

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-081

JUNE TERM, 2017

In re S.S., N.S., S.P. and Z.A., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 103/104/105-6
		Trial Judge: Mary L. Morrissey

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

Mother appeals the superior court's order terminating her parental rights with respect to her children, S.S., N.S., S.P., and Z.A. \* We affirm.

S.S. and N.S. are twins born in December 2007. S.P. was born in April 2009. The Department for Children and Families (DCF) worked with mother through an open family case plan from 2009 until June 2015, when it sought custody of the three children due to mother's unaddressed mental health and substance abuse issues and her inability to meet the children's basic needs. At that time, the children were placed in DCF custody pursuant to an emergency care order. In October 2015, the superior court found the children to be in need of care or supervision (CHINS) based on mother's admissions as to her untreated mental health and substance abuse issues and her inability to meet the children's basic needs. In December 2015, the court entered a disposition order that continued DCF custody and approved a case plan with concurrent goals of reunification and adoption. The case plan expected mother to address substance abuse and mental health issues, housing, and visitation.

Unfortunately, mother failed to address her mental health and substance abuse issues. She did not consistently participate in mental health counseling or complete a substance abuse assessment. In March 2016, while late in her pregnancy with Z.A., she tested positive for cocaine, opiates, and oxycodone. In April 2016, she tested positive for Suboxone and Ritalin. On April 29, 2016, three days before giving birth to Z.A., mother overdosed on heroin. Z.A. was born with drugs in his system and had to be transferred from the Northwest Medical Center to the University of Vermont Medical Center for more intensive care due to a spike in his withdrawal symptoms. He was placed into DCF custody on the day of his birth, and DCF filed a CHINS petition.

On June 6, 2016, DCF filed petitions to terminate parental rights with respect to the three older children. On June 29, 2016, mother agreed to an adjudication of CHINS with respect to Z.A., admitting that she had ongoing substance abuse issues and had not fully engaged in

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\* The father of S.S. and N.S. voluntarily relinquished his parental rights. The parental rights of the father of S.P. were terminated in the proceeding below, but he has not appealed that determination. A petition to terminate the parental rights of the father of Z.A. is pending.

recommended services. On August 10, 2016, DCF filed petitions to terminate the parental rights of Z.A.'s parents in accordance with the recommended goal in the disposition plan. The cases of the four juveniles were consolidated in September 2016.

In October 2016, mother filed a motion in which she requested that conditional custody of the four children be granted to the maternal grandmother. The superior court consolidated the motion with the termination petitions. The motion and petitions were heard together on December 19-20, 2016. In a January 24, 2017 decision, the superior court denied mother's motion for conditional custody and terminated her parental rights to all four children.

The court considered mother's conditional custody motion under 33 V.S.A. § 5113(b), which provides that the court may, upon a party's motion, modify an order "on the grounds that a change in circumstances requires such action to serve the best interests of the child." The court determined that, even assuming mother could show changed circumstances resulting from DCF's change in its disposition plan from reunification to adoption with respect to the three older children, it was not in any of the children's best interests to be placed in the custody of the maternal grandmother. In its findings, the court noted that both mother and DCF had opposed the maternal grandmother's request for the children to be placed with her after they were taken into DCF custody. A DCF social worker testified that the grandmother had engaged in threatening, unpredictable, and erratic behavior over the previous eighteen months, eventually necessitating a trespass order prohibiting her from coming to the DCF office. Further, DCF had denied the grandmother a license to be a foster parent. The court noted the DCF social worker's testimony that it was her "understanding" that the grandmother's mental health was a significant factor in that decision. The court concluded that the grandmother's interactions with DCF raised significant concerns regarding her ability and/or willingness to work with service providers who were necessary to ensure the children's wellbeing. The court also noted the grandmother's denial of mother's substance abuse problems, despite mother's own admission as to her continuing problems.

Examining the best interest factors contained in 33 V.S.A. § 5114(a), the court found that: (1) the grandmother had no relationship with Z.A. and that removing the infant from the foster family with whom he had bonded "would be detrimental to both his stability and wellbeing"; (2) the other three children had had no substantive contact with the grandmother since they came into DCF custody eighteen months earlier; (3) it was questionable how much contact the maternal grandmother had had with the children even before they came into DCF custody, given the grandmother's lack of familiarity with, or failure to recognize, the circumstances that led to them being placed in DCF custody; (4) there was no evidence that the grandmother was equipped to deal with the children's individualized needs; (5) the children were currently safe and stable in their foster homes and had significant ties to their schools and communities; (6) S.S. and N.S. were with foster families that had expressed an interest in adopting them; and (7) the children cannot be safely placed together in the same home, which rendered mother's request an impossibility. The court concluded that placing the children with the grandmother would bring instability and unpredictability into their lives when their paramount need was permanency.

On appeal, mother argues that the superior court's reasons for denying her motion to grant conditional custody to the grandmother are legally and factually unsound. Aside from the denial of her motion for a conditional custody order, mother does not challenge the findings or conclusions concerning the termination of her parental rights. Regarding the unchallenged fact that the children cannot be placed together, mother argues that the court failed to consider placing one or more of the children with the maternal grandmother. Regarding the children's unchallenged

need for permanency, mother points out that at this time adoption is a relative certainty for only one of the four children. As for the grandmother not having contact with the children during the previous eighteen months, mother asserts that at least three of the children face the prospect of living with people with whom they have never had any contact. With regard to the basis for the grandmother being denied a foster care license, mother argues that the social worker's testimony that she imagined the denial was based on the grandmother's mental health issues was speculative and could not be considered evidence of the reason for the denial. Finally, regarding the court's concerns that the grandmother would not be able or willing to work with DCF, mother points out that the friction between the grandmother and DCF had to do with her desire to be the children's custodian and nothing to do with a disagreement over services for the children.

We conclude that mother's arguments are unavailing. Even apart from the challenged findings, the superior court's findings and conclusions, which are supported by the record, amply support its decision to deny mother's motion to have the children conditionally placed with the maternal grandmother. See In re A.F., 160 Vt. 175, 178 (1993) (stating that, notwithstanding deletion of challenged finding and portion of conclusions based on that finding, court's remaining findings were supported by record and were sufficient to sustain decision to terminate mother's parental rights). Regarding mother's specific arguments, the court's finding concerning the basis for the denial of the grandmother's application for a foster care license played no role in its best-interests analysis. Thus, to the extent that the court's finding was erroneous, it was harmless. As for the court's concern that the grandmother would not be able and/or willing to work with DCF, the court found credible the DCF's caseworker's testimony regarding mother's threatening and unpredictable behavior during the previous eighteen months, which supported the court's concerns. See In re B.C., 2013 VT 58, ¶ 21, 194 Vt. 391 ("When findings are challenged on appeal, our role is limited to determining whether they are supported by credible evidence, leaving it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." (quotations omitted)).

Regarding mother's complaint that the superior court did not consider placing one or more of the children with the grandmother, neither mother in her motion nor the grandmother at the hearing ever requested such a possibility in the alternative. In examining the best-interests criteria, the court considered each of the children's circumstances individually in determining whether the best interests of each child would be served by placing the child with the grandmother. No more was required. The court was not obligated to grant relief that was not requested.

As for mother's claim that the court's reliance on the children's need for permanency did not support its decision to deny the motion, adoption is rarely, if ever, guaranteed in juvenile cases, and an adoptive home is not a required element of the court's best-interests analysis. See In re R.B., 2015 VT 100, ¶ 20, 200 Vt. 45 ("There is nothing in the statutory best-interests criteria that requires (or precludes) consideration of the particular permanency plan contemplated for the child, the need for or likelihood of adoption, or the suitability of prospective adoptive parents."); In re J.D., 165 Vt. 440, 444-45 (1996) ("Juvenile proceedings often involve difficult predictions about the future. Best judgment, rather than perfection, is our standard."). Furthermore, conditional custody placement is intended to be an interim measure that establishes a temporary caretaking situation for a child until a more desirable permanency option, such as reunification, adoption, or permanent guardianship, can be achieved. See 33 V.S.A. § 5320a(a) (providing that presumptive duration of initial conditional custody order following disposition is six months from date of disposition order and that court, upon motion, may extend order for additional period not to exceed six months). Even if the court had found the grandmother to be a suitable caregiver for the children, which it did not, it would not have been irrational for the court to maintain the children's

current custodial status with DCF so that they could remain in their current homes and communities while moving forward on the permanency plan of adoption, rather than disrupt their stability by transferring custody to the grandmother under a conditional custody order.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice