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. 2019-220

NOVEMBER TERM, 2019

In re A.L., Juvenile (H.L., Mother*)	}	APPEALED FROM:
	}	Superior Court, Windham Unit, Family Division
	}	DOCKET NO. 86-8-14 Wmjv
		Trial Judge: John R. Treadwell

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

Mother appeals the termination of her parental rights to son A.L., who is seven years old. We affirm.

In August 2014, when A.L. was two years old, the Department for Children and Families (DCF) filed a petition alleging that A.L. and his two-month-old half-sister were children in need of care or supervision (CHINS) after both children suffered significant physical injuries while mother was asleep. Mother told police and DCF that A.L. had injured his sister and that if A.L. killed his sister it would be the State's fault.

A.L. began to receive services at a young age due to his inability to communicate and interact normally with other children and adults. He was aggressive and would scream or use a high-pitched shriek to get attention. He never stopped moving and had difficulty focusing. He bit many adults including mother. He was diagnosed in 2017 with an expressive language disorder and deficits in self-regulation and executive function consistent with ADHD. Since 2014, he has been living with a foster family that provides him with the emotional support and structure that he needs, and his behaviors and language skills have improved markedly.

The parties stipulated that A.L. was CHINS in October 2014. In April 2015, the court approved a disposition case plan that called for returning A.L. to mother's care by July 2015. The plan included mother's boyfriend S.T., who is the father of A.L.'s sister, as part of the family unit. Mother and S.T. participated in substance abuse assessments, parenting classes, family time coaching, and domestic violence education. They also participated in a parenting capacity evaluation with a psychologist who opined that they could meet most of the children's basic needs but needed more support and education to properly supervise them and meet A.L.'s emotional and safety needs. By early June 2015, A.L. was having overnight visits in the family home and was expected to return to mother's care. In July 2015, mother had a second child with S.T.

In July 2015, DCF filed a permanency plan with concurrent goals of reunification by September 2015 or adoption, which the court adopted. The plan noted DCF's concerns about mother and S.T.'s ability to effectively co-parent and mother's ability to regulate her emotions and

supervise the children as a single parent. A few days after the court adopted the plan, S.T. called DCF and asked the case worker to come to the home. He expressed concern that mother could not parent three children at the same time and could not manage A.L.'s behaviors. When the case worker suggested that he should be at home helping mother, he "shrugged it off." The case worker went to the home and saw A.L. kick, slap, punch, pinch, bite, and scratch mother and his sister. He threw toys and tried to turn over the baby's swing. Mother was unable to calm him. With mother's agreement, the case worker contacted A.L.'s foster father, who was able to calm him. Similar reports regarding A.L.'s behavior were made to DCF during August 2015. As a result, visitation was reduced to three times a week with supervision. The DCF case worker believed that S.T. was trying to sabotage the visits because he did not like A.L. The psychologist conducted a home visit and was concerned about S.T.'s negative mood and behavior toward A.L. By October 2015, DCF believed that S.T.'s presence was harmful to A.L.

DCF filed a permanency plan in December 2015 that recommended reunification with mother or adoption. The reunification plan was predicated on S.T.'s not being part of the household and required mother to recognize the negative impact S.T. had on A.L. The plan also called for mother to recognize and meet A.L.'s emotional needs, focus on him during visits, and appropriately supervise and interact with him. After a contested hearing in April 2016, the court adopted the case plan and approved a goal of reunification by July 2016. In its findings, the court stated that it was in A.L.'s best interests to not be parented by S.T. and that reunification could only occur if S.T. was not part of the family unit. Mother did not appeal this permanency order. Mother subsequently informed DCF that she intended to marry S.T. and planned to have him move out until reunification with A.L. occurred, then move back in.

DCF filed a petition to terminate parental rights in July 2016. Mother married S.T. in March 2017. The psychologist conducted an update to her parenting evaluation in June 2017 in which she observed that mother was doing all the parenting work for the two younger children. In June 2017, mother obtained an ex parte restraining order against S.T. She later told DCF that she fabricated the allegations and wanted S.T. home. DCF moved mother's visits with A.L. to a community setting after this incident. Although mother sometimes engaged appropriately with A.L. during visits, she was often preoccupied with her mobile phone and would show him a movie instead of interacting with him. In August 2017, the court ordered mother's visits to occur in the family home without S.T. present and with all electronics turned off.

A termination hearing was held in August and September of 2017. The court terminated mother's rights in December 2017 and mother appealed. Following this Court's decision in In re L.H., 2018 VT 4, 206 Vt. 596, the parties agreed to remand the case for rehearing. The court directed DCF to file a new termination petition, which it did in April 2018.

Mother's supervised visits with A.L., which had stopped after the first termination decision, resumed when the case was remanded. A.L. was confused and distressed by the resumption of visits and tried to leave some of them.

Mother's third child with S.T. was born in May 2018. She continued to live with S.T. and their three children. She worked full-time at Walmart. In September 2018, another psychologist evaluated mother and S.T. and found that mother was nurturing and generally attentive but that there was a lack of structure and "the visit would be described as controlled chaos with an inordinate amount of yelling and shrieking by" the children. In his opinion, A.L. needed a home with emotional support and adequate supervision and that was free from domestic violence.

The court held a second termination hearing over two days in November 2018. It found that mother had stagnated in her ability to parent A.L. because she had only limited visitation with him and had chosen to prioritize her relationship with S.T. instead of taking steps toward reunification with A.L. Turning to the best-interests factors, the court found that mother had diligently maintained contact with A.L. but that her focus remained elsewhere. A.L. regarded his foster parents as his parents and was fully integrated into the foster home, school, and community. Meanwhile, mother continued to live with S.T., who was a substantial barrier to A.L.'s return to the home, and the home did not have adequate room for A.L. The court found that mother would not be able to resume parenting A.L. within a reasonable amount of time because she had not demonstrated that she could safely manage and parent him in her home due to his needs and because S.T. remained in her life. It found that mother did not play a constructive role in A.L.'s life because she did not make him a priority and could not consistently meet his substantial and unusual physical and emotional needs. It therefore concluded termination was in A.L.'s best interests. Mother appealed.

When the State seeks to terminate parental rights after initial disposition, the court must conduct a two-step analysis: it must determine that there has been a change in circumstances sufficient to justify modifying the disposition order, and it must find that termination is in the best interests of the child after considering the statutory factors set forth in 33 V.S.A. § 5114(a). In re M.P., 2019 VT 69, ¶ 24; see also 33 V.S.A. §§ 5113, 5318. "The most important factor in the court's analysis is the likelihood that the natural parent can resume his or her parental duties within a reasonable period of time." In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325. "As long as the court applied the proper standard, we will not disturb its findings unless they are clearly erroneous, and we will affirm its conclusions if they are supported by the findings." In re G.S., 153 Vt. 651, 652 (1990) (mem.).

On appeal, mother first argues that the trial court erred in concluding that she would not be able to resume parenting within a reasonable amount of time when there was no evidence that she or S.T. ever physically harmed A.L. or the other children and she engaged in all aspects of the case plan.

We are unpersuaded by this argument. The court's determination was not predicated on physical abuse by mother or S.T. It was based on findings that mother had not been able to remedy the problems that led to state intervention in the first place despite having had years to do so, primarily her inability to keep A.L. safe in the home. See In re B.M., 165 Vt. 194, 200 (1996) (affirming court's conclusion that father would not be able to resume parenting within reasonable time; even though father was not alleged to have physically abused children, father had not worked to address his own violent behaviors that created chaotic and violent household and led to children's removal). The court recognized that mother had made significant progress toward the case plan goals such that a trial reunification was attempted in July 2015. However, mother was unable to safely parent A.L. at that time with the other children present and DCF stopped unsupervised contact. Since then, mother had not progressed beyond supervised contact with A.L. three times per week, despite receiving substantial supports from DCF. After mother filed a petition for a relief-from-abuse order against S.T. in June 2017, visits were moved out of the home. Although mother diligently attended visits, she often did not engage with A.L., instead putting a movie on for him to watch. Mother now had a fourth child and did not have room for A.L. in her current home. The home was chaotic and would not provide A.L. with the safety and additional emotional support he needed. Mother chose to remain with S.T. despite the clear expectations of the case plan and the disposition order. The court found that S.T.'s negative attitude toward A.L. coupled with A.L.'s particular needs made S.T.'s presence in the home a significant barrier to reunification.

The court's findings are supported by the record and in turn support its conclusion that mother would not be able to resume parenting A.L. within a reasonable time. "[W]hile parental improvement is a factor to consider, the real test is whether there is a reasonable possibility of reuniting parent and child within a reasonable period of time." In re J.J., 143 Vt. 1, 6 (1983). Mother's inability to progress beyond supervised visits outside the home, coupled with S.T.'s continued presence in her life, support the court's conclusion that she could not safely resume parenting A.L. in the near future.

Mother further argues that DCF and the court improperly treated the April 2016 permanency order as a final order. She claims that the court had no authority to demand that mother separate from S.T. as a prerequisite to reunification in that order. Accordingly, she argues, it was error for the court to consider the order in its termination decision.

As we have explained, when the court modifies a disposition order as a result of a permanency hearing, the new order effectively replaces the original disposition order and is a final, appealable order. In re R.M., 2013 VT 78, ¶¶ 7-8, 194 Vt. 431 ("Because a disposition order is a 'final order,' and thus meets the standard for an appealable order, the parties can appeal a disposition order whether original or as a result of modification." (citations omitted)). Mother could have appealed the April 2016 order but did not do so and is foreclosed from challenging its validity now. See In re C.P., 2012 VT 100, ¶ 28, 193 Vt. 29 (holding that father could not collaterally attack CHINS merits decision after termination because it was a final appealable order and he did not appeal). The court therefore did not err in considering the April 2016 order in the context of its termination decision.

Moreover, the court did not terminate mother's parental rights simply for failing to reject S.T., as mother argues. As discussed above, the court found that mother was unable to safely parent A.L. with the other children present. She had not been able to resume unsupervised visits since 2015 and was not focused on A.L. during one-on-one visits. Thus, even without S.T. in the home, it was not clear that mother would be able to resume parenting A.L. within a reasonable time.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice