

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-430

APRIL TERM, 2018

In re S.H. & T.H., Juveniles	}	APPEALED FROM:
(H.H., Mother* & J.H., Father*)	}	
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
	}	DOCKET NO. 97/98-10-15 Cajv

Trial Judge: Robert R. Bent

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

Mother and father separately appeal termination of their parental rights to their children S.H. and T.H., born in May 2009 and September 2006, respectively. On appeal, mother argues that stagnation was caused by the failure to offer her services to address her disability. Father contends that the court failed to evaluate his progress separately from mother's, failed to recognize that his lack of parent-child contact was due to factors beyond his control, and relied on evidence about the cleanliness of father's home without making a proper finding. We affirm.

The court found the following facts by clear and convincing evidence. The Department for Children and Families (DCF) has been involved with this family since 2009. There have been sixty-nine reports of abuse or neglect and thirteen investigations of the home due mainly to parents' inability to keep their children safe from others. Parents are both moderately developmentally disabled and have received support for their disabilities. At various times, parents have allowed others, who have previously been substantiated for sexual abuse of children, to be around the children or live in the home. In August and September 2015, DCF received reports about sexual contact among minors in the household.

This case began in October 2015 when DCF received a report that S.H. had been sexually abused. At the time, mother and father had separated but were sharing an apartment, mother also had a live-in boyfriend and two other adults living in the apartment. A witness identified mother's boyfriend as sexually assaulting S.H. Mother denied that her boyfriend had assaulted S.H., and S.H. did not initially disclose the assault or identify the boyfriend as the perpetrator.\* Initially, father also would not consider the possibility that the boyfriend had assaulted S.H. The children were removed from parents' care and placed in a foster home.

DCF filed petitions alleging that S.H. and T.H. were children in need of care or supervision (CHINS) due to parents' inability to maintain the children's safety and understand the risks to the children in various situations. In particular, DCF alleged that parents failed to accept that mother's

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\* A medical exam of S.H. indicated that S.H. had male seminal fluid on her anus and vagina. Subsequent testing excluded mother's boyfriend.

boyfriend had abused the children. In March 2016, parents stipulated that the children were CHINS, agreeing that at times parents had provided insufficient supervision and allowed inappropriate individuals, including those substantiated for sexual abuse, with mental-health and substance-abuse issues, and with criminal records into their homes. Parents also agreed that DCF has been involved with the family for several years and attempted to have the parents engage in many services to support their parenting.

Following a forensic family assessment, mother was diagnosed with an anxiety disorder, a major depressive disorder, a personality disorder and a mild cannabis substance-use disorder. Father was diagnosed with post-traumatic stress disorder (PTSD) and a delusional disorder. An evaluation of the children revealed that T.H. had attention deficit hyperactivity disorder (ADHD) and hypervigilance. He had a trauma-based emotional bond with his sister. The doctor believed that T.H. needed an extended period of time to heal from the trauma he witnessed. He also had suicidal thoughts. S.H. had PTSD and many of the psychological features of a sexually abused child. The children's therapist noted that S.H. had difficulty sleeping, was bedwetting, and was dissociating. T.H. also was bedwetting, did not make eye contact, had problems with emotional regulation, and antisocial behavior. S.H. did not initially identify mother's boyfriend as having sexually abused her, but subsequently made a disclosure to her therapist and her foster mother. Based on S.H.'s disclosure and other evidence, the court found that mother's boyfriend had sexually abused S.H. T.H. reported to his foster mother that he had witnessed the boyfriend assaulting his sister and had told his mother, but she did not believe it. The children's foster mother reported that T.H. had hour-long tantrums, was violent, and displayed adult knowledge. S.H. was quiet and withdrawn. Both children slept poorly and were worried about whether there would be enough food.

The parties agreed to a disposition order, which had concurrent goals of reunification and adoption. The plan of services for parents required them to, among other things, participate in family team meetings, attend family time, participate in an evaluation and follow the recommendations, demonstrate a clear understanding of the risks posed to the children by exposing them to people with sexually harmful behaviors, demonstrate an understanding of a parent's role in protecting children from abuse, and secure safe housing.

In January 2017, based on lack of progress, DCF filed petitions seeking to terminate the parental rights of mother and father. The court held hearings over several days. The court found that there was a change of circumstances because progress had stagnated. The court explained that neither parent had maintained regular contact with the children. Father's attendance at visits became inconsistent in the fall of 2016 after he gained employment. Because in-person visits interfered with his employment and became sporadic, father then elected to have telephone visits. After the initiation of in-person visits again, and at the children's requests, visits stopped in March 2017. Mother's visits shifted to telephone contact in late 2016 and mother decided to stop visits in February 2017. During visits, mother was not able to demonstrate an understanding of the children's emotional needs. The court found that father had made progress in caring for himself. Father came to believe that mother's boyfriend did abuse S.H., he had a job and housing. The court concluded, however, that father had not gained sufficient insight to care for his children, especially given their history of trauma and special needs. Mother similarly had found employment and become independent but had not made progress in understanding her responsibility for protecting the children and her role in their trauma. She failed to recognize her boyfriend as S.H.'s abuser and continued to live with him. She did not demonstrate an understanding of how her children had been harmed while in her care. She did not engage with

services that would improve her ability to meet her children's mental-health needs. Both parents had not demonstrated empathy to enable them to support their children's extraordinary needs or to assist them in healing from their trauma.

The court further concluded that termination was in the children's best interests. The court found that parents did not play a constructive role in the children's lives. The children were well adapted to their foster home and had made improvements. T.H. rarely wet the bed, was no longer on an Individualized Education Plan, and was sleeping through the night. He did have anxiety about contact with parents and wet himself when father appeared at his baseball game. He expressed anxiety about his mother and her boyfriend knowing where he lived. Most importantly, the court found that parents would not be able to resume parenting within a reasonable period of time. The children required a stable and empathetic caregiver, and, in two years of services, parents had failed to demonstrate the emotional capacity to provide this type of care. Therefore, the court concluded that termination was in the children's best interests. Parents separately appeal.

When there is a prior disposition order, to terminate parental rights, the court must engage in a two-step inquiry. First, the court must find that there has been a change in circumstances; second, the court must find that termination is in the children's best interests. In re B.W., 162 Vt. 287, 291 (1994); see 33 V.S.A. §§ 5113(b) (allowing modification of prior order upon showing of change of circumstances), 5114(a) (listing best-interests factors). "Such findings must be supported by clear and convincing evidence and will withstand review in this Court unless they are clearly erroneous." In re B.W., 162 Vt. at 291.

Father first argues that the court failed to recognize that he made superior progress to mother, specifically that father had eventually recognized the risk posed by mother's boyfriend. We conclude there was no error because the court made an individualized assessment of whether father had stagnated in his ability to care for his children. The court acknowledged that father had progressed in some areas of his life, crediting father with obtaining employment and housing, and recognizing that father had changed his attitude and believed that mother's boyfriend had abused S.H. Nonetheless, the court found that father had not made progress in other key areas and that this lack of progress amounted to stagnation. See In re B.W., 162 Vt. at 291 (explaining that progress in some areas of life does not preclude finding of changed circumstances). The court explained that father had not improved in his parenting capacity to the expected degree contemplated in the case plan—his contact with the children was limited, he failed to demonstrate understanding of the children's extraordinary needs, he put his own needs ahead of those of the children, and he did not demonstrate sufficient empathy to enable him to allow the children to heal from the damage they had suffered. These findings, all specific to father, support the court's determination that father's progress had stagnated.

Father also contends that the court failed to recognize that his lack of parent-child contact was due to factors beyond his control. Father argues that his lack of contact with the children was because the children refused contact with father based on their fear that father would inform mother and her boyfriend where they were living. The court found that the children were resistant to visits when father sought to resume visits in the late winter of 2017; however, father's assertion that the children's desire to stop visits was caused solely by their fear of mother's boyfriend and not his own actions is speculation. The court's findings demonstrated that contact with father caused the children stress, as exhibited by T.H. wetting himself when father appeared at his baseball game. Moreover, the court indicated that contact was reduced to allow the children to "self-regulate." In addition, there were other facts in the record to demonstrate that father's lack of contact with the

children was due to factors within his control. Father attendance was inconsistent after he obtained employment in the fall of 2016, and, as noted, after a number of telephone contacts, the children asked to stop contact with him.

Father's final argument is that the court improperly recounted testimony reporting that father's new home was unclean without making a finding to that effect. In its factual findings, the court recited that a disability service worker described the physical condition of father's home as "disgusting." Father asserts that there was conflicting evidence, and that the court's statement was a recitation of the evidence rather than a finding. We need not reach the question of whether there was an error because any error was harmless. See In re M.M., 2015 VT 122, ¶ 13, 200 Vt. 540 (explaining that in juvenile cases reversal warranted only where substantial right of party affected). The state of father's home was not critical to the court's evaluation of whether father's progress had stagnated or the children's best interests. After noting the description of father's home, the court explained that nonetheless, it found that father had made gains in his ability to care for himself. The court's decision that father's progress had stagnated, and that termination was in the children's best interests rested primarily on its findings that father had failed to make the necessary improvements to his parenting skills, lacked the ability to empathize with the children, could not parent them within a reasonable period of time, and had not engaged in parent-child contact.

Mother argues that stagnation was due to DCF's failure to offer services to her to address her disability. A change of circumstances occurs "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. at 291 (quotation omitted). Stagnation cannot be based on factors beyond a parent's control. In re S.R., 157 Vt. 417, 421-22 (1991). Mother asserts that the family forensic evaluation recommended that mother have service providers with specific knowledge of mother's disabilities, but that the disposition case plan did not sufficiently address mother's challenges related to her disability. Therefore, mother contends that stagnation was due to factors beyond her control.

We conclude that mother has failed to preserve her argument regarding the insufficiency of the plan of services. See In re R.L., 148 Vt. 223, 226 (1987) (holding that failure to raise objection below waives claim on appeal). After parents stipulated that S.H. and T.H. were CHINS, the court scheduled a disposition hearing. At the initial hearing, the court granted the parties' request to wait for the expert's evaluation. At the subsequent hearing, the parties indicated that they had agreed on a disposition. The court inquired whether mother's attorney had any remaining objections that required a ruling from the court. The parties discussed the plan of services and took a short recess to discuss the disposition. Mother's remaining objection was that mother's plan of services required her to seek housing independent from her boyfriend. The court accepted the parties' agreement to strike the language referring to mother's boyfriend. With that change, all parties agreed to the case plan. Mother did not object to the plan of services on the ground that it failed to provide for accommodation of mother's disability.

Moreover, the court's decision regarding change of circumstances demonstrates that mother's stagnation was caused by factors totally within her control. The court found that mother had decreased her contact with the children to telephone calls and then eventually stopped visiting them. Even when she attended visits, she did not demonstrate an understanding of the children's emotional needs. Mother placed her own interests ahead of the children's and failed to demonstrate empathy towards the children or exhibit an ability to support their extraordinary needs. She continued to disbelieve that her partner had been abusive and chose living with him over a

relationship with her children. These findings are sufficient to support the court's conclusion that mother's progress had stagnated.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice