

*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. 2019-195

OCTOBER TERM, 2019

In re J.L., Juvenile  
(H.L., Mother\*)

} APPEALED FROM:  
}  
} Superior Court, Windsor Unit,  
} Family Division  
}  
} DOCKET NO. 22-2-19 Wrjv

Trial Judge: Elizabeth D. Mann

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

Mother appeals the family court’s determination that her son J.L., who is six years old, was a child in need of care or supervision (CHINS), and she appeals the disposition order award of custody to DCF. We affirm.

In February 2019, J.L. appeared at his kindergarten with a black eye. When asked by another kindergartener what happened, he stated, “My dad.” School staff reported the incident to the Department for Children and Families (DCF). DCF was already involved with mother and her family due to issues with mother’s older son.

A DCF worker observed the black eye and contacted mother. Mother told the DCF worker that she heard the incident but did not see it. She told the DCF worker that she was in one room and her boyfriend was with J.L. in another room. She heard a bang, then a slapping sound. She said she heard the chair flip, and she heard what she thought was J.L. being hit. The DCF worker asked mother why she didn’t contact her social worker or the police. She stated she didn’t feel that would accomplish anything. Mother expressed concerns about J.L.’s behaviors, which included smearing his feces, throwing furniture and objects, and some sexualized behaviors such as putting a toilet-bowl plunger between his buttocks. The DCF worker stated that there were also concerns about J.L.’s attendance and behaviors at school.

J.L. reported to the DCF worker that his dad hit him and identified his “dad” as mother’s boyfriend. While saying this, he made a motion with his fist going toward his eye.

DCF filed a petition alleging J.L. was CHINS due to abuse and lack of proper parental care. Custody was transferred to DCF pursuant to an emergency care order and J.L. was placed in a foster home. Following a hearing at which mother appeared, but her attorney did not, the court issued a temporary care order continuing DCF custody and finding that no services would have been appropriate to keep J.L. at home due to emergency circumstances.

Mother’s attorney requested a contested merits hearing regarding J.L. and a hearing to contest the revocation of a conditional custody order for mother’s older son. The hearings were

held on the same day in April 2019, but the parties agreed that evidence would be taken separately and evidence from the older son's hearing would not be admitted as to J.L.

At the merits hearing, mother denied telling the DCF worker that she heard J.L. being hit. She stated that she did not notice the injury until later in the evening and J.L. said he hurt himself. She stated that she did not report the injury because there was "nothing to report." She testified that at the time of the incident, she was living with J.L., her older son, and her boyfriend at the boyfriend's parents' home. The boyfriend had since moved out, but she continued to reside with his parents because she had nowhere else to go.

The court found by a preponderance of the evidence that J.L. was injured by mother's boyfriend and mother failed to intervene or take steps to prevent J.L. from further injury. The court stated that these findings alone supported a determination that J.L. was CHINS due to neglect. The court also noted that mother's failure to engage in services to protect J.L. was consistent with her failure to follow through with services for his older brother, and further found that there were concerns about J.L.'s absences from school.

DCF filed a disposition case plan that called for continued DCF custody with a goal of reunification with mother. The court held a disposition hearing on June 3 at which mother's attorney stated that mother did not object to the goal but had some objections regarding the action steps. She requested ten days to file her objections in writing. However, she did not file anything until more than a month later, and then only objected generally to continuing DCF custody. In July 2019, the court issued a disposition order continuing custody of J.L. with DCF. Mother appealed.\*

When reviewing a CHINS merits decision, we will uphold the court's factual findings unless they are clearly erroneous and its legal conclusions if supported by the findings. In re M.K., 2015 VT 8, ¶ 8, 198 Vt. 233. "Only those findings that are bereft of evidentiary support are clearly erroneous." Id.

On appeal, mother first argues that the State did not meet its burden of showing that J.L. was at risk of harm in his home because the court dismissed the claim that J.L. was CHINS due to abuse, there was no evidence that the boyfriend had been substantiated or charged by police, mother testified that she did not see the incident and did not believe there was anything to report, and mother did take steps to protect her son. Mother argues that the court improperly treated her as if she were a mandated reporter under 33 V.S.A. § 4913 by faulting her for her failure to report.

The court's finding that J.L. was injured by mother's boyfriend and mother failed to intervene or take steps to prevent J.L. from further injury was supported by evidence in the record. J.L. stated at school and reported to the DCF worker that mother's boyfriend hit him. Mother initially reported to DCF that she did not see the incident but that her boyfriend and J.L. were in the other room and she thought she heard J.L. being hit. Despite this, mother did not intervene, seek medical attention, or report the injury to anyone, and instead sent J.L. to school with the black eye. Although mother later claimed that there was nothing to report, and that J.L. told her that he had injured herself, the court plainly did not find her testimony to be credible on this point. "We

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\* Mother initially filed a notice appealing the June 3 order, which was not a final disposition order. Following the court's July 19, 2019 disposition order, mother filed a second notice of her appeal of that order. The two appeals were consolidated. For all practical purposes, the focus of this appeal is the July 19 order.

leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence.” In re M.L., 2010 VT 5, ¶ 8, 187 Vt. 291 (quotation omitted).

Contrary to mother’s argument, the family court did not treat mother as a mandated reporter or transfer custody solely because she had not made a report to DCF. The court’s finding that J.L. was CHINS was based on the injury caused by mother’s boyfriend and mother’s failure to either prevent that injury or take steps to protect J.L. after it occurred. This finding was adequate to support the court’s determination that J.L. was CHINS due to neglect. See In re J.W., 2016 VT 78, ¶ 24, 202 Vt. 424 (“Mother’s failure to protect [child] from an individual she believed to be dangerous supports a conclusion that [child] was without proper parental care or subsistence, education, medical, or other care necessary for her well-being.” (quotation and alteration omitted)).

Mother’s subsequent cooperation with DCF, and statements at the temporary care hearing that she wanted her boyfriend to move out and never let her children out of her sight, do not affect the validity of the court’s CHINS determination. “The issue before the family court at the merits stage of a CHINS proceeding is a determination of whether, at the time of the filing of the petition, the juvenile is a child in need of care and supervision.” In re D.T., 170 Vt. 148, 156 (1999) (emphasis added). The evidence showed that at the time of the petition, mother’s boyfriend was still living in the home. Moreover, mother stated that when the boyfriend struck J.L., she was in another room.

Mother argues—and we agree—that the court’s findings about educational neglect were unsupported by any evidence from J.L.’s hearing. Mother also argues that the court improperly relied on testimony from the hearing involving her older son. However, these errors do not warrant reversal. The court specifically found that mother’s failure to intervene or take steps to protect J.L. from further injury “alone warrants continuation of the temporary care order and a finding of merits.” This finding clearly indicates that the trial court’s determination did not rest in any significant part on the erroneous findings.

Mother contends that the temporary care order must be vacated because the court conducted the temporary care hearing without mother’s attorney being present and made a reasonable-efforts finding without notice to the parties, thereby denying mother due process. It is not clear why mother’s attorney was not present at the initial hearing in February. However, she was present at all subsequent hearings, including the merits hearing. At no point during the proceedings below did mother or her attorney challenge the reasonable-efforts determination or otherwise object to the alleged errors in the temporary care hearing. Even if the temporary care order was flawed, any error was mooted when the court issued a disposition order maintaining custody of J.L. with DCF. Cf. In re A.M., 2017 VT 5, ¶ 10, 204 Vt. 198 (stating that disposition hearing “effectively moot[ed] the question of the children’s placement pending disposition”). We note that the issue of whether DCF undertook reasonable efforts to prevent the removal of J.L. from mother’s care is separate from, and not a prerequisite to, the determination of whether J.L. was CHINS. In re D.C., 2012 VT 108, ¶ 33, 193 Vt. 101. We therefore decline to disturb the decision below on this basis.

Next, mother argues that the court improperly modified findings in its disposition order. The record does not support her claim. At the merits hearing, the court found that mother told DCF and police that she did not see the incident, but that she did hear a chair being thrown and a slap and did not report the injury. This was consistent with its statement in the disposition order that “[m]other was present and heard her boyfriend strike [J.L.] resulting in a black eye but . . . took no actions to intervene on behalf of [J.L.] or to protect him from further harm.” Likewise, the

court’s statement in the disposition order that “although she initially acknowledged to DCF concerns regarding the boyfriend, at the merits hearing mother denied making such statements of concern and testified that she failed to file any reports regarding the boyfriend striking [J.L.] because there was ‘nothing to report,’ ” is consistent with its findings on the record at the merits hearing that mother initially told DCF that she heard boyfriend strike J.L. but then denied those statements at the merits hearing. Those findings were in turn supported by the evidence.

Finally, we address mother’s claim that the court’s decision at disposition to continue custody with DCF was unsupported by the evidence because the State did not show that mother and her boyfriend were still in a relationship or living together. In connection with its CHINS merits order, the court continued temporary custody with the State. It found that mother’s failure to intervene or take steps to protect J.L. was itself sufficient to warrant continuation of temporary custody. It then set the matter for a disposition hearing. DCF filed its proposed case plan the business day before the June 3 disposition hearing—inadequate time to give mother an ample opportunity to review and comment. See 33 V.S.A. § 5316(a) (requiring DCF to file disposition case plan not later than seven business days before scheduled disposition hearing). At the scheduled hearing, mother sought more time to review the proposed disposition case plan; she indicated that she did not object to the case plan goal, but she did expect to file objections to the action steps. The court gave her ten days to do so and set a follow-up conference on July 1 to review mother’s objections to the disposition case plan. See 33 V.S.A. § 5317 (providing that “[i]f disposition is contested” all parties shall have right to evidentiary hearing).

There is no record that mother filed any objections to the disposition case plan within ten days, or at any time prior to the July 1 hearing for that matter. Mother’s attorney on appeal has indicated that the July 1 transcript is not necessary for review on appeal, so we cannot assume that mother asserted her objection to the custody recommendation in DCF’s disposition case plan at that time. It appears from the trial court’s scheduling entry order that the focus of that status conference was a proposal to place J.L. in an out-of-state placement, rather than on the question of placement at disposition. Mother did not file any objection to assignment of custody to DCF in the disposition order until July 12—more than thirty-nine days after the June 3 order giving mother ten days to file her objections, and nearly two weeks after the status conference scheduled to review mother’s objections. On this record, the trial court acted within its discretion in concluding that the disposition case plan was uncontested and issuing a disposition order consistent with that plan.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice