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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-435

APRIL TERM, 2017

In re W.S. & J.S., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Essex Unit,
	}	Family Division
	}	
	}	DOCKET NO. 7/8-7-15 Exjv
		Trial Judge: Robert R. Bent

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

Father appeals from an order terminating his parental rights in his sons W.S. and J.S. Mother voluntarily relinquished her rights. Father attempts to challenge the court's determination that the children were in need of care or supervision (CHINS) as well as the disposition order. These orders are not on appeal and we do not address these arguments. Father also asserts that the court erred in finding that he had stagnated in his ability to parent and that termination of his rights was in the children's best interests. We affirm the court's decision.

The following summary is drawn from the record and the trial court's findings. The Department for Children and Families (DCF) became involved with the family in November 2014 after mother reported to police that father had sexually assaulted J.S. J.S. was five months old at the time; W.S. was two-and-a-half years old. The family was living with the children's maternal grandmother. Mother told police that the family was in bed together and parents were having sex. Father lost his erection and mother began manually stimulating him. Father started to regain his erection, and when mother looked over at him, father was groping J.S. Mother confronted father, and father offered various explanations for his conduct. Father spoke to grandmother about the incident. He told grandmother he had been sexually abused as a child. Grandmother told father to leave; father became distraught, picked up a gun, and threatened to kill himself. Mother also reported to investigators that father masturbated frequently while the children were in bed with him. In January 2015, father was charged with lewd and lascivious conduct with a child. Father ceased contact with the children after January 2015.

Mother obtained a relief-from-abuse (RFA) order against father, which satisfied DCF that steps were being taken to protect the children. Mother and father reunited, however, and in early July 2015, DCF learned that mother had dismissed the RFA order and was allowing contact between father and the children. Mother had also initiated a parentage action and stipulated to unsupervised contact between father and the children. Mother was reportedly using drugs and alcohol. In July 2015, the children were taken into emergency DCF custody. At an August 2015 hearing attended by parents and their attorneys, mother stipulated that the children were CHINS. Specifically, mother agreed that "W.S. and J.S. are [CHINS] because they were without proper parental care for their well-being because after making allegations against father regarding misconduct between father and J.S., mother [] signed a parental rights stipulation allowing unsupervised visits between J.S. and W.S. and their father [], and after DCF requested

her not to allow contact, she did so." Father did not object to this stipulation, nor did he appeal from the court's CHINS decision.

The court held a disposition hearing over two days in the fall of 2015. Parents attended with their attorneys. The disposition plan contemplated either adoption or reunification with mother. Father expressly did not seek reunification with him given his pending criminal charge. His lawyer explained, "[h]e would like to be considered as a person for reunification, but we understand with the current situation of his charges still pending that at this time that's not an argument we would make at this time."

The case plan required father, among other things, to have a psychosexual evaluation and to follow any treatment recommendations. Whatever reservations father might have had on the first day of the disposition hearing, his attorney made clear to the court on the second day that he, like mother, had no objections to the plan with the exception of whether the children should be placed with maternal grandmother. His counsel specifically stated, "[a]t this point he's not in disagreement with the plan as a whole," but instead only contested DCF's proposed placement of the children. The disposition hearing thus focused on whether grandmother was a suitable placement option.[1] At the close of the hearing, the court considered placing the children with grandmother but determined that it was in their best interest to remain in DCF custody.

Following its placement ruling, the court also discussed the disposition plan with the parties on the record, including the requirement that father have a psychosexual evaluation. Father's attorney specifically acknowledged that father was required to get a psychosexual evaluation and follow any of the treatment recommendations. The court explained to the parties that if they objected to something DCF asked them to do, they should raise that issue with their lawyers rather than simply not complying. The court signed a disposition order consistent with its on-the-record statements on November 24, 2016. The date-stamped order is in the trial court file. Father did not appeal from the disposition order. In early January 2016, DCF changed the disposition goal for the children to adoption.

Around the time of the disposition hearing, DCF also moved to terminate father's parent-child contact because the children were experiencing great distress after visits. The court held a hearing on this issue in July 2016, which included the submission of a trauma assessment conducted through the Northeastern Family Institute (NFI). The NFI evaluation showed, and the court found by clear and convincing evidence, that both children had been affected by developmental trauma and they were in a pathological state. Contact with father triggered hyperarousal in the children, which did not let their stress level return to an acceptable range. While the boys had made progress in their foster home, contact with father continued to slow down their healing. The court found that the current harm to the children from visits warranted a suspension of contact.

DCF subsequently moved to terminate parents' rights, and following a hearing, the court granted its request. In addition to the findings noted above, the court found that the children had developmental delays; W.S.'s delays were substantial. The boys also exhibited concerning behaviors, including a consistent inability to sleep. W.S. also would sexually hump a ball after visiting with father, and make

[1] In his briefing, father suggests that he contested the case plan goal and requirements and complaints that despite his objections, "the only evidence that was presented pertained to mother, and mother's request that the children be placed with the grandmother." As noted above, the transcript reflects that the disposition hearing was conducted pursuant to an agreement of all concerned, including father, and that the case plan and goals were uncontested other than the placement of the children pending further order.

humping motions on the couch and in the bathtub. He would have tantrums, throwing himself on the ground, and he was aggressive toward others. After visits with father stopped, the boys began sleeping better and they seemed happier, more energetic, and less preoccupied.

The court found that father visited the children weekly until visitation was suspended. Father did not timely attend to the other case plan requirements, however, including completing a psychosexual evaluation and a mental health assessment. Father finally contacted a mental health/substance abuse clinic for an assessment in April 2016, although DCF was not advised of these appointments until after the TPR hearing commenced. The assessment recommended that father abstain from all substances and attend individual substance abuse and mental health counseling. There was no evidence that father continued therapy beyond two visits, and father did not advise his therapist of the facts underlying the pending case or the allegations involved. Father did not complete a psychosexual evaluation. The court found it unclear whether DCF ever assisted father in setting one up or how it proposed to process or implement an evaluation given father's pending criminal charges. Father flatly denied inappropriate touching at the TPR hearing. The court did not credit his denial of physical contact with J.S. as described by mother, nor did it credit mother's recantation of those allegations. It did credit the evidence that father said that he had been sexually abused as a child.

As to the children, the court found that they were doing very well in their foster placement and that their behavior had greatly improved. The foster parents sought to adopt the boys if they were freed for adoption.

Based on these and numerous additional findings, the court found that father had stagnated in his ability to parent. He had done nothing, or very little, toward meeting the conditions set forth in the case plan. The boys were particularly vulnerable and needed a parent equipped with sufficient skills and sound mental health to attend to their needs. Father's failure or refusal to engage in any of the requested mental health and/or psychosexual evaluations created a standoff as to how the case could move forward. The impasse was not surmounted, although the court found it within father's power to do so. The court determined that it was father's failure to act on the recommendations for evaluations that created stasis in the case. By failing to cooperate with DCF, father failed to progress beyond weekly supervised visits. In short, the court saw no improvement in father's capacity to care for the children.

Turning to the statutory best-interest factors, the court concluded that they all supported termination. As to the most important factor, the court found no likelihood that father could resume parental duties within a reasonable period. He had made no progress toward answering the question of whether he posed a sexual risk to his children. His failure to timely engage in mental health and substance abuse assessments, as well as his failure to make headway in following the treatment recommendations, left the court unable to reach conclusions about his parenting capacity for such injured children and whether it would be safe for father to have unsupervised time with them. Father appealed.

All of father's arguments on appeal turn on the timely proof, or lack thereof, of the allegations of sexual misconduct by father that underlay the CHINS determination, the disposition case plan approved by the court, and the court's ultimate termination decision. In particular, father argues that both the CHINS determination and the disposition order and its requirement that father undergo a psychosexual evaluation were issued without any evidentiary basis to support the underlying allegations of sexual misconduct. His rights cannot be terminated largely on account of his failure to engage in a psychosexual evaluation, father argues, when the State has never proven by any standard that he engaged in conduct warranting the psychosexual evaluation requirement in the first place. Moreover, father argues that the court's finding

at the TPR hearing on the critical question of whether father engaged in sexual misconduct with one or both of the children was supported only by hearsay testimony, in violation of father's constitutional rights.

The force of father's arguments is considerably undermined by the positions and actions he took throughout the trial court proceedings—particularly at the CHINS and disposition hearings.

Father first argues that the court erred in issuing a CHINS merits determination based on mother's stipulation to the CHINS finding when he did not enter into a stipulation.[2] No party filed a timely appeal of the CHINS decision, and under the law then in effect, that decision became final in 2015.[3] Father cannot collaterally attack the CHINS decision in this appeal. See In re C.P., 2012 VT 100, ¶ 28, 193 Vt. 29 (recognizing, under statute in effect at time of CHINS decision here, that CHINS determination is final appealable order and cannot be collaterally attacked); In re D.D., 2013 VT 79, ¶ 32, 194 Vt. 508 (holding, under statute in effect at time of CHINS order here, that party must appeal from CHINS decision within thirty days and cannot wait to appeal until after issuance of disposition order). To the extent that father asserts that the CHINS decision is void for lack of jurisdiction, we reject that argument. In re C.P., 2012 VT 100, ¶ 18 (rejecting similar argument, and explaining that "a challenge made on subject matter grounds must show that the court lacked jurisdiction over the general category of case").

Father likewise argues that his failure to comply with the case plan requirement of a psychosexual evaluation cannot support his ultimate termination because that requirement was itself unwarranted and unsupported by any judicial findings that father engaged in conduct that warranted such an evaluation. In essence, he seeks to collaterally attack the court's disposition order.

We decline to reach father's challenge to the psychosexual evaluation requirement for two reasons. First and foremost, as set forth above, at the disposition hearing, father did not contest the requirement or put the State to its proof as to its necessity. After the disposition hearing, father's challenges with the psychosexual evaluation requirement did not surface in the court record until April 2016, well after the disposition order. In a pretrial conference, father's counsel represented to the court that the psychosexual evaluator could not complete an evaluation without father admitting the allegations of sexual abuse. Counsel noted at that time that there had been a recantation. At the time of the disposition hearing, by contrast, father, through counsel, affirmed that he had no objection to the requirements of the case plan and maintained that position throughout the proceeding—even after the trial court specifically flagged the psychosexual evaluation requirement. By accepting the evaluation condition, father forfeited his opportunity to challenge its necessity.

Second, father did not appeal the disposition order that included the psychosexual evaluation requirement. In re R.M., 2013 VT 78, ¶ 8, 194 Vt. 431 (disposition order is a final, appealable order).

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[2] At the hearing where the State, mother, and the child presented their stipulation as to merits, father also did not object to the court relying on a stipulation executed by mother but not him, did not assert that the CHINS determination was contested, and did not seek the opportunity to present any evidence on the point.

[3] Effective July 1, 2016 a CHINS determination is not a final order and may be appealed following a disposition order. See 2015, No. 153, § 28 (Adj. Sess) (amending 33 V.S.A. § 5315(g) to include provision that "[a]n adjudication pursuant to this subsection is not a final order subject to appeal separate from the resulting disposition order.") This change in law does not affect the finality of the trial court's August 2015 CHINS determination.

Father's briefs suggest that he reasonably understood that no disposition order would issue until after he had an opportunity to present evidence concerning the sexual abuse allegations, and that there is no record that a final disposition order, triggering the period for appeal, actually issued. The first claim is not supported by the record. All parties represented to the court during the second day of the disposition hearing that they did not contest the proposed disposition case plan except with respect to the issue of placement. The second claim is also not supported by the record. The trial court's docket entries reflect the court's on-the-record disposition order on November 6, and there is a date-stamped copy of a written disposition order dated November 24 in the trial court file. Counsel offers no evidence that the disposition order was not served on the parties, instead noting only that counsel has been unable to confirm that the parties received the order. Although it is true that the trial court's docket entries do not document the court's issuance of the November 24 written order that is date-stamped in its file, in the absence of any evidence of non-receipt, and given that the written order reiterated the court's on-the-record determination at the disposition hearing, we will not infer that father was not on notice of the order.

We thus turn to the court's termination decision itself. Father challenges the court's stagnation and best interests findings, arguing that both relied heavily on his failure to complete a psychosexual evaluation. He argues that, because the court had never, prior to the TPR hearing, found that the state had proven by clear and convincing evidence that such an evaluation was needed or that father posed a risk of sexual harm to his children, his parental rights could not be terminated for failing to complete the evaluation. Moreover, father argues that when the trial court finally did make findings about the sexual abuse allegations, in its decision on the termination petition, it erred in relying on hearsay and double hearsay evidence that contradicted father's direct testimony.

The first prong of father's argument folds back into his implicit challenge of the disposition order. The case plan approved by the court without objection by father contains extensive discussion of the allegations of sexual abuse against father, as well as the requirements, including the psychosexual evaluation, for father to address the allegations. Father could have challenged these allegations, declined to accept the case plan, and required the State to prove that a psychosexual evaluation was an appropriate component of the case plan. He did not. As the court warned father at the disposition hearing, he needed to voice any concerns that he might have about the required services rather than simply fail to comply. In direct response to any concerns that father might have had about making incriminatory statements, the record shows that in October 2015, the State expressed its willingness not to use any statements that father made in the mental health and psychosexual evaluations against him. Father apparently did not pursue this with the State, but simply failed to comply with the requirements of the case plan. Having accepted the case plan as it was, father cannot now collaterally challenge the necessity of the case plan requirements adopted in the disposition order. The court did not, as father argues, improperly shift the burden of proof with respect to the allegations of sexual conduct to father; the court's analysis in the TPR decision flowed directly from father's choice not to contest the proposed disposition plan.

The second prong—that the court committed error in finding that he had engaged in the alleged conduct—likewise does not support reversal in this case. The trial court found by clear and convincing evidence that father put his hand on his younger son's groin while being sexually stimulated by his wife, and that father regularly masturbated while in bed when his children were present. Father argues that the court's critical findings on this point were not supported by evidence.

On appeal, we will affirm the trial court's findings unless they are clearly erroneous, and we will affirm its conclusions if supported by the findings. In re B.S., 166 Vt. 345, 350 (1997). The court's findings as to father's conduct are supported by evidence in the record. A DCF employee testified that mother had disclosed to her both the groping incident and father's frequent masturbating. Mother provided

written statements to this effect to police. The court found this evidence credible, and it rejected father's denial of this conduct as not credible. This Court does not reweigh the evidence on appeal. In re S.B., 174 Vt. 427, 429 (2002) (mem.) (explaining that Supreme Court's "role is not to second-guess the family court or to reweigh the evidence"). The fact that the testimony the court credited relied on hearsay does not alter our conclusion. We have recognized that "[h]earsay evidence is admissible in termination proceedings as long as it is not the sole basis for termination of parental rights." In re A.F., 160 Vt. 175, 181 (1993). In this case, the trial court relied on a range of non-hearsay evidence, including testimony about the effect of visits with their father on the children, to support its termination decision.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Superior Judge,
Specially Assigned