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. 2018-194

OCTOBER TERM, 2018

In re A.B., Juvenile (M.B., Father* & M.C., Mother*)	}	APPEALED FROM:
	}	Superior Court, Chittenden Unit, Family Division
	}	DOCKET NO. 284-11-15 Cnjv
		Trial Judge: David Fenster

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

Mother and father separately appeal the trial court's order terminating their parental rights to their child A.B., born in November 2008. On appeal, father contends that the court's conclusion that termination of his rights is in A.B.'s best interests was not supported by credible evidence, and that the court erred in issuing a protective order regarding A.B.'s records. Mother argues that the court's finding that mother's progress had stagnated was not supported by the evidence and that the court erred in admitting hearsay at the termination hearing. We affirm.

The court found the following facts. When A.B. was born, mother was residing at the Lund Center and father was not living with them. At father's request, mother sexually assaulted A.B. and sent father photos of the assault. The assault was not discovered or reported at that time. Father moved in with mother in January 2011 and lived with her periodically until 2015. Father was physically and verbally abusive of mother and A.B. witnessed the abuse. Father blacked mother's eyes, shoved her, made death threats against her, threatened to take A.B., and punched and kicked holes in the walls of the apartment. Despite father's conduct, mother would leave A.B. alone with father.

In November 2015, the State filed a petition alleging that A.B. was a child in need of care or supervision (CHINS). That same month, the parties stipulated to the merits of the CHINS petition, which found that A.B. was at risk of emotional harm because of parent's volatile relationship. A.B. was placed with mother under a conditional custody order. In December 2015, A.B. disclosed to mother that father was sexually abusing her. Mother reported to police A.B.'s disclosure of father's sexual abuse and her own prior sexual assault of A.B. Mother was charged and plead no contest to domestic assault for her conduct when the child was a baby. Father was charged with sexual assault and has not seen A.B. since his arrest in December 2015. In 2017, father was convicted of sexual assault and sentenced to thirty to fifty years. His appeal of the conviction is pending.

The court transferred custody of A.B. to the Department for Children and Families (DCF), which placed A.B. with a foster family. Although her foster parents have since separated, A.B. has remained with the same foster mother.

In June 2016, the court issued a disposition order continuing DCF custody and adopting DCF's plan of services for mother. This required mother to, among other things, engage in counseling and treatment, engage in a domestic-violence program, complete a forensic evaluation focused on her parenting skills, visit with A.B. regularly and have appropriate conversations, sign releases for DCF, maintain safe and stable housing, and communicate with DCF. Following the court's request, a parent-education requirement was added to the disposition order.

At the disposition hearing, the DCF caseworker described services she recommended for father, including a program for perpetrators of domestic violence. She stated that father could file a motion if he wanted visits with A.B., but that A.B. did not wish to see father. At the time, the criminal division had imposed conditions prohibiting contact between father and A.B. Father's attorney explained that there were no programs available to father during his incarceration because he was a pre-trial detainee. Father reserved taking a position on the case plan pending the outcome of this criminal trial.

The State filed petitions to terminate parental rights in March 2017. Based on a hearing held over several days between July 2017 and February 2018, the court found the following. Mother had made some progress towards the goals identified in the case plan; she complied with conditions set in her criminal case, completed a forensic evaluation, and obtained safe and stable housing. Mother did not make progress in other respects. Mother either failed to maintain sufficient communication with DCF or to provide updated releases so that DCF was unable to monitor mother's progress with her providers. Mother testified that she was meeting with counselors, but mother was unable to demonstrate any insight she learned from counseling or how it has helped her meet A.B.'s needs. Mother did not engage with family-time coaching or counseling to improve her parenting skills. Mother had supervised visits with A.B. three times a week. During one visit, mother told A.B. about her assault when A.B. was an infant without any therapeutic support for the disclosure or plan to deal with A.B.'s reaction.[*] Between early August and mid-October mother missed visits. She lost her place on the waiting list for family-time coaching due to these missed visits and did not begin family-time coaching until 2017. In December 2017, family-time coaching was discontinued based on mother's lack of engagement. Mother was not implementing strategies, and blamed the family-time-coaching organization for her discharge. Mother did not demonstrate insight on how her missed visits impacted A.B. Mother was not attuned to A.B.'s needs during visits.

A.B. was diagnosed with adjustment disorder and post-traumatic stress disorder (PTSD). She had flashbacks and bad dreams and became angry and tearful. She requires a predictable schedule and attuned caregiver. She and her foster mother are attached and have a supportive relationship. A.B. made progress in her academic studies and social skills since coming into DCF custody.

The court determined that there was a change in circumstances due to parents' stagnation. Father had not made any progress towards resuming parental duties. He had no contact with A.B. for two years and had not improved his parenting capacity; he had been convicted of sexual assault and faced a long prison sentence. Mother continued to lack insight into A.B.'s needs and her trauma and was not implementing strategies from family-time coaching. The court further concluded that termination was in A.B.'s best interests. Father's sexual abuse of A.B. caused her significant trauma, he did not play a constructive role in her life, and he would not be able to parent within a reasonable time given his lengthy criminal sentence and the extensive time required for A.B. to overcome her trauma from his actions. Although mother loved A.B. she could not provide

[*] Mother denied that she made this disclosure to A.B.

A.B. with the emotional support that A.B. required and would not be able to resume parenting duties within a reasonable period of time. Both parents appeal.

When the termination of parental rights is sought after the initial disposition, the trial court must conduct a two-step analysis. In re B.W., 162 Vt. 287, 291 (1994). The court must first find that there has been a change in circumstances; second, the court must find that termination of parental rights is in the child's best interests. Id. In assessing the child's best interests, the court is guided by the statutory criteria. 33 V.S.A. § 5114. The most important factor is whether the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.).

On appeal, father first argues that the trial court erroneously relied on mother's testimony in terminating his parental rights. Father asserts that the court concluded he would not be able to parent A.B. during a reasonable time because of his incarceration and his abuse of A.B., and contends that the abuse was proven solely through mother's noncredible testimony. We conclude that there was no error. In assessing whether a parent will be able to resume parenting within a reasonable period of time, the court must measure the period of time "from the perspective of the child's needs." In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325 (quotation omitted). Father's incarceration, even absent a finding of abuse or a conviction, was a proper consideration for the court. See In re M.W., 2016 VT 28, ¶ 22, 201 Vt. 622 (holding that court should consider how parent's incarceration "affects the child's best interests" regardless of whether incarceration was within parent's control). Even without mother's testimony of father's abuse, the evidence supported the court's conclusion that father would not be able to parent in a reasonable period of time. It was undisputed that father did not have any contact with A.B. for over two years and A.B.'s therapists provided credible testimony concerning A.B.'s PTSD and adjustment disorder and the type of parenting A.B. required. This evidence supported the court's conclusion that even if father's conviction was overturned, his lack of contact with A.B. combined with her extensive need for therapy and consistent care would not allow him to parent within a reasonable period of time as measured from her perspective.

Father next argues that a protective order issued by the family court was in error. During the proceedings, father signed a release giving the attorney in his criminal proceeding access to A.B.'s records, including her school and treatment records. The State moved for a protective order, arguing that father did not retain as part of his residual parental rights the authority to release his child's records to a third party because that authority rested with DCF, as legal custodian. The State further argued that even if father had legal authority, the court should issue a protective order in this particular case because the release would harm A.B. See 33 V.S.A. § 5115(a) ("On motion of a party or on the Court's own motion, the Court may make an order restraining or otherwise controlling the conduct of a person if the Court finds that such conduct is or may be detrimental or harmful to a child."). Father's attorney argued that the statute describing legal custody did not specifically delineate that the legal custodian had the authority to sign releases and therefore this power was reserved to parents. See 33 V.S.A. § 5102(16)(A) (defining legal custody). The court concluded that even if father had authority to access or release A.B.'s records, the court had the power to limit access to the records if it was in A.B.'s best interest under § 5115(a). Given father's conviction for sexually assaulting A.B. and her resulting trauma, the court found that providing father with unfettered access to A.B.'s records would be detrimental and harmful to A.B. The court acknowledged that father might be entitled to certain records for purposes of litigation, but explained that the protective order did not preclude such access through discovery. The court issued a protective order preventing father from waiving A.B.'s confidentiality or signing a release of records on A.B.'s behalf unless the release was signed by DCF or from procuring A.B.'s records

unless the court approved release. Following issuance of the protective order, father did not make any discovery requests in the juvenile proceeding for A.B.'s records.

On appeal, father argues that 33 V.S.A. § 5115 is facially overbroad and is unconstitutional as applied to father because denial of access to the records deprived father of the opportunity to challenge the termination petition. The State contends that father failed to preserve this argument in the trial court because he did not raise the constitutionality of the statute below. See In re C.H., 170 Vt. 603, 604 (2000) (mem.) (explaining that matters not raised in trial court are not preserved for appeal). We need not reach the preservation question or the constitutionality of the statute because we conclude that father has failed to demonstrate how the protective order prejudiced him. The protective order precluded father from gaining access to A.B.'s records through a release; it did not prevent him from asking for records either with DCF approval or through discovery. Father failed to seek any records through either of those mechanisms. Moreover, father has not proffered what information he sought through the records and how that information would have affected the court's conclusion that that termination was in A.B.'s best interests. In re R.W., 2011 VT 124, ¶ 17, 191 Vt. 108 (noting that we apply harmless error analysis in termination of parental rights cases and will reverse judgment only where error has affected substantial rights of party).

Next, we turn to mother's appeal. Mother first argues that the evidence does not support the court's finding that her progress stagnated. Mother contends that certain evidence demonstrates that she had proper parenting skills, and that she related to A.B. as a parent and not a peer. Mother also alleges that the court failed to properly weigh her accomplishments, such as obtaining housing, and to credit her progress. On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993). We conclude that there was no error in this case insofar as there was evidence to support the court's findings that mother related to A.B. more as a peer, mother had not made progress toward increasing her actual parenting capacity, and mother lacked insight into A.B.'s needs. The court considered mother's progress in certain areas, but weighed her lack of progress in her parenting skills more heavily. The court properly considered and weighed the evidence and on appeal, this Court does not "second-guess the family court or [] reweigh the evidence." In re S.B., 174 Vt. 427, 429 (2002) (mem.).

Mother also contends that the trial court erred in admitting hearsay over mother's objection without an evaluation of the reliability of that hearsay. Mother specifically challenges the court's admission of the affidavit filed in father's criminal case and DCF's case plans. Pursuant to statute, hearsay may be admitted in a termination proceeding. 33 V.S.A. § 5317(b). Our cases have long held 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. at 181. Mother contends that prior to admitting hearsay, the court should make a reliability determination.

We need not reach mother's argument regarding the hearsay standard because the challenged items were admissible in this case even absent the statute allowing admission of hearsay. As to the case plans, the court admitted the case plans not to prove the truth of the statements within them, but to demonstrate what expectations DCF had and why DCF made the recommendations it did. As to the affidavit, mother asserts generally that it contained hearsay accusations against her, but does not specify what particular information she is challenging or how it impacted the court's decision. The major allegation against mother in the information is the officer's recounting of mother's disclosure of her sexual assault of A.B. when A.B. was an infant. Even if hearsay rules were applicable, this disclosure would be admissible against mother as nonhearsay because it is mother's admission of her own conduct. See V.R.E. 801(d)(2) (explaining that statement is admissible against party as nonhearsay). Moreover, this evidence

was duplicative of other testimony. During mother's own testimony, mother admitted that she had reported her assault of A.B. to police and that she had pled no contest to a charge of domestic assault. Finally, there is no indication that hearsay statements in the affidavit impacted the trial court's decision on mother's stagnation or its evaluation of A.B.'s best interests.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice