

VERMONT SUPREME COURT  
109 State Street  
Montpelier VT 05609-0801  
802-828-4774  
www.vermontjudiciary.org



Case No. 22-AP-105

*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**

AUGUST TERM, 2022

In re C.N. & S.N., Juveniles	}	APPEALED FROM:
(K.S., Mother*)	}	
	}	Superior Court, Orange Unit,
	}	Family Division
	}	CASE NOS. 20-JV-00065, 20-JV-00066
	}	Trial Judge: Timothy B. Tomasi

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

Mother appeals the family court's order terminating her parental rights to juveniles C.N. and S.N., born in November 2017 and June 2019, respectively. On appeal, mother argues that the evidence does not support the court's finding that mother's progress stagnated and that she did not receive effective assistance of counsel at the termination hearing. We affirm.

In June 2020, the Department for Children and Families (DCF) received a report of concern for the children's safety based on the fact that parents had significant substance-abuse and mental-health issues and there was domestic violence in the home. The children were removed from mother's care and following a contested hearing in February 2021 were adjudicated children in need of care or supervision (CHINS) due to lack of proper parental care. The initial disposition plan was adopted by stipulation of the parties. It continued DCF custody and had a goal of reunification with parents. The case plan identified several goals for mother including to demonstrate the ability to supervise the children appropriately, engage in Family Time Coaching, meet with a parent educator, engage in parenting classes, obtain stable housing, participate in a domestic-violence assessment, refrain from criminal activity, engage in a substance-abuse evaluation and treatment, and meet her mental-health needs.

In August 2021, the State filed a petition to terminate parental rights. The petition alleged that the children had been in custody for twelve months and parents had made minimal progress towards addressing the areas of concern.

The court held a hearing on the matter in March 2022. Father voluntarily relinquished his residual parental rights on the first day of the termination hearing. Mother was present at the beginning of the hearing but subsequently left and did not to participate.

The court issued oral findings on the record. The court found that overall mother failed to meet the goals identified in the case plan. As to contact with the children, mother's visits were unsuccessful and twice had to be canceled due to mother's misconduct. The children displayed fear of mother and had anxiety prior to visits. They hid from mother under the table. Due to mother's behavior, the court entered several protective orders and visits had to be supervised with a sheriff present for protection. Mother did not help the children address their trauma-induced behavior. Mother did not meet with a parent educator or engage in parenting classes. Mother did not express understanding regarding the need for stable housing and remained homeless and without steady income at the time of the final hearing. Mother did not participate in a domestic-violence assessment and continued to make verbal threats and engage in verbal and physical aggression with father during visits. Mother completed a substance-abuse assessment but did not engage fully in her substance-abuse treatment and did not maintain a sober lifestyle. Mother was under the influence of drugs during visits with the children. Mother obtained a mental-health assessment and did engage for a couple of months in treatment. Mother then stopped counseling and taking her recommended medication and regressed. Mother had a psychotic episode in May 2021 that required hospitalization.

The court found that this lack of progress amounted to a change of circumstances. The court was particularly concerned about mother's lack of progress towards addressing her substance use and mental-health challenges. The court further concluded that termination was in the children's best interests. The court found that mother had taken little action toward being able to resume parenting. She did not engage in mental-health treatment, she did not successfully complete a substance-abuse program, she lacked stable housing, she did not engage in parent education or domestic-violence services, and her mental-health and substance-abuse needs remained untreated. The court determined that mother would not be able to resume parenting within a reasonable time and was not a positive influence on the children. The court found that the children's needs were being met by their foster parents, the children were happy in their placement, and that the foster parents intend to adopt. The court granted the petition to terminate. Mother appeals.

To terminate parental rights when there is an existing disposition order, the family court must first find there was a change of circumstances and then that termination is in the child's best interests. In re B.M., 165 Vt. 331, 335-36 (1996). 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 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. In re A.F., 160 Vt. 175, 178 (1993).

Mother first argues that the evidence does not support the court's finding that there was a change of circumstances due to stagnation. A change of circumstances may occur "when the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. 287, 291 (1994) (quotation omitted). Stagnation cannot be based on factors beyond a parent's control. In re S.R., 157 Vt. 417, 421-22 (1991). Mother argues that

stagnation was caused by her relationship with her DCF caseworker, and this was a circumstance outside her control. The trial court found that mother had ongoing mental-health issues, and that these issues caused her to think that the caseworker was a person from her past and was trying to kill her. Mother asserts that her interactions with her caseworker led to her visits being suspended and to the presence of law enforcement at visits. She claims this was a matter beyond her control and posits that if she had been able to effectively communicate with her caseworker, she could have made more progress towards reunification.

The State responds that mother failed to preserve this argument for appeal. See In re R.L., 148 Vt. 223, 226 (1987) (holding that failure to raise objection below waives claim on appeal). We need not determine if the argument was preserved because we conclude it lacks merit. The court's findings, based on undisputed evidence, support the court's determination that mother's lack of progress was the result of circumstances within mother's control. The court identified at least four major areas where mother made little or no progress to address the conditions that caused the children to be taken into custody: parenting skills and education, mental-health treatment, substance use, and housing. In all these areas, mother's lack of action or success was fully within her control. Mother chose not to follow through on mental-health treatment, work with a parent educator and engage with other parenting services, commit to substance-abuse treatment, or engage with services to address her housing. Therefore, the court properly concluded that there was a change in circumstances due to stagnation.

Mother next contends that her counsel was ineffective because he failed to present any evidence at the termination hearing or to challenge evidence presented. Assuming that an ineffective-assistance claim may be raised, mother has failed to establish the necessary elements. See In re K.F., 2013 VT 39, ¶ 22, 194 Vt. 64 (declining to address whether ineffective-assistance claim may be raised in juvenile proceeding and evaluating ineffective-assistance claim under standard used in criminal context). An ineffective-assistance claim requires a parent to "show by a preponderance of the evidence that (1) counsel's conduct fell short of the prevailing standard of a reasonably competent attorney, and (2) this incompetence was sufficiently prejudicial to create a reasonable probability of a different result." In re M.B., 162 Vt. 229, 234 (1994) (quotation omitted).

We do not reach the question of whether counsel's conduct fell below the prevailing standard of reasonable competence because mother has not shown that she was prejudiced by counsel's performance. Mother's general argument is that her attorney failed to challenge the State's evidence, did not cross examine witnesses, and did not present any evidence on mother's behalf. Mother contends that if she had been able to participate fully in the TPR hearing, she would have shown how strained her relationship was with her DCF caseworker.

At the outset, it is important to emphasize that the fact that mother was not present at the hearing and that her absence may have impaired counsel's ability to challenge the State's evidence was a matter totally within mother's control and not a product of counsel's performance. The court gave mother permission to attend the final hearing in person, but mother chose to join the meeting briefly by telephone and then to leave.

Mother speculates that if her attorney had cross-examined her caseworker, it may have revealed more about her relationship with her caseworker and would have provided more clarity on the reasons for her suspended visits. Even accepting these suggestions as true, mother has not

demonstrated how this would have altered the court’s critical findings on the children’s best interests. The court found that mother had “shown little inclination or ability to take the steps necessary to resume her parental duties within a reasonable period.” As outlined above, mother was offered services to address a variety of concerns impacting the children’s welfare and did not take action. Most critically, mother failed to engage in services to treat her substance use and her mental-health needs. After almost two years in custody, the issues that caused the children to be removed from parents’ custody remained without improvement. Mother has not shown that there is a reasonable probability that cross-examination of the DCF caseworker would have altered this result.

Affirmed.

BY THE COURT:

---

Karen R. Carroll, Associate Justice

---

William D. Cohen, Associate Justice

---

Nancy J. Waples, Associate Justice