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. 2019-217

OCTOBER TERM, 2019

In re J.L., Juvenile	}	APPEALED FROM:
(B.L., Mother*)	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 99-3-17 Cnjv
		Trial Judge: John L. Pacht

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

Mother appeals the family division's order terminating her parental rights to her son, J.L.* We affirm.

Mother does not challenge any of the family division's findings, which reveal the following facts. J.L. was born in April 2012. Mother has two other children, a younger daughter who is living with her father and an older son who is in the legal custody of mother's mother. Mother has a long history of substance abuse and mental health challenges. She began smoking marijuana and drinking alcohol at age thirteen and was abusing crack cocaine and prescription drugs by age twenty-one. Mother also has a criminal history dating back to 2001, when she was seventeen years old. By the time J.L. was born in 2012, mother was heavily abusing drugs.

Not long after J.L.'s birth, mother began treatment in a rehabilitation program. The Department for Children and Families (DCF) became involved with the family in December 2014 over concerns that mother might be dealing and using drugs and leaving J.L. and his younger sister unattended. Mother relapsed on alcohol and cocaine in March 2015, but in July 2015 DCF closed the case because mother was engaged in treatment, employed, current with the children's medical appointments, and engaged in daycare and services. In June 2016, mother relapsed on cocaine and heroin, resulting in criminal charges against her.

On March 3, 2017, the State filed a petition alleging that J.L. was a child in need of care or supervision (CHINS). At that point, mother was using two to two-and-one-half grams of heroin per day. The State filed its CHINS petition after mother was arrested on state and federal drug charges. A Vermont state trooper reported to DCF that mother was involved in ongoing drug activity in her residence in the presence of her children. Mother admitted that she exposed her children to numerous dangerous individuals who were selling drugs out of her residence. DCF was awarded temporary custody of J.L., who at that time was placed with his current foster family.

* The family division also terminated the parental rights of J.L.'s father, who had not been significantly involved in J.L.'s life and has not appealed the court's termination order.

Mother stipulated to the CHINS adjudication, admitting that she was actively using heroin, was placing her children at risk, and was unavailable to care for her children due to her incarceration. In April 2017, mother was released from federal custody to a residential treatment facility. The following month, she successfully completed a treatment program at the facility and had her first supervised visit with J.L. on May 9, 2017. On the same date, she tested positive for opiates and cocaine. Following a hearing on this violation of her federal conditions of release, mother was allowed to remain in the community. She tested negative for illicit substances for the remainder of May, and supervised bimonthly contact was scheduled.

At a disposition hearing in late June 2017, the parties stipulated to DCF custody, with a goal of reunification with mother within a period of nine to twelve months. The family division adopted a case plan that called for mother to, among other things, abstain from illicit substances, provide random urinalysis samples, engage in mental health therapy and follow recommendations, find safe and stable housing, visit J.L. unimpaired and provide age appropriate supervision, and follow all probation conditions.

Mother was incarcerated again in July 2017 following another relapse and an arrest on a charge of driving under the influence of intoxicating liquor (DUI). As a result, mother was incarcerated at a federal prison in Essex, New York, where she remained until her sentencing in March 2018. In October 2017, mother asked the family division to order parent-child contact at the New York facility. Following a November 2017 hearing, the family division declined to order in-person visits at the facility but instead ordered the parties to move forward with weekly video contact between mother and J.L. In March 2018, mother was sentenced to a thirty-month prison term to be followed by three years of supervised release. After sentencing, mother was transferred to a federal correctional facility in Danbury, Connecticut.

In February 2018, J.L. filed petitions to terminate his mother's and father's parental rights. In its February 2018 permanency case plan, DCF changed its disposition goal from reunification with mother to adoption. At that time, J.L. had been in foster care for nearly a year, and mother remained incarcerated. Mother was released to a New Hampshire halfway house in April 2019, after which she hoped to be released to home detention.

A contested termination hearing was held in September 2018, with the court taking the decision under advisement. In March 2019, the family division held a status conference, at which time the court floated the idea of a post-adoption contact agreement accompanied by mother's voluntary relinquishment of her parental rights. See 33 V.S.A. § 5124. The foster parents expressed an openness to the idea and requested that they be appointed counsel, which the court did. Subsequent negotiations regarding a potential agreement were unsuccessful, and, in May 2019, the court issued its decision granting J.L.'s termination petitions.

On appeal, mother first argues that by denying her parent-child contact with J.L. while she was in prison and then terminating her parental rights based solely on her incarceration, the family division violated her First Amendment right to freedom of association and her Eighth Amendment right to be free from cruel and unusual punishment. She asserts that denying visitation predetermined the critical statutory best-interest factors that the court relied upon in terminating her parental rights. See 33 V.S.A. § 5114(a) (setting forth best-interest factors to consider in reviewing, among other things, petition to terminate parental rights). She further contends that the family division violated her due process protections by finding stagnation of her parenting ability and presuming her unfitness based on the lack of physical contact between her and J.L. rather than focusing on her ability to parent J.L. in the future. See id. § 5313(b) (providing that court may modify previous order "on grounds that a change of circumstances requires such action to serve

the best interests of the child"); In re T.M., 2016 VT 23, ¶ 13, 201 Vt. 358 ("The State must demonstrate, and the family court must find, stagnation by clear and convincing evidence before the court may consider whether termination of parental rights is in the children's best interests.").

We conclude that these arguments do not undermine the family division's decision to terminate mother's parental rights. As noted above, in October 2017, mother requested that the family division order parent-child contact with J.L. at the New York facility where mother was incarcerated. At the November 27, 2017 hearing on mother's motion, J.L.'s attorney opposed the motion, stating that visits at the jail would be traumatic for the then five-year-old child. The attorney stated that J.L. had seen his mother arrested and witnessed many traumatic events while under her care. The attorney indicated that she supported FaceTime and telephone calls, but that she had concerns about whether relatively short visits at the prison facility would be emotionally harmful to J.L. J.L.'s guardian ad litem raised the possibility of video chatting, and mother's attorney suggested that there had been problems setting that up. In the end, the court granted weekly video chatting and assigned the parties' attorneys to arrange it. The court expressed its concerns about in-person visits, noting that the young child would undoubtedly have to go through a series of prison doors in visiting his mother there. Mother does not contend, and the family division docket entries do not indicate, that mother made later requests for in-prison visits.

Given these facts, we conclude that the family division did not abuse its discretion by denying prison visits at that time and instead ordering weekly contact between mother and J.L. through video chatting. Generally, the court must order parent-child contact unless it "finds that it is necessary to deny parent-child contact because the protection of the physical safety or emotional well-being of the child so requires." 33 V.S.A. § 5319(a). In this case, the court did not deny all parent-child contact, but it restricted the contact at that time to video chatting because of concerns raised about the potential harm to J.L. from in-person visits at the prison facility where mother was incarcerated; the court issued this order in response to child-specific arguments that J.L. had been exposed to traumatic events, such as seeing mother arrested, while in mother's care. As for mother's suggestion that the minimal parent-child contact she had with J.L. during her incarceration was beyond her control, mother, not DCF, is responsible for her criminal behavior that led to her incarceration and the resulting limited contact with J.L. See In re D.S., 2014 VT 38, ¶¶ 20, 26, 196 Vt. 325 ("[O]ur case law makes clear that a parent is responsible for the behavior that leads to incarceration and for the consequences that come with such incarceration.").

Nor did the family division rely solely on the fact of mother's incarceration in concluding that mother's ability to care for J.L. had stagnated, as mother asserts. Rather, the court concluded that: (1) because mother's behavior that led to J.L. being placed in state custody caused the child emotional harm and exposed him to serious risk of physical harm, it was imperative that mother promptly obtain treatment, follow conditions of release, and abide by the plan of services set forth in the disposition case plan; (2) mother had several opportunities to reestablish her sobriety and resume her parental responsibilities through services provided during her pretrial release period, but instead she relapsed into drug use; (3) mother was given a second chance after her first relapse, but began using again, which led to a DUI charge and her incarceration; and (4) her incarceration delayed the time period for mother to resume her parental responsibilities, which was critical given J.L.'s need for stability and permanency. These findings support the court's conclusion that mother's ability to parent J.L. had stagnated. Further, in addressing mother's incarceration, the court considered the relevant factors affecting J.L.'s best interests, including mother's relationship with J.L. before the child came into state custody, J.L.'s needs, and the effect of incarceration on mother's ability to parent J.L. within a reasonable period of time from J.L.'s perspective. See In re M.W., 2016 VT 28, ¶ 22, 201 Vt. 622 (stating that relevant factors regarding incarceration include nature of parent-child relationship before incarceration, terms of incarceration, needs of

child, and incarceration's effect on parent's ability to remain involved with child and be in position to resume parental duties within reasonable period of time from child's perspective).

Mother also argues that, given the family division's acknowledged inability to predict how she would integrate into the community following her release from prison, there was no clear and convincing evidence of stagnation or her unfitness. In making this argument, mother reasserts her contention that the court relied solely upon mother's status as an incarcerated parent as proof she was unfit. Mother further contends that the court impermissibly based its decision on a determination that J.L. would be better off with the foster parents than with her.

We disagree. As noted, the court's conclusions that mother's parenting ability had stagnated and that she would be unable to resume her parental duties within a reasonable period of time were based on mother's drug relapses during a critical period of time when it was imperative that she reach a point where she could provide care for J.L., who had been previously traumatized under her care and needed stability in his life. The fact that the court could not predict whether mother would relapse again did not undermine its best-interests calculation by clear and convincing evidence. See In re R.B., 2015 VT 100, ¶ 25, 200 Vt. 45 ("[J]uvenile proceedings often involve difficult predictions about the future. Best judgment, rather than perfection, is our standard." (quotation omitted)). At the time of the termination hearing, J.L. had been in foster care for a lengthy period of time, and mother still had not reached a point where she was in a position to care for him. As the court noted, given mother's long history of addiction, significant challenges remained for her—including finding stable housing and establishing employment and relationships conducive to maintaining her sobriety. Given the many challenges mother still had to overcome, the court essentially concluded that mother would not be in a position to resume parental responsibilities in a reasonable time, if ever. In discussing J.L.'s marked improvement while in foster care, the court was considering J.L.'s relationship with people significantly affecting his best interests, as required by § 5114(a)(1), not suggesting that it was terminating mother's rights merely because J.L. would be better off with the foster parents.

Finally, mother argues that the family division abdicated its responsibility to protect J.L.'s best interests by suggesting that it was in J.L.'s best interests for mother to have parent-child contact but then terminating mother's rights anyway. According to mother, the court's termination order violated her right to equal protection under the law because both J.L. and his sister were removed from her care under the same set of circumstances and yet she will not have the benefit of an ongoing relationship with J.L. only because, unlike his sister, he does not have a father who can care for him. Mother contends that the family division had other options besides terminating her parental rights, such as establishing a permanent guardianship for J.L. that allowed for visitation by mother.

Again, we find these arguments unavailing. To be sure, the family division delayed its decision on J.L.'s petitions to allow the parties to explore the possibility of entering into a post-adoption contact agreement, and it indicated in its termination decision that it had hoped the parties would reach an agreement. The court then noted the limited choices it had before concluding by clear and convincing evidence that termination was in J.L.'s best interests. Mother argues that given its stated ambivalence about terminating mother's parental rights, and its express recognition that ongoing post-adoption contact would be in J.L.'s best interests, the court should have considered a guardianship or other disposition under 33 V.S.A. § 5318. Mother distinguishes this case from those in which a court concludes that terminating a parent's rights is itself in the children's best interests. However, other than opposing termination, mother did not argue for an alternative placement or disposition, such as a permanent guardianship, at the termination hearing. As a consequence, we need not consider whether the court misunderstood its options, or whether

it should have rejected the TPR petition because in this case an alternative disposition would better promote the child's best interests. Because mother did not argue for a permanent guardianship below, and thus presented no evidence that permanent guardianship would be in the child's best interests, the court had no record on which to base such an assessment. (The record does not even indicate whether the foster parents were willing to accept an assignment as permanent guardians.)

Regarding mother's equal protection argument, the family division did not treat mother differently with respect to her two children; in both cases, the court issued disposition orders that it determined were in the best interests of each child. Even assuming mother is correct that in one case the child's other parent is fostering an ongoing relationship between the child and mother, and in the other, the foster parents have not agreed to any ongoing contact, the circumstances would not signal a common benefits violation. Any differences in the trajectory of mother's relationships with the respective children stem from the distinct needs and circumstances of the respective children. What mother really wars with in her brief is the absence of any statutory authority to compel post-adoption visitation in the absence of a voluntary post-adoption contact agreement. Whether the statutes are best designed to promote the best interests of children whose parents' rights are terminated is a policy question that should be directed to the Legislature. Here, the record supports the family division's determination by clear and convincing evidence that mother's ability to parent J.L. had stagnated and that termination of mother's parental rights was in J.L.'s best interests.

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