

VERMONT SUPREME COURT  
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Case No. 23-AP-218

*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**

DECEMBER TERM, 2023

In re K.W., Juvenile	}	APPEALED FROM:
(C.W., Mother*)	}	
	}	Superior Court, Bennington Unit,
	}	Family Division
	}	CASE NO. 22-JV-01789
		Trial Judge: Howard A. Kalfus

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

Mother appeals a family division order concluding that her daughter K.W. was a child in need of care or supervision (CHINS) due to abuse. On appeal, mother argues that the law and the facts do not support a finding of abuse, the court erred by adjudicating the CHINS abuse allegation after mother stipulation that the child was CHINS due to being out of control, and the court exceeded its authority by modifying the disposition goal. We affirm.

In December 2022, mother contacted the Vermont State Police to report that her fifteen-year-old daughter K.W. was missing and had not been in school for several days. A trooper contacted K.W., and K. W. agreed to meet. K.W. reported that mother was abusive and had physically hit her during an argument, leaving a bruise. K.W. alleged that mother brought her to New York against her will and locked her in a closet for two days. K.W. agreed to enter the custody of the Department for Children and Families (DCF), but refused to return to mother's care. The State filed a two-count petition alleging that K.W. was CHINS both due to abuse, CHINS-A, and because she was beyond mother's control, CHINS-C.\* Following an emergency care hearing, the family division found, among other things, that during a disagreement mother punched K.W.'s arm leaving a bruise. The court made no finding on the veracity of K.W.'s claim of being locked in a room. The court found that the State had proven that K.W.'s safety

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\* There are four possible categories of CHINS under the statute and the labels of abuse, CHINS-A, and beyond a parent's control, CHINS-C, derive from the statutory subsections of those definitions. See 33 V.S.A. § 5102(3)(A), (C) (defining CHINS).

could not be ensured by returning her to mother's care and therefore continued temporary custody with DCF.

In March 2023, the court held a hearing on the merits of the CHINS petition. At the start of the hearing, the parties stipulated that K.W. was CHINS-C because her behaviors placed her beyond mother's control. The State indicated that it intended to proceed on the CHINS-A allegation, and the court set a hearing for disposition on the CHINS-C and a merits hearing on the CHINS-A. At the merits hearing for the CHINS-A count, the court indicated that it would limit testimony to topics not covered in the temporary-care hearing. K.W. testified that mother was angry with her and hit her with her fist. Mother denied punching K.W. and alleged that K.W. fabricated the events so she could stay with relatives in a more permissive environment. The court credited K.W.'s account of the events over mother's and found that the State met its burden of proving that mother hit K.W. The court rejected mother's argument that a single strike that causes a bruise is insufficient under the statute to amount to abuse. The court concluded that K.W. was CHINS because she was abused.

The proposed case plan had a goal of reunification with mother. K.W.'s attorney emphasized that K.W. did not want to return to mother's care and advocated for an alternative goal. The court indicated that it was considering adopting concurrent goals of reunification and another planned permanency living arrangement (APPLA). Mother objected to a concurrent goal. The court issued a disposition order continuing custody with DCF and set concurrent goals of reunification or APPLA. Mother filed this appeal.

“[T]he focus of a CHINS proceeding is the welfare of the child.” In re B.R., 2014 VT 37, ¶ 13, 196 Vt. 304 (quotation omitted). The State has the burden of proving the allegations in the petition by a preponderance of the evidence. 33 V.S.A. § 5315(a). “On review, we will uphold the trial court's findings unless they are clearly erroneous, and the court's legal conclusions will stand when supported by the findings.” In re A.O., 2023 VT 54, ¶ 9 (quotation omitted). We defer to the family division's assessment regarding the credibility of witnesses and the weight of the evidence. In re M.E., 2019 VT 90, ¶ 12, 211 Vt. 320.

On appeal, mother first challenges the court's finding that she abused K.W., both as a legal and factual matter. As to the facts, mother argues that the evidence does not support the court's finding that mother hit K.W. In support, she alleges that K.W.'s testimony was weak and provides reasons why the court should have credited mother's account over K.W.'s. As the trier of fact, we defer to the family division's assessment concerning the weight and credibility of the evidence and will not reweigh the evidence on appeal. In re H.T., 2020 VT 3, ¶ 34, 211 Vt. 476. Because there was adequate evidence to support the court's finding that during an argument mother hit K.W. causing a bruise, there are no grounds to disturb this finding. Mother also argues that the court erred in limiting the presentation of evidence. The trial court has discretion to control the presentation of evidence and acted within its discretion here. Moreover, mother has not demonstrated what additional evidence would have been presented that would have impacted the court's finding of abuse, which rested on K.W.'s credible testimony. See In re K.G., 2023 VT 51, ¶ 47 (concluding that any error in limiting parent's “ability to question witnesses or present evidence was harmless as it would not have changed the outcome”); In re B.A., 2014 VT 76, ¶ 16, 197 Vt. 169 (explaining that reversal not warranted where no prejudice resulted from admission of irrelevant evidence).

Next, mother argues that, even if she struck K.W., one incident of physical force is insufficient to constitute abuse within the meaning of the statute because the court did not make a concurrent finding regarding mother's intent. The juvenile judicial proceedings act does not define "abuse." The statute on reporting child abuse defines "abused or neglected child" to include "a child whose physical health . . . is harmed or is at substantial risk of harm by the acts or omissions of his or her parent." 33 V.S.A. § 4912(1). Mother relies on a case involving a request for a relief-from-abuse order on behalf of a child and applying the definition of "abuse" in 15 V.S.A. § 1101(1)(C), which incorporates the definition of § 4912, and requires a larger degree of physical harm to show child abuse than that required for domestic abuse between adults. See Wood ex rel. Eddy v. Eddy, 2003 VT 67, ¶ 12, 175 Vt. 608 (mem.). This Court has not adopted the § 4912 definition of abuse for CHINS proceedings because of the differences between the goals of the child-abuse registry and the juvenile proceedings statutes, but we have used the definition for "guidance." In re M.K., 2015 VT 8, ¶ 12, 198 Vt. 233. In the context of a CHINS proceeding where the focus is on protection of the child and not punishment of parents, "we must liberally construe the relevant terms to carry out the central purpose of neglect and dependency proceedings." Id.

Here, the family court did not err in determining that mother's actions amounted to abuse under the CHINS statute. The family court credited K.W.'s account that during an argument mother struck K.W. in the arm, causing K.W. pain and a bruise to form. The family court was not persuaded by mother's assertion that the incident did not occur and was fabricated by K.W. This Court has interpreted even the narrow definition of abuse in § 4912 to include instances where a parent inflicts physical harm out of anger rather than for a corrective purpose. See State v. Martin, 170 Vt. 614, 616 (2000) (mem.) (explaining in criminal context that punishment fueled by anger rather than corrective purpose is not discipline). Here, although the family court did not make an explicit finding that mother's action was out of anger rather than for corrective action, it was implicit from the context and other findings. Mother alleged that K.W. fabricated the events; she did not claim that her physical action was for discipline or corrective action. Under these circumstances, the family court did not err in concluding that mother's act of hitting K.W. amounted to abuse under the CHINS statute.

Mother next argues that the court erred by allowing the State to pursue the CHINS-A allegation after mother stipulated that K.W. was CHINS-C. Mother contends that this amounted to punishing mother rather than advancing K.W.'s welfare. We do not address this argument because mother did not raise it below and has therefore failed to preserve it for appeal. See In re B.A., 2014 VT 76, ¶ 15, 197 Vt. 169.

Finally, mother argues that the court exceeded its authority under the statute by modifying the proposed goal of reunification to include a concurrent goal of reunification and APPLA. The State asserts that the statute permits the court to modify the goal where no change in the case plan is required. See 33 V.S.A. § 5318(b) (providing court with authority to "establish a permanency goal for the minor child" and indicating that if plan does not adequately support goal court must reject plan); see also In re D.F., 2018 VT 132, ¶ 5 n.1, 209 Vt. 272 (noting that family court added concurrent goal of reunification with father on its own initiative and explaining that because case plan did not contemplate reunification with father, court should have rejected proposed case plan). We conclude that mother has not preserved this argument for appeal. Although mother objected to the court adopting concurrent goals or a goal of APPLA, at

no time did mother argue that the court lacked authority under the statute to revise the goal without rejecting the entire case plan. Because this issue was not preserved for appeal, we do not address the merits of the argument.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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William D. Cohen, Associate Justice

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Nancy J. Waples, Associate Justice