

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. 2018-078

JUNE TERM, 2018

In re A.D., Juvenile	}	APPEALED FROM:
(S.G., Mother*)	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 168-5-16 Cnjv
		Trial Judge: Kevin W. Griffin

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

Mother appeals the termination of her parental rights to her two-year old daughter A.D. We affirm.

A.D. was born in April 2016. A few days after her birth, the Department for Children and Families (DCF) filed a petition alleging that she was a child in need of care or supervision (CHINS). The grounds for the petition were the parents' inadequate housing, substance abuse in the home, father's status as a sex offender with restrictions on contact with minors, and mother's untreated mental health issues. In June 2016, the parties stipulated to the merits of the CHINS petition. The court approved a conditional custody order transferring custody of A.D. to her paternal grandmother, where she has lived ever since.

The court subsequently approved a disposition case plan with concurrent goals of adoption or reunification with both parents. The case plan, as amended by the court, required mother to undergo a mental health assessment and engage in treatment, to take a parenting class, to participate in team meetings and in the Easter Seals Family Time Coaching program, and to maintain a safe and stable home free from substance abuse and domestic violence. Mother and father made virtually no progress on the case plan goals, and in the meantime had another child, who was also removed from their care and placed with paternal grandmother. In March 2017, A.D.'s attorney filed motions to terminate mother's and father's parental rights to A.D.

The termination hearing was held in February 2018. Father appeared and voluntarily relinquished his parental rights. Mother did not appear. Her attorney told the court that mother knew about the hearing but was not feeling well and did not plan to attend. Mother's attorney then received a message from mother asking if she could listen in by telephone. The court noted that mother lived a mile away and that she had been inconsistent in attending prior hearings. Mother's attorney told the court that mother had PTSD and became extremely upset at hearings, which was why she did not attend. The court granted permission for mother to appear by telephone.

Mother's attorney called mother and the following exchange took place:

[Mother's attorney]: I'm calling you from the court line. Do you still want to listen in on the hearing?

Mother: Yes, but I'm not testifying.

[Mother's attorney]: If she listens, does she have to?

[DCF's attorney]: I think she has to. I mean, I would want to ask her a few questions, definitely.

[Mother's attorney]: So [mother], if you're—if you are present for the hearing by phone then you could be called as a witness by the State and you must be asked some questions.

[Mother]: No, (indiscernible) they'll hurt me again. No, I'm not doing it.

Mother then hung up. The court told mother's attorney that it was willing to allow mother to participate by phone and that "part of participation by phone would be that she would be available to give testimony if any of the attorneys wish to ask her questions, including you, if she wanted to be heard on the issue of whether she opposes the TPR." There is no evidence the attorney communicated this information to mother. Mother did not call back, and no party attempted to call her as a witness.

After hearing testimony from the DCF caseworker and the grandmother, including cross-examination by mother's attorney, the court granted the termination petition in a decision entered on the record. It concluded that mother had stagnated in her ability to parent A.D. and that termination was in A.D.'s best interests because mother had never played a constructive role in A.D.'s life, had little if any bond with A.D., and was unlikely to be able to resume parental duties within a reasonable time.

Mother does not challenge the court's findings and conclusions on appeal. Instead, she argues that her due process right to be present at the termination hearing was improperly conditioned on her being a witness; that her testimony was unnecessary to DCF's case; and that the court improperly used her absence against her in granting the termination petition.

Mother's arguments are unavailing. Although mother left the proceeding before DCF had a chance to do so, DCF could have called mother as a witness if it chose. See V.R.E. 611(c) (governing examination of adverse party); Milne v. Shell Oil Co., 129 Vt. 375, 377 (1971) (holding, under predecessor statute to V.R.E. 611, party may call adverse party as witness in civil case). In turn, the trial court could have compelled mother to testify if requested, subject to the privilege against self-incrimination, which was not asserted here. See 33 V.S.A. § 5108 (stating court has power to order parent to appear at any hearing and may issue warrant to compel attendance); id. § 5109 (giving court power to issue subpoenas requiring attendance and testimony of witnesses); Milne, 129 Vt. at 377. The trial court did not "condition" mother's participation on her having to testify; the court merely told mother what to expect if she decided to attend. Mother appears to believe that the court should have allowed her to participate as a silent observer due to her mental illness. However, mother did not assert a specific disability or request any accommodation from the court. When told that she might be asked to testify, she simply hung up. It was not improper for the court to draw an adverse inference from mother's decision to voluntarily absent herself from the hearing, particularly in light of her history of poor attendance to visits with A.D. and court hearings in this case.

Further, mother does not challenge any of the court’s findings or conclusions or otherwise explain how the outcome of the proceeding would have been different if she had been permitted to listen in without having to testify. See In re C.R., No. 2016-108, 2016 WL 4446598, at *2 (Vt. Aug. 19, 2016) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo16-108.pdf> (holding mother’s absence from termination hearing did not warrant reversal where mother appeared at beginning of hearing but then left courthouse and did not return, attorney represented her during remainder of hearing, and mother did not point to any particular error by court or attorney). It is clear from the record that mother received notice and initially participated in the termination hearing, but then chose to absent herself. “That [s]he hung up the phone, for whatever reason, and thus ended [her] participation, should not deprive the court of jurisdiction over [her] to go forward and determine the fate of the child in this case.” In re J.L., 2007 VT 32, ¶ 13, 181 Vt. 615 (finding no due process violation where father, who was incarcerated, received actual notice of termination hearing and initially participated in hearing by phone but then hung up). “The only issues before the court at termination are whether there has been a substantial change in material circumstances and whether termination is in the child’s best interests.” In re K.F., 2013 VT 39, ¶ 29, 194 Vt. 64. Mother fails to explain how the alleged error affected the court’s findings and conclusions regarding either of these elements. We therefore see no reason to disturb the decision below.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice