

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. 2019-258

NOVEMBER TERM, 2019

In re K.H. & K.H., Juveniles
(K.H., Mother*)

} APPEALED FROM:
}
} Superior Court, Windham Unit,
} Family Division
}
} DOCKET NO. 21/23-2-17 Wmjv

Trial Judge: Howard A. Kalfus,
Specially Assigned

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

Mother appeals the termination of her parental rights to minor children Kn.H. and Kb.H. We affirm.

Kb.H. was born in March 2010 and Kn.H. was born in August 2011.¹ The Department for Children and Families (DCF) began working with the family in June 2016 after receiving reports that the children had appeared at school with marks on their bodies and mother was hitting the children. DCF provided mother with services to address these issues. Despite DCF providing support, however, mother allowed the children to fall behind on their medical and dental appointments. She also did not consistently attend her own therapy appointments or take prescribed medications designed to address her mental health issues.

As a result, in February 2017 DCF filed petitions alleging that the children were in need of care or supervision (CHINS). Mother was given conditional custody of the children. The conditional custody order required mother to ensure that the children attended school and medical and dental appointments and were properly supervised; continue to see her therapist; participate in Intensive Family-Based Services (IFBS); maintain stable housing; and not use physical discipline with the children.

In June 2017, mother stipulated that the children were CHINS due to mother's use of physical discipline, her failure to properly supervise them, and her guilty plea to simple assault for slapping a neighbor child. At disposition, the court ordered that mother would have custody subject to the conditions in the February 2017 order. The court established a permanency goal of reunification with mother and adopted DCF's case plan.

During the fall of 2017, however, mother's mental health deteriorated and she was unable to provide the children with adequate food and clothing. In November 2017 the court issued a

¹ The children's fathers have not been involved in their lives. The fathers' rights were also terminated in the proceeding below. They did not appeal.

temporary care order transferring custody to DCF. The parties agreed that changed circumstances allowed for modification of the disposition order. In May 2018, the court issued an order continuing custody with DCF and adopted a new case plan with concurrent goals of reunification with mother by October 2018 or adoption. The children were placed with mother's adopted sister, in whose care they remain.

In November 2018, the State moved to terminate parental rights. At the conclusion of a three-day hearing in June 2019, the court made the following oral findings. It found that mother had made significant progress toward the case plan goals. She had maintained stable housing and employment, had consistently attended visits, and had engaged in therapy more regularly. She and the children had a loving relationship.

However, the court found that mother had not demonstrated an ability to retain the skills taught during family time coaching from visit to visit. When the family time coach stopped transporting mother to visits, mother stopped attending pre-visit and post-visit sessions and lost valuable instruction and time to discuss parenting skills. Mother used physical restraints despite being warned not to and was unable to control the children without using her hands. The court found that mother had not made much progress toward being able to resume a parenting role.

The court concluded that mother had stagnated in her progress and that it was in the children's best interests to terminate parental rights. The court found that the children had significant behavioral issues and other needs and that mother would not be able to resume parenting within a reasonable amount of time, as evidenced by the fact that she was still having short supervised visits after two years of receiving services from DCF. It stated that some ongoing contact with mother would be beneficial but that it had no authority to order such contact. Mother appealed.

When considering whether to grant a petition to terminate parental rights, the family court must conduct a two-step analysis. In re B.W., 162 Vt. 287, 291 (1994). First, the court must determine that there has been a substantial change in material circumstances sufficient to justify modification of the existing disposition order. Id.; 33 V.S.A. § 5113. Second, the court must find that termination is in the best interests of the child. In re B.W., 162 Vt. at 291; 33 V.S.A. § 5114(a). We will affirm the court's findings unless they are clearly erroneous, and its conclusions if supported by the findings. In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44.

We first address mother's challenge to the court's finding of changed circumstances. The requisite change in circumstances is often based on a parent's failure to make any progress toward the case plan goals. In re S.W., 2003 VT 90, ¶ 4, 176 Vt. 517. But "the mere fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances warranting modification of a previous disposition order." In re A.F., 160 Vt. 175, 181 (1993). Here, the court found that mother had made significant progress toward some of the case plan goals but her parenting skills had not improved. The record shows that mother received services through the IFBS program, which normally lasts three to six months, for over a year. Mother also worked with a family time coach from October 2018 to May 2019 and continued with supervised family time. Despite receiving these significant parenting supports, she continued to struggle to control the children without using physical restraints. Mother also failed to attend important meetings before and after visits. DCF case workers and the family time coach testified that mother did not retain the skills she was taught from visit to visit and did not show progress. This evidence supports the court's conclusion that mother stagnated in her progress toward improving her parenting skills.

Mother argues that her stagnation was due to factors beyond her control, namely, DCF's failure to provide adequate parenting services and the children's behavioral issues. The record does not support mother's argument. While the children exhibited challenging behaviors at times, the purpose of coaching was to help mother develop the skills to address these behaviors without resorting to physical restraints, as other caregivers were apparently able to do. Mother's failure to attend the pre- and post-visit coaching offered to her and to apply the skills taught by providers was a matter within her own control. See *In re D.M.*, 2004 VT 41, ¶ 6, 176 Vt. 639 ("Changing her own behavior and implementing the many parenting lessons she received from other service providers was and remains fully within mother's control.").

Next, mother challenges the court's finding that she did not play a constructive role in the children's lives. The court found that mother had demonstrated emotional support and affection for the children, but that her role in their lives had not been "entirely constructive because of the failure to progress in being able to control and provide the parenting for the children that . . . was hoped for." It therefore concluded that this factor was either neutral or weighed against mother. As discussed above, the evidence showed that mother continued to use physical discipline that negatively impacted the children and had led to the children entering custody in the first place. This evidence supports the court's finding that mother did not play an entirely constructive role in their lives.

Mother claims that the court should not have terminated parental rights where the evidence showed that she had a loving parental bond with the children and that ongoing contact with her would be beneficial. She argues the court should have considered alternative placement options such as permanent guardianship. "Public policy, however, does not dictate that the parent-child bond be maintained regardless of the cost to the child; [the CHINS statute] recognizes that severance of that bond may be in the child's best interest." *In re M.B.*, 162 Vt. 229, 238 (1994). The court concluded that the statutory factors—including, most importantly, mother's inability to resume parenting the children within a reasonable time—weighed in favor of termination. The court applied the correct standard and its findings are supported by the evidence. We therefore will not disturb its conclusion on appeal. See *In re S.B.*, 174 Vt. 427, 429 (2002) (explaining that this Court's role is not to second-guess family court or reweigh evidence). Moreover, "[w]e have repeatedly rejected the claim . . . that the court must consider less drastic alternatives to termination once it has determined the parent to be unfit and unable to resume his or her parental responsibilities." *In re G.F.*, 2007 VT 11, ¶ 20, 181 Vt. 593. Having reached the conclusion that termination was appropriate, the court was not required to address placement options that might allow for ongoing contact. See *In re T.T.*, 2005 VT 30, ¶ 7, 178 Vt. 496 (explaining that once family court determines child's best interests warrant termination, court need not explain why it is choosing termination over other permanency options).

We also reject mother's argument that the trial court misunderstood its authority or failed to exercise its discretion to issue an order promoting ongoing contact between mother and children. The trial court found that ongoing contact with their mother would be beneficial to the children, and stated that if the Legislature gave the court the authority to impose a post-adoption contact agreement absent a voluntary relinquishment, it would do so. The trial court is correct that having concluded that termination of mother's rights without limitation as to adoption was in the children's best interests, the court had no authority to impose post-adoption contact requirements. See 33 V.S.A. § 5124 (providing for post-adoption contact orders pursuant to an agreement between either or both parents and each intended adoptive parent). To the extent that mother argues that the court could have denied the termination petition and urged DCF to develop a modified case plan for permanent guardianship or transfer of custody to aunt with provisions for parent-child contact with mother, we do not necessarily disagree with her description of the court's

authority. But we cannot conclude that the trial court abused its discretion in declining to do so, especially given the absence of any evidence in the record that either of these dispositions was viable.

Mother also argues the decision below must be reversed because the court did not address the relationship between the children and their younger sister P.P., who is in the custody of her father. Virtually no evidence was introduced regarding this relationship, however, and mother does not explain how the sibling relationship would have altered the court's analysis. We therefore decline to disturb the decision on this basis.

Finally, mother claims that the termination proceeding violated her rights to due process and equal protection under the United States and Vermont Constitutions by treating her and her children differently than two-parent families. Mother failed to preserve these arguments by raising them below. See In re G.F., 2007 VT 11, ¶ 23, 923 A.2d 578 (declining to address constitutional claims not raised before trial court in first instance). Furthermore, assuming that the plain-error doctrine applies in a CHINS proceeding, this is not a case "in which the error, if any, is so obvious, grave, and serious as to warrant reversal." In re D.C., 157 Vt. 659, 660 (1991).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice