*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**

SUPREME COURT DOCKET NO. 2019-038

MAY TERM, 2019

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| In re L.H., L.H., L.H., Juveniles<br>(C.H., Father* & M.J-H., Mother*) | }<br>}<br>}<br>}<br>}<br>}<br>} | APPEALED FROM:<br><br>Superior Court, Windham Unit,<br>Family Division<br><br>DOCKET NOS 113/114/115-9-14 Wmjv<br><br>Trial Judge: Katherine A. Hayes |

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

Both mother and father appeal the family division's second order, following remand from this Court, terminating their parental rights with respect to their children, Ly.H., Le.H., and Li.H. We affirm.

Neither mother nor father challenges any of the family division's specific findings, which reveal the following facts. Ly.H. was born in September 2007, Le.H. in October 2009, and Li.H. in September 2011.[1] In September 2014, the State filed a petition alleging that Ly.H., Le.H., Li.H., and their older sister were children in need of care or supervision (CHINS). At that time, the parents had been divorced for a little over two years, and the children were living with mother in the family home. The affidavit supporting the petition alleged that father had assaulted mother in front of the two older children,[2] the family home was unsanitary, and the New Hampshire child-services agency had had prior significant involvement with the family due to domestic abuse, neglect, homelessness, and alcohol consumption.

In October 2014, mother and father stipulated to the merits of the CHINS petition, essentially agreeing to the facts alleged in the affidavit. That same month, the family division issued a conditional custody order (CCO) that kept the children with mother. The CCO prohibited mother from having contact with father or allowing contact between the children and father. The order also required that the children attend school, that mother not use drugs or alcohol, and that she cooperate with the Department for Children and Families (DCF).

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[1] The parents have another child born in June 2003, La.H., who is not a subject of the family division's termination order. Mother has two other older children; she has not had custody of them since they were small children.

[2] Father pled guilty to domestic assault and was placed on probation with special conditions to address the risk of future violence. As part of his plea agreement, he acknowledged that he struck mother in the eye with a closed fist, pulled her hair, and kicked her in the hip.

The CCO continued in effect at the time of the disposition hearing in December 2014. The initial disposition case plan goal was reunification with mother to be achieved by June 2015. Mother's plan of services required, among other things, that she demonstrate an ability to meet the children's physical, emotional, and educational needs; demonstrate safe and appropriate parenting skills; keep the children safe from harm; not allow contact between father and the children; not consume alcohol, use illegal substances, or misuse prescription medications; not engage in criminal activity; demonstrate financial stability; and maintain safe and stable housing. Father's plan of services required, among other things, that he complete mental-health and substance-abuse assessments; follow recommendations resulting from those assessments; stay sober; not engage in criminal activity; demonstrate financial stability; maintain safe and stable housing; and have no contact with the children except with DCF approval.

At a post-disposition hearing in February 2015, the CCO was extended for an additional ninety days, but in April 2015, the family division issued an emergency care order removing La.H. from the home because of verbal and physical altercations between mother and the child. That same month, the family division issued an order permitting father to have limited written contact with the children. The CCO was extended again at review hearings in May and July of 2015. At that time, father began having supervised visits with the children.

In October 2015, serious issues began to arise concerning the condition of the family home. The Family Time coach reported that there was trash everywhere in the house with dirty clothes piled in the hallway. He stated that mother, who had been diagnosed in late 2014 with Attention Deficit/Hyperactivity Disorder, Post-Traumatic Stress Disorder, alcohol abuse in remission, and a mood disorder, appeared to struggle with basic parenting skills and seemed unable to set boundaries or provide structure for the children. In November 2015, DCF sought to modify the CCO to require, among other things, that mother obtain a cleaning service to make the house safe and sanitary for the children. In December 2015, at which point the CCO had been in place for over thirteen months, DCF asked the family division to transfer custody of the children to the Department because of chronic neglect. The family division vacated the CCO and temporarily granted DCF custody due to continued unsanitary conditions in the home, concerns that the children were not being fed adequately, and mother's difficulty in performing basic parental duties. All parties stipulated to the facts underlying the temporary order, including that the family home was in constant disarray and that mother had not been able to properly supervise the children.

In February 2016, the children filed a motion to end father's parent-child contact. Later, a similar motion was filed with respect to mother. In July 2016, following a two-day evidentiary hearing, the family division granted both motions based on recent incidents demonstrating that the children were fearful of their parents and much calmer when visits were not occurring, as well as the fact that both parents were telling the children during supervised visits that they should not be in DCF custody. The family division found that when visits were occurring, the children had significant behavioral issues, including bedwetting, tantrums, and difficulty sleeping. The court concluded that continued parent-child contact would have a detrimental impact on the children's emotional well-being.

In March 2016, the State filed petitions seeking termination of mother's and father's parental rights. A termination hearing was held over six days between October 2016 and February 2017. In June 2017, the family division issued an order granting the petitions. The parents appealed, and this Court reversed, concluding that a conflict of interest caused by the children's former attorney representing the State fatally compromised the proceedings and the termination decision. In re L.H., 2018 VT 4, ¶ 1, 205 Vt. 596. We remanded the matter for a new termination hearing, noting that "[n]othing about our decision should be construed to preclude the parties from

stipulating on remand to admission in the new TPR hearing of parts or all of the transcripts from the prior TPR hearing." Id. ¶ 35 n.10.

A new termination hearing was held over four days in July 2018, by which time the parents were living with each other again in the family home. In December 2018, following the hearing, the family division issued an order terminating mother's and father's parental rights. Both parents appeal. Father argues that the State failed to meet its threshold burden of showing parental stagnation by clear and convincing evidence, that termination of their parental rights is not in the children's best interests, and that the proceedings on remand remained tainted by the initial conflict of interest found in L.H. Mother joins father's brief and also argues that, specific to her, the State failed to meet its threshold burden of showing parental stagnation.

In post-disposition termination cases, the family division undertakes a two-step inquiry, "first determining whether there has been a substantial change in material circumstances from the initial disposition order, and, if there has, whether the best interests of the child require termination of parental rights." In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44. "A substantial 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." Id. (quotation omitted). "Stagnation may be found when the parent has not made progress expected in the plan of services . . . despite the passage of time." Id. (quotation omitted). "We will affirm the trial court's findings in support of changed circumstances unless they are clearly erroneous, and its conclusions if reasonably supported by the findings." Id. To determine a child's best interests, the family division must consider the four factors set forth in 33 V.S.A. § 5114(a). The most important factor in the court's analysis is the likelihood that the legal parent can resume parental duties within a reasonable period of time. In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325. "The reasonableness of the time period is measured from the perspective of the child's needs . . . ." In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29. That inquiry is "forward-looking"—"the court must consider a parent's prospective ability to parent the child," although "past events are relevant in this analysis." D.S., 2014 VT 38, ¶ 22. "As long as the court applied the proper standard, we will not disturb findings unless they are clearly erroneous, and we will affirm its conclusions if they are supported by the findings." Id. "We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." Id.

We first consider the parents' arguments concerning stagnation. Father argues that the family division's stagnation conclusion was unsupported because he had achieved every case-plan goal, including long-term sobriety and financial stability. He states that he has completed domestic-abuse programming and has stopped abusing mother while acknowledging that his actions were dangerous when he was drinking. He likens this case to the situation in In re A.M., 2017 VT 5, ¶ 1, 204 Vt. 198, where we concluded "that a single transgression by father, in the face of otherwise positive evidence and findings as to his compliance with the case plans and his observed parenting abilities, did not support a finding of changed circumstances to warrant modification of the case plan goal." For her part, mother argues that the family division relied on old information in determining that her parental rights had stagnated. Both parents state that there were good reasons for their frustration with DCF, given their compliance with the case plan and the confusing barrage of service providers with whom they had to work.

We find these arguments unavailing. The family division acknowledged that the parents had done their best to meet case-plan goals and, in doing so, had improved their lives in many ways since the children were taken into DCF custody. They had resumed their shared relationship; the home was less cluttered; the bills were being paid; mother had obtained social security benefits and father had a regular job; they had reduced the risk of domestic violence by making significant

progress through couples counseling; they were engaged in individual counseling; and, most importantly, they had maintained their sobriety for years.

While commending the parents for making significant progress in their lives, the family division concluded that they had not made essential steps necessary to enable them to resume parenting their children. They still deny that they neglected or abused their children and they have not accepted any responsibility for the children's "abysmal condition" at the time the children were taken into state custody years earlier. The family division cited "overwhelming evidence," supported by the court's detailed unchallenged findings, that, notwithstanding the parents' denials, "the children were in terrible physical, emotional, and mental condition at the time they were placed in custody." The court detailed not only the neglect of the children's physical needs, but also the trauma they endured as the result of the domestic abuse they witnessed and, in some instances, were victimized by. The court described the parents' continued denials as "nearly delusional,"[3] given the consistency of the independent testimony verifying the severity of neglect and abuse issues concerning the children.

The family division understood that the neglect and abuse occurred long ago, but the court concluded that the parents could not begin to repair their relationships with the children until they recognized, and accepted responsibility for, the harm to the children caused by their past actions. The court noted that, notwithstanding receiving years of services, the parents still failed to acknowledge the severe trauma experienced by the children under their care and the children's ongoing need for a calm, predictable and supportive environment at home and school. The court concluded that, given their continuing denials regarding the reasons the children were taken into state custody, the parents had failed to make significant progress regarding the most important case-plan goals for achieving reunification: demonstrating an ability to meet the children's physical, emotional, and educational needs; demonstrating safe and appropriate parenting skills; and keeping the children safe from harm. The court further pointed out that, even if the parents were able to accept responsibility for their actions and inactions, the children were afraid of their parents and had extremely high needs for ongoing emotional and psychological support that the parents had not demonstrated they could provide.

As the family division stated, there is overwhelming evidence in the record of the parents' failure to accept or comprehend the reasons the children were taken into state custody, which was a critical step for them to be able to provide the emotional support that the traumatized children desperately needed and had been receiving in their foster families. Among the testimony that the family division found credible was that of a forensic evaluator who did a family assessment in June 2018. The court concluded that the evidence supported the evaluator's assessment that, although the parents had maintained their sobriety, they were not in a position to care for the children, who had not had any willing contact with the parents since 2016 and who had an immediate need of permanent placements. This case is easily distinguishable from A.M., where father had fully satisfied the case-plan goals and was engaged in positive parent-child contact, with the only issue being whether his conduct on one occasion in allowing the children to see their mother without informing DCF justified the termination of his parental rights. 2017 VT 5, ¶¶ 37-38.

[3] The family division noted mother's hostile and bizarre conduct, including her insistence that DCF took the children away because they were beautiful and people wanted babies, her recent stalking of one of the foster parents, and her calling a DCF a caseworker at the termination hearing a trafficker of children.

For similar reasons, the record also fully supports the family division's best-interests analysis. Father argues that the court ignored the testimony of witnesses presented by mother and him, and that the court should have considered his situation separately from that of mother because he was not in the family home when the previous neglect occurred. In fact, the family division acknowledged the testimony of the parents' witnesses and considered both parents' situations. The court addressed each of the statutory factors, examining the children's relationships with mother and father and their foster families, their adjustment to their homes and communities, the lack of any constructive role by either parent in the children's lives, and, most importantly, the parents' inability to resume parental care within a reasonable period of time, given the parents' continued denial of past abuse and neglect and the children's immediate need for permanency. Father's arguments fail to undercut these findings and the family division's best-interests analysis.

Finally, father argues that the proceedings on remand remained tainted because the State failed to meet its burden of demonstrating at the second termination hearing that it had in place a procedure to screen the rest of the Attorney General's Office from the conflict of interest found in L.H. We find no merit to this argument. We emphasized in L.H. that our analysis was limited to the particular attorney who had joined the Attorney General's Office and was representing the State after previously representing the children in this case. 2018 VT 4, ¶ 15 n.5. We noted that the parents had not argued "that the Attorney General's office more broadly should have been disqualified," and further stated that "nothing in our analysis would support such a conclusion." Id. (citing State v. Miner, 128 Vt. 55, 62 (1969) for its "holding that conflict of state's attorney does not bar State from performing prosecutor's function"). On remand, neither father nor mother argued that the Attorney General's Office was tainted by the conflict of interest found in L.H. or that the replacement attorney from that office had a conflict of interest. Nor did they argue that the Attorney General's Office had to have in place a procedure to demonstrate the lack of a conflict in this case, notwithstanding the withdrawal of the attorney found to have had a conflict of interest. Accordingly, father has waived review of this argument, which was raised for the first time on appeal. See In re B.A., 2014 VT 76, ¶ 15, 197 Vt. 169 ("Generally, in juvenile proceedings, as for other civil cases, unpreserved issues that are not raised at trial are waived on appeal.").

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice