*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. 2018-081

JULY TERM, 2018

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| In re K.B., Juvenile<br>(N.B., Father*) | }<br>} | APPEALED FROM: |
| | }<br>}<br>} | Superior Court, Windsor Unit,<br>Family Division |
| | }<br>} | DOCKET NO. 34-3-16 Wrjv |
| | | Trial Judge: Elizabeth D. Mann |

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

Father appeals the termination of his parental rights to his four-year-old son K.B. We affirm.

K.B. was born in October 2013. He lived with father, mother, and mother's older daughter A.S. in White River Junction at the time this case began. On February 29, 2016, police in Lebanon, New Hampshire reported to the Vermont Department for Children and Families (DCF) that mother had been arrested and charged with driving while intoxicated with the children in the car, as well as endangering the welfare of a child, driving after a license suspension, and violating her conditions of bail. DCF opened an investigation and learned from father that he actively abused alcohol, marijuana, unprescribed suboxone, and other opioids. Both mother and father had numerous criminal convictions and pending criminal charges.

In March 2016, DCF filed a petition alleging K.B. was a child in need of care or supervision, and the court issued an emergency care order transferring custody to DCF.[1] K.B. was placed with his maternal grandmother. In May 2016, the parents each stipulated to the merits of the petition. In particular, father stipulated that he had untreated drug use issues, and agreed that all issues raised in the affidavit accompanying the State's petition could be raised in the disposition hearing. The court issued a disposition order in June 2016 that continued custody with DCF and established concurrent permanency goals of reunification with either parent or adoption. In July 2016, K.B.'s maternal grandmother asked to be relieved as a placement because she was planning a permanent move out of state. K.B. was placed with a foster family and has lived with them throughout the pendency of this proceeding.

The case plan approved by the court in June 2016 called for father to maintain safe housing and employment; undergo substance abuse treatment; seek treatment for anger management and follow recommendations from his domestic violence assessment; participate productively in visits with K.B., including refraining from verbal aggression and profanity toward providers; and not

[1] A.S.'s father sought and obtained primary legal and physical responsibilities for A.S. in a separate proceeding in March 2016.

engage in any new criminal behavior. At a hearing in September 2016, father objected to the anger management and domestic violence treatment requirements on the ground that he had never been convicted of domestic assault or been the subject of a relief-from-abuse order. DCF agreed that those requirements were unnecessary. Although the court did not formally modify the approved case plan, it orally informed father that the requirements regarding anger management and domestic violence treatment were not mandatory, and that it was more important for father to work on his substance abuse issues.

DCF filed a petition to terminate the parental rights of mother and father to K.B. in March 2017. The court held the termination hearing over two days in December 2017 and January 2018. Mother voluntarily relinquished her parental rights on the first day of the hearing. Father attended both days of the hearing and was represented by counsel.

Based on the evidence presented at the hearing, the court found that father had made little progress towards reunification. Father had not demonstrated an ability to maintain stable housing because he lived in a condominium rented by his mother and there was no evidence he was permitted by the landlord to reside there. He also failed to demonstrate that he had steady employment. He reported to DCF that he worked for his father but provided no paystubs or other verification. He also told DCF that he did not file tax returns, rendering him vulnerable to criminal charges for tax fraud.

Father's participation in substance abuse treatment was inconsistent. During 2016, he attended about one-half of his scheduled substance abuse treatment sessions. He refused to provide urine samples during that time. He successfully completed an inpatient substance abuse treatment program in May 2017 but did not follow through with after-care recommendations. He did not attend daily Alcoholics Anonymous meetings or identify a sponsor, as recommended upon his discharge from inpatient care. He did not participate in substance abuse treatment after May 2017.

Father regularly attended visits with K.B. when he was not incarcerated, and the quality of his interactions with K.B. improved over time. He completed a parenting class as required by the case plan. However, he ignored suggestions from the Family Time coach and rarely participated in pre- and post-visit meetings with the coach. He continued to be verbally aggressive and use profanities with providers in front of K.B.

In early summer 2017, father was arrested for a violation of probation in New Hampshire and incarcerated for a month. Shortly after his release, he was incarcerated in Vermont. At the time of the termination hearing, father remained incarcerated with a number of unresolved criminal charges and his release date was unknown.

The court determined that there had been a substantial change in circumstances sufficient to warrant modification of the disposition order because although father had shown some improvement in his parenting skills, he had failed to substantially conform to the other expectations of the case plan.

The court weighed the statutory factors set forth in 33 V.S.A. § 5114(a), and concluded that termination of father's parental rights was in K.B.'s best interests. The court considered each of the statutory best-interests factors. 33 V.S.A. § 5114(a). The most important of these factors was the likelihood that father would be able to resume parenting K.B. within a reasonable time. In re J.B., 167 Vt. 637, 639 (1998). The court concluded that, although father had been diligent in visiting with K.B. when not incarcerated, his significant continuing legal issues in criminal court, unaddressed substance abuse and continuing inability to curb his aggressive and profanity laced outbursts, including in K.B.'s presence, were not constructive. The court further found that father

was unlikely to resume parenting K.B. in a reasonable time because father was incarcerated and his release date was unknown. The court noted that when K.B. was taken into custody, he had unaddressed dental and emotional health needs. Although those needs had been addressed since K.B. entered foster care, permanency was of "paramount importance for [K.B.]'s well-being." The court found father had had only telephone contact with K.B. since July 2017 due to his incarceration. Meanwhile, K.B. had established a strong and positive connection to his foster family, in whose care he was thriving. Father appealed.

In reviewing a decision to terminate parental rights, we will uphold the family court's factual findings unless they are clearly erroneous and will affirm its conclusions if they are supported by the findings. In re G.S., 153 Vt. 651, 652 (1990) (mem.). "Our role is not to second-guess the family court or to reweigh the evidence, but rather to determine whether the court abused its discretion" in terminating father's parental rights. In re S.B., 174 Vt. 427, 429 (2002).

On appeal, father first argues that the trial court erroneously found that he was required to "follow the recommendation from his domestic violence assessment addressing issues of power and control" and seek anger management therapy, even though the court had previously told him that he need not complete those requirements. It is true that the court mentioned these case plan requirements in its TPR decision, but nothing in the court's analysis supports the suggestion that the court's termination of father's parental rights was based in any part on his failure to complete such programming. The court made no findings regarding father's participation or lack thereof in domestic violence or anger management treatment. Rather, it focused entirely on father's failure to make significant progress in addressing his untreated substance abuse issues, findings which were supported by the record and in turn supported the court's determination that father had stagnated in his ability to parent K.B. See In re D.D., 2013 VT 79, ¶¶ 35-37, 194 Vt. 508 (explaining unsupported findings not reversible error if other, supported findings sufficient to sustain decision).

Father also argues that the court's finding of changed circumstances was based entirely on unsupported hearsay testimony by the DCF worker assigned to father's case. He contends that because DCF presented the majority of its case through this witness, in the form of hearsay evidence, there was insufficient evidence to support a finding of stagnation or termination. Father acknowledges that, although he objected to certain specific instances of hearsay testimony, he neither raised a blanket objection to the DCF witness's hearsay testimony, nor a specific objection to every instance of hearsay testimony that he now argues was objectionable.

Hearsay evidence is admissible in termination proceedings, although it may not be "the sole basis for termination of parental rights." In re A.F., 160 Vt. 175, 181 (1993); see 33 V.S.A. § 5317(b) ("Hearsay may be admitted and may be relied on to the extent of its probative value."). Most of the trial court's key findings were either based on the DCF witness's own personal knowledge or the father's own testimony or admissions, or are otherwise undisputed, including that father: had not followed through with after-care recommendations following his inpatient substance abuse treatment; did not attend AA meetings with the recommended frequency and did not identify a sponsor or provide a journal with the time and place of meetings attended; did not participate in continuing substance abuse counseling after that; repeatedly refused to provide the DCF social worker with a swab to analyze for drug use; had been incarcerated in Vermont since July 2017, with no determined release date; was living in a home rented solely by his mother with no evidence that he had permission to live there; had no documentary evidence to support the claim that he had steady work; and often had escalating discussions with the DCF social worker, ending when father resorted to denials, name calling, and profanities.

The record contains ample nonhearsay testimony to support these findings regarding father's lack of progress on the case plan recommendations. Father himself testified that he was incarcerated in New Hampshire for falsifying a urine sample; continued to be incarcerated in Vermont with an uncertain release date; had a pending heroin possession charge; did not attend Alcoholics Anonymous daily after completing inpatient substance abuse treatment; was evicted from the White River Junction apartment and had lived in a tent for a period; had been living prior to his incarceration in a condominium that was leased by his mother; had no proof of his income; and had "butted heads" with the Family Time coach because he disagreed with the requirement for pre-visit meetings and felt that she overreacted sometimes, as when he permitted K.B. to ride a motorized toy Jeep around a park with a hat pulled down over his eyes. The record also includes nonhearsay statements father made to the DCF case worker, such as his admission to her in the fall of 2016 that he continued to abuse opiates, and his statements that he was paid "under the table" and did not file tax returns. See V.R.E. 801(d)(2) (establishing that party's own out-of-court statement is not hearsay if offered against him in court). Finally, much of the DCF worker's testimony was based on her direct knowledge of events, including her personal observations of father's visits with K.B. and his aggressive behavior towards her in front of K.B.

Although he complains generally that the DCF worker's testimony was hearsay, father identifies only two specific instances of hearsay that he claims should not have been admitted. These were the DCF worker's purported testimony that the Family Time coach "insisted that [father] allowed his son to be unsafe and did not set limits" and her statement that K.B. had two severe cavities when he entered DCF custody. Father did not object to this testimony at the hearing, and thus we may review the issue only for plain error. In re R.L., 148 Vt. 223, 228 (1987) (holding parents' failure to object to introduction of hearsay at disposition hearing "served as a waiver of their claim that its use at that hearing was error"). Plain error will only be found in rare cases "where the error is an obvious one and so grave and serious as to strike at the very heart" of a party's constitutional rights. G.S., 153 Vt. at 651-52 (quotation omitted).

The record does not support father's claim of plain error. First of all, it is clear from the transcript of the hearing that the DCF worker's testimony regarding father's conduct during visits was based on her own observations, not those of the Family Time coach. The testimony therefore was not hearsay. The DCF worker never stated that the Family Time coaches disapproved of the toy Jeep father brought to visits, as father alleges. Furthermore, the court did not find that father allowed K.B. to be unsafe or failed to set limits; to the contrary, it found that father made improvements in setting limits for K.B. and directing him away from poor choices. Thus, even if it was hearsay, father has not shown that the testimony was in any way prejudicial to him. As to the testimony about K.B.'s cavities, father himself admitted that K.B. had two cavities when he entered DCF custody, and the testimony was corroborated by K.B.'s foster mother. The court's finding that K.B. had cavities was therefore amply supported by nonhearsay testimony.

Father also contends that the case plan mandated too many requirements, leading to scheduling conflicts and making it impossible for him to comply. Other than the domestic violence and anger management therapy recommendations, father never objected to the case plan requirements. Nor did he appeal the disposition order approving those requirements. Father essentially seeks to blame DCF for his own resistance to the case plan recommendations.[2] "While

[2] The record does not support father's claim that DCF and Easter Seals "punished" him for entering residential treatment by ending visitation. Father was switched from Easter Seals Family Time Coaching to supervised visitation in the fall of 2016 because he refused to engage in the coaching model. Father was repeatedly late to visits and continued to be argumentative, use his phone during visits, and disregard suggestions from the coach, leading DCF to send a letter to

stagnation caused by factors beyond [father's] control could not support termination of parental rights, the claim that [DCF] caused stagnation in this case is without merit." In re S.R., 157 Vt. 417, 421–22 (1991). The record shows that father attended visits with K.B. but did little else. He refused to engage in parent coaching and continued to be verbally aggressive toward providers. He refused to demonstrate that he had obtained stable housing or employment, continued to abuse drugs, did not consistently attend substance abuse treatment, and engaged in new criminal behavior. Father's actions were within father's control and support the court's finding of stagnation. See In re K.F., 2004 VT 40, ¶ 12, 176 Vt. 636 (rejecting argument that father's failure to meet case plan requirements was due to factors beyond his control; "father bears sole responsibility for his frequent incarceration").

Finally, father argues that there was insufficient evidence to support the court's conclusion that termination was in K.B.'s best interests. We disagree. As set forth above, the court considered each of the statutory best-interests factors. 33 V.S.A. § 5114(a). The record supports the court's findings, which in turn support the court's conclusion that termination of father's parental rights was in K.B.'s best interests.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

father reiterating rules and expectations for visits. Easter Seals provided supervised visitation until father entered residential treatment, at which point they terminated their involvement because father had missed several visits and it was unclear when he would return. He was not permitted to reenter the program after finishing treatment in May 2017 because of his refusal to engage with the program. The DCF case worker supervised visits herself after father finished treatment. However, visitation ceased shortly thereafter because father was incarcerated.