO. 74-6-20 Frjv
		Trial Judge: Mary L. Morrissey

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

Mother appeals the termination of her parental rights to fifteen-year-old son B.F. We affirm.

The following facts are stated in the family division's termination order and the case record and are not in dispute. B.F. was born in 2007 and entered the care of his aunt shortly after his birth. In 2009, B.F.'s aunt became his legal guardian. B.F.'s aunt has been B.F.'s only consistent caregiver throughout his life.

B.F. is fifteen years old but functions at the level of a seven- or eight-year-old child and has been evaluated to have a full-scale intelligence quotient of 41. He is diagnosed with ADHD and struggles with impulsivity. He requires eyes-on supervision in the community due to his limited ability to regulate his emotions. B.F. receives treatment from a psychiatrist and a neurologist for a seizure disorder, aggression, and anxiety. He has issues with bedwetting and soiling. He requires extensive supports for his intellectual and developmental disabilities.

In 2019, the Department for Children and Families (DCF) opened a family support case for B.F., resulting in a safety plan that required B.F.'s aunt to provide continuous supervision for B.F. when he was in the community. In June 2020, B.F. was charged with lewd and lascivious conduct with a child after he exposed his penis and buttocks during a verbal altercation and pushed a transgender peer off their bike, causing injury. A week later, he was charged with disorderly conduct for chasing two children, aged six and three, on the playground while screaming and spitting at their faces, saying "now they can get coronavirus." The State filed a petition alleging B.F. was a child in need of care or supervision (CHINS) because he was beyond the supervision and control of his legal guardian. The court issued emergency and temporary care orders transferring custody of B.F. to DCF. The delinquency charges were eventually

dismissed following a determination that B.F.'s intellectual disabilities made supervision through probation inappropriate.

Due to his extraordinary needs, B.F. was placed with numerous different caregivers after entering DCF custody. His placements included a six-month stay at the Brattleboro Retreat, seven different foster homes, and a twenty-two day stay at the hospital emergency department. At the time of the termination hearing, B.F. was living with a foster family who had specialized training to care for his complex needs. He also received support from a personal care attendant for seventeen hours each week. Despite the foster family's training and extensive mental-health, educational, and other supports, B.F. continued to struggle to regulate himself and had destroyed property and threatened self-harm. The foster family was not a pre-adoptive home for B.F.

In May 2021, B.F.'s aunt stipulated to the merits of the CHINS petition. DCF submitted a disposition case plan recommending B.F. be placed with his aunt in a permanent guardianship, which the court adopted as the goal in July 2021.[1]

However, in October 2021, aunt notified DCF that she would not be able to meet B.F.'s needs and could not be a permanent placement for him. DCF filed an updated case plan that amended the permanency goal to adoption. The case worker attempted to consult with mother, who lives in Dover, New Hampshire, prior to doing so but was unsuccessful.

In January 2022, mother appeared for the first time in court and was appointed counsel. Appointed counsel had to withdraw due to a conflict and substitute counsel was appointed in March 2022.

In May 2022, DCF filed a petition to terminate mother's parental rights.[2] DCF's rationale for recommending termination was that B.F. acted much younger than his age and needed parents who could provide him with lifelong safety and support. If B.F. were freed for adoption, DCF planned to conduct a state and nationwide search for parents who could address his extensive needs.

The court held a one-day hearing on the petition in June 2022. B.F.'s DCF case worker was the sole witness. The case worker testified that she had repeatedly tried to involve mother in the case beginning in the summer of 2020. Mother had approximately ten brief virtual visits with B.F. and a couple of phone calls but no in-person contact during the pendency of the case. She had not attended any team meetings or contacted B.F.'s foster family. The DCF worker testified that B.F. seemed to regard mother as a distant relative and preferred to speak to his aunt. Mother did not testify. At the end of the hearing, mother's attorney asked the court to create a permanent guardianship to allow mother's connection with B.F. to continue. The court asked

[1] Later in July 2021, mother filed a motion in probate court to terminate the guardianship of B.F. The family division and probate division conferred pursuant to 14 V.S.A. § 2624. The family division decided that the probate division would retain jurisdiction over the guardianship while the case was pending because at that time the permanency goal for B.F. was permanent guardianship with his aunt. The status of the probate division case is unclear, and mother does not argue that it is relevant to this appeal.

[2] DCF concurrently petitioned to terminate the parental rights of B.F.'s father. The case record indicates that the family division granted the petition in August 2022 and father did not appeal.

mother whether she acknowledged that she was not currently able to take on a primary parenting role for B.F. and would not be able to do so within a reasonable time. Mother answered "yes" to both questions.

The court granted the petition in a written decision. The court found that mother's progress had stagnated because she had taken no meaningful steps to assume a parental role. It concluded that mother's stagnation and aunt's inability to serve as a permanent placement constituted a substantial change in circumstances. The court then assessed the factors set forth in 33 V.S.A. § 5114(a). It found that mother played no meaningful role in B.F.'s life and had not tried to visit or increase contact with him. B.F. had no ties to mother's community in New Hampshire. There was no likelihood that mother would be able to assume parenting duties within a reasonable time because B.F. had complex needs, mother had never acted as his primary caregiver, and mother had not participated in team meetings or case planning to try to understand his circumstances. The court rejected mother's request to establish a permanent guardianship because there was no individual or family identified as a long-term placement for B.F. and it did not appear that mother's limited contact with B.F. had benefitted him. The court therefore concluded that termination of mother's parental rights was in B.F.'s best interests.

Mother's sole argument on appeal is that the court erred in finding mother had stagnated because she did not become a party to the proceeding until after merits and disposition. Mother argues that there were no expectations for her in the disposition case plan and therefore she cannot be faulted for failing to make progress in relation to that plan.

To terminate parental rights after initial disposition, the family division must first find by clear and convincing evidence that there has been "a change in circumstances." 33 V.S.A. § 5113(b); In re R.W., 2011 VT 124, ¶ 15, 191 Vt. 108. A change in circumstances is "most often found when the parent's ability to care properly for the child has either stagnated or deteriorated." In re M.M., 159 Vt. 517, 521 (1993) (quotation omitted). A parent's progress, or lack thereof, is measured by examining whether the parent has substantially conformed to the expectations set forth in the disposition case plan. In re S.M., 163 Vt. 136, 140 (1994). We agree that the concept of stagnation was inapplicable here because there were no expectations for mother in the case plan adopted by the court or the resulting disposition order. See In re M.P., 2019 VT 69, ¶ 30, 211 Vt. 20 (reversing decision terminating father's parental rights because analysis was based on father's stagnation, which was inapplicable because there were no expectations for father in approved case plan or disposition order).

However, "[p]arental stagnation is just one way to show changed circumstances, and the statutory standard may be met in other ways." Id. ¶ 27. The court's finding of changed circumstances was not premised solely on mother's stagnation—it was also expressly based on the fact that B.F.'s aunt, who had been B.F.'s primary caregiver throughout his life and was the sole focus of reunification efforts at the time of disposition, was no longer able to be a permanent placement for B.F. This alone was a sufficient change in circumstances to warrant modification of the disposition order pursuant to 33 V.S.A. § 5113(b). See In re D.C., 2012 VT 108, ¶ 19, 193 Vt. 101 (holding that voluntary relinquishment of parental rights by only parent who was subject of reunification efforts, as well as custodial grandmother's death, established changed circumstances). Thus, the court's erroneous finding of stagnation does not warrant reversal.

Mother does not challenge the court's assessment of the statutory factors relating to the best interests of the child. The court's findings are supported by the DCF case worker's testimony and, notably, mother's own admission that she would not be able to assume parenting

duties for B.F. within a reasonable time. See In re B.M., 165 Vt. 331, 336 (1996) ("The critical factor is whether the natural parent will be able to resume parental duties within a reasonable period of time."). The findings in turn support the court's conclusion that termination of mother's parental rights was in B.F.'s best interests.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice