

**ENTRY ORDER**

MAY 21 2010

SUPREME COURT DOCKET NO. 2009-481

MAY TERM, 2010

In re H.D., Juvenile

} APPEALED FROM:  
}  
}  
} Addison Family Court  
}  
}  
} DOCKET NO. 74-10-08 Anjv

Trial Judge: Cortland Corsones

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

Mother appeals termination of her parental rights to her child H.D. On appeal, mother argues that the family court's findings of neglect and sexual abuse are based solely on hearsay and therefore not supported by competent evidence. We affirm.

Mother has four girls, three by father: Ha.D., H.D., and M.D., who were ten, eight, and four at the time of the family court's termination decision. Mother's oldest daughter has reached the age of majority. The current appeal concerns only H.D. Mother and H.D.'s father divorced in January 2006. Parental rights were contested, and although mother had been the children's primary care giver, the family court found that mother's care was neglectful and awarded father custody. This Court affirmed. D'Avignon v. D'Avignon, No. 2006-044, 2006 WL 5838208 (Nov. Term 2006) (unpub. mem.). In 2007, mother filed a motion to modify custody. Dr. Lamb was appointed to complete a forensic evaluation in conjunction with this motion. Shortly thereafter H.D.'s daycare provider reported observing sexualized behavior by H.D. and her older sister Ha.D. The provider observed the girls kissing passionately and humping each other. The provider also observed H.D. rubbing M.D.'s private parts. In response, the Department for Children and Families (DCF) conducted an investigation,<sup>1</sup> and Dr. Lamb performed a sexual abuse evaluation. Dr. Lamb concluded that mother had abused her children and so testified at the custody hearing. Dr. Lamb was also extremely concerned about mother's history of childhood trauma that was untreated. Following a hearing, the court denied mother's motion to modify and reduced mother's contact with the children to supervised visits once a week as was recommended by Dr. Lamb. The court explained that if mother wished to regain unsupervised contact she was required, among other things, to begin counseling with a licensed therapist to address her own issues of childhood abuse and neglect. Mother did not engage a therapist.

In July 2008, the child's attorney moved to suspend contact between mother and the children. Mother did not attend the hearing on this motion. H.D.'s and Ha.D.'s therapists both testified that the children continued to disclose sexual abuse by mother and recommended that

---

<sup>1</sup> In September 2007, DCF substantiated mother for sexually abusing Ha.D. In April 2008, DCF substantiated mother for sexually abusing H.D.

mother have no contact with the children until she had completed sex offender treatment. In August 2008, the court terminated contact between mother and the children. The court found by clear and convincing evidence that the children's reports of sexual abuse by mother were credible. The court explained that before mother could reinitiate contact she must complete sex offender treatment and comply with the court's previous order to begin counseling with a licensed therapist to address her own childhood abuse. Mother did not appeal this decision.

In October 2008, DCF commenced a proceeding to have H.D. declared a child in need of care or supervision (CHINS). Father stipulated that H.D. was a CHINS. He believed that H.D. had offended against M.D. while under his care, and he did not believe he could provide the necessary protection for M.D. As the noncustodial parent, mother took no position on the CHINS adjudication.

DCF's initial disposition report, issued in February 2009, recommended termination without limitation as to adoption. Father admitted that he could not meet H.D.'s needs and voluntarily relinquished his rights, conditioned on mother's rights being terminated. The report explained that mother could not meet H.D.'s needs because mother (1) was substantiated for sexual abuse and required long-term psychotherapy; (2) lacked stable housing; and (3) failed to take care of her own mental health issues. Mother opposed the termination petition.

The court held a two-day termination hearing in October 2009. At the outset, the court considered mother's motion to exclude the sexual abuse findings from the divorce case. The court concluded that mother was not precluded from challenging the prior findings of abuse.

DCF presented five witnesses in support of the termination petition: the DCF caseworker, H.D.'s foster mother, two DCF investigators, and Dr. Lamb. Dr. Lamb testified that H.D.'s sexualized behavior was "unusual" and "well beyond the normal experimentation or exploration." While Dr. Lamb tended to believe that mother sexually abused the girls, she also explained that mother had neglected H.D. and this neglect was just as harmful.

Based on the evidence, the family court found that mother had inappropriately touched H.D. and Ha.D. in a sexual manner and taught them to touch each other. The court also found that mother neglected H.D.'s emotional and material needs and had not developed a healthy attachment to her. The court concluded that all of the statutory best-interest factors supported termination of parental rights. Most importantly, the court found that mother would not be able to parent H.D. within a reasonable period of time given mother's need for long-term therapy and inability to maintain stable housing or employment.

Mother appeals, arguing that the court's conclusion was based entirely on hearsay evidence and that the expert inappropriately commented on H.D.'s credibility.

The family court may terminate parental rights at the initial disposition proceeding if the court finds by clear and convincing evidence that termination is in the child's best interests. In re J.T., 166 Vt. 173, 177 (1997). In assessing the child's best interests, the court must consider the statutory criteria. 33 V.S.A. § 5114. The most important factor is whether the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639, (1998) (mem.). On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. Id.

Mother first argues that the family court's findings are not supported by credible evidence. Mother attacks the family court's findings that she sexually abused H.D. and that she

neglected H.D. because she alleges that the family court relied solely on hearsay evidence. “When findings are attacked on appeal, our role is limited to determining whether they are supported by credible evidence.” *In re A.F.*, 160 Vt. 175, 178 (1993). Hearsay is admissible in a termination proceeding, 33 V.S.A. § 5317(b), but may not be “the sole basis for termination of parental rights,” *In re A.F.*, 160 Vt. at 181. In this case, we conclude that there was no error because the court’s findings were not based solely on hearsay.

We first address the court’s finding that mother inappropriately touched H.D. and Ha.D. in a sexual manner and taught them to inappropriately touch each other. As the court indicated, this finding is supported by the hearsay disclosures of H.D. and Ha.D. discussed in the testimony of Dr. Lamb<sup>2</sup> and the DCF caseworker. The finding is also supported by H.D.’s high level of sexualized behavior, as witnessed by the daycare provider and related through the testimony of others. H.D.’s foster mother testified concerning H.D.’s hearsay statements that she and Ha.D. touched each other and mother touched H.D. She also gave her first-hand observations of H.D.’s sexualized behavior. On one occasion, she pulled H.D. towards her to prevent her from running away and their lips accidentally touched. Immediately H.D. began rubbing her foster mother’s breast and hugging her. At the hearing, mother did not deny that the girls engaged in sexualized behavior. She testified that she believed the daycare provider’s observations of the girls touching each other. Mother offered no explanation for this behavior, other than stating that she believed her ex-husband had coached the girls into making their accusations. H.D.’s unusual sexualized behavior, which was demonstrated by direct and hearsay evidence and not challenged by mother, combined with the hearsay disclosures of H.D. and her sister, formed a sufficient basis for the court to find that mother sexually abused H.D.

Similarly, the family court’s findings that mother was and continues to be unable to meet H.D.’s emotional and material needs is supported by both hearsay and non-hearsay evidence. The court relied on hearsay reports that when mother was the primary care giver, prior to the divorce, her household was chaotic and dirty, the children were not properly fed, and they were isolated and not enrolled in school. These reports were buttressed, however, by Dr. Lamb’s first-hand observations of mother with the children in June 2007 in mother’s home. At that visit, there was no electricity or running water in the home. Dr. Lamb observed that mother lacked empathy towards the children and was unduly harsh with them. Furthermore, the testimony of H.D.’s foster mother describing H.D.’s behavioral changes supports the court’s finding that H.D. experienced past neglect. Her foster mother testified that when H.D. first arrived at their house she was apprehensive and needy, exhibited baby-like behaviors such as sucking her thumb, and ate very fast, shoving food in as fast as possible. After several months in her foster home, H.D. formed a healthy attachment to her foster parents and siblings, her eating habits improved, and she stopped sucking her thumb.

Mother’s own testimony concerning her current circumstances supports the court’s finding that mother is not able to care for H.D. Mother has no stable residence or employment.

---

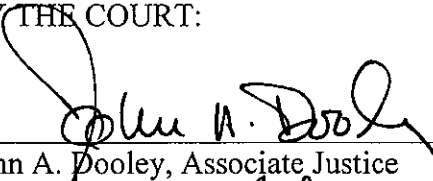
<sup>2</sup> The family court did not impermissibly rely on Dr. Lamb’s assessment that the girl’s disclosures of abuse were credible as mother claims, relying on *State v. Wetherbee*, 156 Vt. 425, 431-32 (1991). As discussed above, the court made its own determination of abuse on properly admitted evidence. See 33 V.S.A. § 5317(b) (allowing admission of hearsay evidence). Moreover, because this was a court trial there was not the same concern as in *Wetherbee* that the jury would be unduly prejudiced by an expert’s testimony and “reach the unspoken but unmistakable conclusion that the expert’s recounting of the assault is the way it happened.” *Id.* at 434.


In addition, mother continues to demonstrate little empathy or concern for H.D. Mother has had no contact with H.D. since April 2008, yet she has not asked DCF for visits with the child or how she can work towards visitation. Since H.D. was taken into custody, mother has made no inquiry into H.D.'s education, therapy, or medical care. At trial, mother denied abusing H.D., but seemed unconcerned about H.D.'s sexualized behavior.

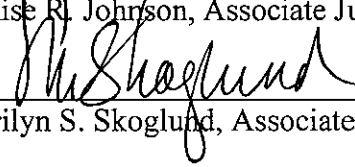
Based on this evidence, the court's conclusion that all of the statutory best-interest factors support termination was not in error. Most importantly, there was credible evidence to support the court's conclusion that mother will not be able to resume parenting within a reasonable period of time. See *In re M.M.*, 159 Vt. 517, 523 (1993) (stating that most important statutory factor is likelihood of parent resuming parental duties within reasonable period of time). Mother has not sought treatment for sexual abuse and denies abusing her children. In addition, despite court orders since January 2006 directing mother to seek therapy to address her own childhood trauma, mother did not seek treatment with a therapist until just before the termination hearing in May 2009. As the family court noted, mother needed at least one year of therapy before even beginning supervised visits with H.D.<sup>3</sup> Even an optimistic timeline is too long for H.D., who needs permanence and stability now.

Affirmed.

BY THE COURT:

  
\_\_\_\_\_  
John A. Dooley, Associate Justice

  
\_\_\_\_\_  
Denise R. Johnson, Associate Justice

  
\_\_\_\_\_  
Marilyn S. Skoglund, Associate Justice

---

<sup>3</sup> We disagree with mother's assertion that her failure to obtain counseling is irrelevant if she did not neglect or sexually abuse H.D. The family court directed mother to engage in therapy to address mother's own personal trauma. As the court explained, the goal would be for mother "to gain a better understanding of herself and her past so that she does not allow her past to interfere with her ability to form healthy relationships, to raise her children, and to obtain steady employment and housing." That mother chose for three years to ignore the court's repeated instruction to engage in therapy is certainly relevant to whether mother is able to resume parenting within a reasonable period of time.