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. 2019-013

MAY TERM, 2019

In re C.B., Juvenile	}	APPEALED FROM:
(L.A., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 59-5-15 Wmjv
		Trial Judge: Katherine A. Hayes

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

Mother appeals the family division's order terminating her residual parental rights with respect to her son, C.B. We affirm.

C.B. was born in May 2007. His father has not played any significant role in his life. Mother struggled with long-term substance-abuse and mental-health issues, which led the Department for Children and Families (DCF) to get involved with the family on several occasions between 2009 and 2013. In May 2015, C.B. and his then five-year-old brother came into DCF custody under an emergency-care order after the brother could not be awakened from a deep sleep. The maternal grandmother reported to DCF that mother was doing eight bags of heroin a day, and C.B. stated that mother had accidently given his brother some of her medicine. C.B. has remained in DCF custody ever since then.

In July 2015, mother entered into a merits stipulation in which she agreed that C.B. and his brother were children in need of care or supervision (CHINS). In October 2015, the family division issued a disposition order for both children that continued their placement in DCF custody and set forth concurrent goals of reunification or adoption. The disposition case plan that was adopted as part of that order indicated that permanency should be achieved by May 2016. The risk factors for mother listed in the disposition report included a history of substance abuse, a history of mental-health issues, a history of being a victim of domestic violence, a lack of understanding of her children's emotional and developmental needs, a lack of understanding of how domestic violence and her substance abuse negatively impacted the children, an inability to maintain a safe home for the children free of violence and substance abuse, and a reluctance to work with DCF. The plan of services required mother, among other things, to participate in a substance-abuse assessment; complete intensive inpatient substance-abuse treatment; follow all treatment recommendations; establish a sustained recovery; comply with drug screening requests; participate in a mental-health evaluation; actively engage in individual therapy; participate in a domestic/sexual violence psychoeducational program; demonstrate an ability to consistently meet C.B.'s physical, emotional, and developmental needs; attend Family Time visits; actively participate in a parenting evaluation and take a parenting class; maintain a home environment free from the risk of sexual harm, substance abuse, domestic violence, and criminal activity; and refrain from criminal activity.

Between the summer of 2015 and the summer of 2016, mother did not make significant progress in achieving the case plan goals despite participating in several inpatient and outpatient substance-abuse treatment programs. Meanwhile, in November 2015, she gave birth to a son, at which time she tested positive for benzodiazepines, cocaine, and opiates, in addition to methadone, which had been prescribed to her. The baby suffered from neonatal abstinence disorder, requiring morphine treatment to address withdrawal symptoms. DCF took custody of the baby pursuant to an emergency-care order after he was released from the hospital.

In June 2016, C.B. was removed from his second foster home after he was suspected of having engaged in inappropriate sexual conduct with his brother and then expressed suicidal ideation, with a specific plan for achieving that goal. He was admitted to a crisis stabilization program, and later the Brattleboro Retreat, before being placed at Pine Haven Boys Center, a New Hampshire residential facility for boys with behavioral issues, often related to sexually inappropriate behavior.

That same month, the State filed a petition to terminate mother's parental rights. The termination hearing was not held until November 2017, in part due to discovery disputes, attorney unavailability, and motions to continue. On the first of the two days of hearing, C.B.'s father relinquished his parental rights contingent upon mother's rights being terminated. Following the hearing, while the case was still under advisement with the family division, this Court issued In re L.H., 2018 VT 4, ¶ 17, in which "we conclude[d] as a matter of law that representation of children in abuse-and-neglect proceedings conflicts with subsequent representation of the State." Because that was the situation in this case—the attorney who initially represented the children changed jobs and later filed the State's termination petition—the State filed a motion for rehearing. Following a February 2018 status conference, the family division indicated that it would rely on the transcripts from the November 2017 hearing subject to the parties' right to move to strike evidence from those transcripts or to request the opportunity to present additional evidence or call a witness. The family division included father in this procedure even though he had already voluntarily relinquished his parental rights contingent on mother's rights being terminated.

Pursuant to this procedure, mother and the State presented additional evidence at the second termination hearing, which was held over three days in May and June of 2018. In November 2018, the family division issued a decision terminating mother's parental rights. A week later, the court terminated father's parental rights. Only mother appealed.

On appeal, mother first argues that the family division erred in concluding that termination of her parental rights was in C.B.'s best interests, given C.B.'s opposition to the termination of mother's parental rights and the court's finding that contact with his mother would be beneficial. Upon review of the record, we conclude that the family division's best-interests determination is supported by clear and convincing evidence. See In re A.M., 2017 VT 5, ¶ 34, 204 Vt. 198 (stating that this Court will not disturb family division's findings "unless they are clearly erroneous, nor its conclusions if reasonably supported by the findings," but noting that more exacting clear-and-convincing standard of proof regarding parents' unfitness is applied in termination proceedings).

We reject mother's argument that the family division's conclusion regarding C.B.'s best interests is inconsistent with the court's expression of hope that mother would be allowed to maintain contact with C.B. The family division found that for the first year and a half after C.B. was taken into DCF custody, mother relapsed repeatedly and seriously, failed to remain sober for any significant period, and did not commit to any sustained recovery from her drug addiction. The court also found that since July 2017, mother had made concerted efforts to remain sober and had made great strides in turning her life around. The court stated, however, that she continued to have

relapses and had not had any period of true sobriety for longer than several months. The court emphasized that C.B. needed a consistently and reliably sober parent who could focus on his special needs and provide him with critical emotional support. The court stated that mother remained at risk of additional relapses and had never obtained housing that would be safe and appropriate for C.B. The court noted that C.B. was now ready to be placed in a therapeutic foster home wherein his specialized needs could be addressed. Acknowledging that C.B. still cared deeply about his mother, the court "hoped," but recognized it could not order, "that he and mother will be allowed to maintain written communication, and even to visit one another in person from time to time."

This latter comment is not inconsistent with the family division's best-interests analysis, in which the court noted C.B.'s critical need for the kind of care and support that mother was still not able to provide despite the passage of a significant period of time since C.B. was placed in DCF custody. Regarding C.B.'s desire to be united with mother, the court cited his clinicians' conclusions that his attachment to his mother was an anxious one and that he experienced some emotional conflict and ambivalence about the relationship—not entirely trusting that she could provide him with a stable and safe environment.

Mother also takes exception to the family division's comment at the end of its decision that the issuance of its order would "open up many more resources for [C.B.] to find a healthy, permanent, supportive family." According to mother, this comment ignores the fact that C.B. has no prospects for a permanent home in his current situation. To the extent that the challenged comment is critical to the court's termination decision, which was based primarily on mother's inability to resume her parental duties within a reasonable time from C.B.'s perspective, it is supported by the record. The DCF caseworker testified that C.B. had been going on respite visits with families and had progressed to the point where he was ready to start more intensive trauma-based therapy and to be placed in a therapeutic foster home where his higher needs could be addressed. The caseworker stated that C.B. was at an optimal age to transition from a residency program to a permanent foster home, which would become more difficult as he got older. The caseworker explained that DCF and the Lund Family Center were working together to explore all available placement options and that C.B. had been referred to a service provider that would get C.B. out into the community more to work on his social skills so that he could better transition to a foster home.

Next, mother asserts that C.B. lacked his own independent advocate throughout the proceedings, which amounted to a denial of counsel. According to mother, after this Court's decision in L.H. and the withdrawal of C.B.'s original attorney, the family division failed to provide the oversight necessary to assure that C.B. was effectively represented by counsel. Mother notes that between April 2016 and the final order, C.B. was represented by four attorneys. She also points out that the parties' waiver of any objections to the conflict resulting from C.B.'s first attorney was not reduced to writing. She states that her waiver of any objection to the admission of transcripts of the original termination hearing did not waive the conflict of interest over C.B.'s representation.

We find no merit to these arguments. Nothing in the record supports mother's vague suggestion that C.B. did not have effective representation. The first attorney represented C.B. from May 2015 until she was replaced in April 2016, before the termination petition was filed. There were no hearings during the next eight months before the appearance of the third attorney, who represented C.B. through the first termination hearing and the status conference held to determine how to proceed after the issuance of L.H. A fourth attorney represented C.B. from May 2018 through the end of the second termination hearing in June 2018. Mother does not point to

any specific failings on the attorney's part at the termination hearing. After the conclusion of the that second hearing, a fifth attorney represented C.B. beginning in July 2018.

Mother appears to argue that the decision to admit the transcripts of the first termination hearing in addition to evidence presented in the second hearing constituted a continued conflict of interest with respect to the first attorney's representation of C.B. No party objected to that procedure, however, and in L.H., this Court expressly authorized the parties on remand to stipulate "to admission in the new TPR hearing of parts or all of the transcripts from the prior TPR hearing." 2018 VT 4, ¶ 35 n.10. Any appearance of a conflict of interest with the first attorney was cured by the second termination hearing after the first attorney withdrew. Furthermore, we find no merit to mother's suggestion that, regarding how to proceed following the issuance of L.H., the family division violated the requirement in Vermont Rule of Family Procedure 6(d)(1) that the court review any settlements or waivers involving a ward's substantial rights in any proceeding where a guardian ad litem has been appointed. Here, beyond reviewing it, the family division suggested the procedure and discussed it with the parties, none of whom objected.

Finally, mother argues that the record does not sufficiently reflect that father consented to the termination of his rights. She states that although father did not testify on his own behalf because he did not request an opportunity to present evidence at the second termination hearing, he did not waive the conflict regarding C.B.'s first attorney, and the State still had the burden to demonstrate that termination of father's parental rights was in C.B.'s best interests. Again, we find no merit to this argument. Father did not appeal the family division's termination of his parental rights and mother has failed to demonstrate that the termination of father's rights adversely affected her or was even relevant to the termination of her parental rights, especially considering that she and father were not a couple throughout the duration of the CHINS proceedings. See In re M.C., 156 Vt. 642, 643 (1991) (mem.) (stating that, to establish standing, "the rights of the party seeking to appeal must be adversely affected by the judgment"). Further, even assuming father's termination order was subject to reversal without him appealing that order, it is well established that the family division can terminate one parent's rights and not the other's. See In re C.F., 2015 VT 45, ¶ 14, 198 Vt. 504 ("The fact that father retains residual parental rights as the result of the family division's second order did not prevent the court from terminating mother's rights after examining the applicable statutory criteria.").

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice