

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. 2020-206

DECEMBER TERM, 2020

In re A.T., Juvenile	}	APPEALED FROM:
(W.T., Father* & C.B., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 155-12-17 Wmjv
		Trial Judge: John R. Treadwell,
		Katherine A. Hayes

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

Mother and father individually appeal the family division’s decision terminating their parental rights with respect to their daughter, A.T. We affirm.

After her birth in October 2017, A.T. remained in mother’s care for approximately ten weeks. In mid-December 2017, mother and father stipulated to father’s parentage. The previous month, the Department for Children and Families (DCF) had opened a family support case to address, among other things, reports of domestic violence between mother and father. In late December, mother and father filed a series of relief-from-abuse (RFA) petitions against each other. As the result of one of those petitions, the family division issued a temporary order granting father parental rights and responsibilities and prohibiting contact between mother and A.T. On December 27, 2017, father brought A.T. into the home of his mother, with whom he was living. Meanwhile, mother was charged with domestic assault for striking father and cruelty to a child for shaking A.T.¹ Two days later, on December 29, the State filed a nonemergency petition alleging that A.T. was in need of care or supervision (CHINS) because she was without proper parental care necessary for her well-being.

On January 8, 2018, the paternal grandmother filed a petition in the probate division seeking voluntary guardianship over A.T. On January 11, 2018, one day after father was arrested on charges of kidnapping and assaulting mother, the State filed an emergency request for state custody based on father’s incarceration and an RFA order preventing mother from contacting A.T. The family division issued an emergency care order that same day, and A.T. was taken into state custody, where she has remained ever since while being placed with the same foster family. The next day, at a temporary care hearing, the family division told the parties and the paternal grandmother, whose request to attend the hearing was granted, that it would confer with the probate division to discuss jurisdiction over the paternal grandmother’s pending guardianship petition. After considering the grandmother’s request for a conditional custody order (CCO) and the State’s

¹ Mother was arraigned on those charges and released on conditions that included no contact with father or A.T. The charges were eventually dismissed.

concerns over granting that request, the family division continued custody of A.T. with DCF at that time.

On January 16, 2018, at a preliminary hearing, the family division indicated, after conferring with the probate division, that it would consolidate the guardianship matter with the CHINS case. All parties agreed with that procedure. At that hearing, the parties discussed the grandmother's suitability as a conditional custodian of A.T. The State explained DCF's concern that the grandmother lived approximately two hours away from where mother was living, which would make contact between A.T. and mother difficult. Mother's attorney supported a CCO with the grandmother if visits with mother did not start soon but indicated that mother was working with her criminal attorney to allow that to happen. The court declined to grant the CCO at that time and instead continued A.T.'s custody with DCF while urging DCF to begin visits with mother as soon as mother's pending criminal conditions of release allowed it. The court made no decision regarding parent-child contact with father, who was incarcerated at the time. At the conclusion of the hearing, the court reminded the parties that it would decide the guardianship matter and that the grandmother was an interested party.

At a pre-merits status conference on February 14, 2018, the family division and the parties discussed mother's progress towards resuming care of A.T. and A.T.'s potential placement. Father and his mother advocated for placing A.T. with the grandmother through a CCO. DCF, mother, and A.T. advocated for keeping A.T. locally with her foster family so that mother could increase her visits with A.T. through the Family Time program. The court explained to the grandmother that she could attend, but did not have standing to participate in, the upcoming CHINS merits hearing. The court stated that if the matter reached disposition, then the grandmother might have standing to argue about A.T.'s placement and pursue her guardianship petition. In its initial March 2018 case plan, DCF's case plan goal was reunification with either parent, but its focus was on mother because she was making good progress and father was incarcerated.

At the conclusion of the merits hearing, which took place on May 24 and June 14, 2018, the family division adjudicated A.T. CHINS. The disposition hearing was held on August 7 and November 15, 2018. The first day of the hearing served as a status conference. The grandmother was not notified of either hearing date, an apparent oversight, but father, who attended the hearing, was living with his mother by the second day of the hearing in November 2018. At that time, mother's whereabouts were unknown, and she was facing an arrest warrant. As a result, the family division adopted DCF's modified case plan goal focusing on reunification with father, who was out of jail, on probation, and living with his mother. The parties discussed the services in which father would need to participate and the need for A.T.'s gradual introduction into his life through the Family Time program. Father did not ask that A.T. be placed with his mother in the meantime or raise the issue of her guardianship petition.

On January 19, 2019, the State filed petitions to terminate the parental rights of both mother and father with respect to A.T. Mother was incarcerated at the time, and father had indicated two days earlier at a permanency hearing that he intended to oppose DCF's anticipated termination petition on the basis that he had complied with the case plan.²

In a June 26, 2019 entry order, after summarizing the procedural history of the case, including the grandmother's guardianship petition, the family division issued an entry order stating

² The grandmother was not notified of the January 9, 2019 permanency hearing; however, father was living with her at the time. In any event, the court notified the grandmother of four later hearings taking place through June 2019.

that because the grandmother's petition would be moot if it granted the State's termination petitions,³ it was "going to transfer the guardianship case back to the probate division for further proceedings as appropriate, unless, within two weeks, any party or interested person files [a] written objection stating good cause why that transfer should not be ordered." The court sent the entry order to the grandmother, in addition to all the parties. No-one objected, and on July 16, 2019, the court transferred the guardianship case back to the probate division.

The termination hearing was held over three days in late January 2020. Mother had absconded from furlough and did not appear. The family division granted the State's petitions in a July 2020 order, concluding that: (1) circumstances had substantially changed because both parents' ability to care for A.T. had stagnated; and (2) it was in A.T.'s best interests to terminate her parents' parental rights. See In re A.M., 2020 VT 95, ¶ 25 (explaining that "when the termination of parental rights is sought after initial disposition, the trial court must first find that there has been a substantial change in material circumstances, and second, that termination of parental rights is in the child's best interests").

On appeal, mother argues that: (1) the family division committed plain error by failing to exercise its discretion when it forgot about the paternal grandmother's pending guardianship petition and then transferred it back to the probate division based on its conclusion that her petition was irrelevant to the CHINS proceeding; and (2) the delays in not addressing the guardianship petition and A.T.'s placement constituted structural errors that require a new hearing. For his part, father adopts mother's arguments and further challenges the family division's finding of stagnation with respect to him, claiming that DCF was responsible for any stagnation concerning his contact with, and ability to care for, A.T. None of these arguments, which are based on an incomplete and inaccurate rendition of the record, have any merit. See id. ("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." (quotation omitted)). "Our role is not to second-guess the family court or to reweigh the evidence, but rather to determine whether the court abused its discretion in terminating [the parents'] parental rights." Id. (quotation omitted).

Mother argues that the family division abused its discretion in the way it handled the grandmother's guardianship petition. According to mother, the court incorrectly presumed that it could not consider the guardianship petition in the early phases of the CHINS case and then forgot about the petition for months before wrongly concluding that the petition was irrelevant. We find no merit to this argument. The record belies mother's statements that "[t]here is absolutely no explanation discernable on the record for why the court refused to address the merits of the guardianship at the outset of the case," and that "the only plausible explanation is that the court believed it lacked the authority to create a guardianship unless custody was first returned to Mother at disposition." Nor do we find any support for mother's assertion that the family division failed to take into account A.T.'s best interests when it transferred the guardianship petition back to the probate division pending resolution of the State's termination petitions.

The record reveals the following. At the January 2018 temporary care hearing, which was held four days after the grandmother filed her guardianship petition and at a time when mother was prohibited from having contact with A.T., mother stated that she supported A.T. being with

³ Presumably, the family division was referring to the fact that if the parents' parental rights were terminated, they would no longer have any right to agree to or oppose the grandmother's consensual guardianship request. See In re C.B., 2020 VT 80, ¶ 14 (explaining that "[c]onsensual minor guardianships are based on the consent of the parents" (citing 14 V.S.A. § 2626(a)).

the paternal grandmother, but she did not state any support for Ms. The grandmother's guardianship petition, which she had not signed. At that hearing, after listening to DCF's concerns—including the difficulty of mother being able to visit A.T. if the child were placed with the grandmother—the court continued DCF custody over A.T. rather than grant the grandmother a CCO at that time. By the time of the February 2018 merits status conference one month later, mother expressed, through her attorney, her strong concerns about placing A.T. with the grandmother and her support for A.T. remaining nearby so she could continue visits. Given these circumstances, and the fact that DCF was focused on reunifying A.T. with mother, who at the time was making good progress towards reunification, the family division did not abuse its discretion in not addressing the guardianship petition at that juncture.

At the June 14, 2018 merits hearing, the grandmother's brief testimony focused on her belief in father's ability to care for A.T. At the conclusion of the hearing, the court adjudicated A.T. CHINS. By the second day of the disposition hearing in November 2018, mother's whereabouts were unknown, and father became the focus of DCF's reunification efforts. At that hearing, father did not raise the issue of a guardianship with his mother. By the time of the January 2019 permanency hearing, DCF's case plan goal had changed to termination of both parents' parental rights. Father took the position that he was going to contest termination of his parental rights on the basis that he had done everything DCF had asked him to do. Once again, neither father nor any other party raised the issue of the grandmother's guardianship petition. Nor did father or any other party do so between that hearing and the termination hearing in January 2020, although father was active in filing other motions with the court. The court itself, however, addressed the guardianship petition in a June 2019 entry order in which it explained why it intended to transfer the petition back to the probate court pending resolution of the State's termination petitions. The court gave the parties two weeks to object to that procedure, but no party did.

In short, the record reveals that the family division was aware of the guardianship petition throughout the CHINS proceedings and that it acted well within its broad discretion in initially reserving judgment on the petition pending reunification efforts first with mother and then father before transferring the petition back to the probate division pending resolution of DCF's termination petitions. *In re C.B.*, 2020 VT 80, ¶ 22 (stating that “the family division has a broad range of options as to timing and outcome when a minor guardianship proceeding is transferred to the family division” and that it “has the discretion to determine whether and when to address the minor guardianship petition relative to the CHINS petition”). The family division did not abuse its discretion by making determinations regarding the grandmother's guardianship petition in response to changing circumstances concerning the parents' potential availability to resume care of A.T. and the waning support for the petition as expressed by mother. *Id.* ¶¶ 22, 27 (stating that if court “initially consolidates the proceedings, it may prioritize the CHINS proceeding and subsequently transfer the minor guardianship proceeding back to the probate division,” and noting that “as circumstances change through the course of a case, on its own initiative or in response to arguments by parties, the court's approach to alternate paths may shift”).

Further, we find unavailing mother's argument, joined by father, that the court erred by not considering at the termination hearing whether the grandmother's guardianship petition would serve A.T.'s best interests, given that there was no proposal for a permanent guardianship, and that no party, including father, advocated for such at the termination hearing. See *id.* ¶ 35 (stating that father failed to preserve any request for permanent guardianship at termination hearing and that our “Legislature has expressly indicated that the family division is not required to rule out permanent-guardianship possibilities before terminating parental rights”). In her reply brief, mother, who did not appear at the termination hearing, points out that, based on the State's objection, the family division did not allow father's attorney to question the grandmother about

her past requests for kinship placements. She posits that the family division could have granted her a temporary guardianship or placement if it had allowed evidence on the grandmother's suitability for such a placement. As indicated, the family division acted well within its discretion in determining, without objection from any party, that it made sense to transfer the case back to the probate division pending resolution of the State's termination petitions. Cf. *id.* ¶ 25 (providing example that "in a CHINS case where the minor child has been living with and building attachments in a preadoptive foster family for a significant period of time and the proposed guardian has less of a relationship with the child[,] [t]he court may transfer the guardianship petition back to the probate division for consideration after final disposition, which may be a termination of the parents' rights that clears the way for adoption"). As in *C.B.*, in this case the family division acted consistent with the governing statute in transferring the guardianship petition back to the probate division pending resolution of the termination petitions. See *id.* ¶ 30.

By the same token, mother's argument that the family division committed structural error in dealing with the grandmother's guardianship petition is meritless. Assuming that the structural-error doctrine applies CHINS proceedings,⁴ it cannot benefit mother or father in this case, where the court acted well within its discretion in how it handled the grandmother's guardianship petition.

Finally, father challenges the family division's finding of changed circumstances based on stagnation, arguing that his lack of contact with his daughter while she was in DCF custody was not his fault but rather the result of DCF intentionally failing to provide him with any opportunity to establish visits with A.T. This argument is not supported by the record, which reveals that, while father repeatedly sought visitation with A.T., he also repeatedly failed to do what was necessary to participate in a certified domestic-violence program, which was an essential condition for him to resume contact with A.T. and to which he agreed. In short, the record amply supports the family division's conclusion that father's ability to care for A.T. stagnated as the result of factors solely within his control. Cf. *In re S.R.*, 157 Vt. 417, 421-22 (1991) ("While stagnation caused by factors beyond the parents' control could not support termination of parental rights, the claim that [Department of Social and Rehabilitative Services] caused stagnation in this case is without merit.").

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

⁴ As we indicated in *In re A.M.*, 2020 VT 95, ¶ 15, structural error is ordinarily a criminal-law doctrine concerning an alleged defect affecting the framework in which a trial proceeded so as to prevent the trial from serving its function to determine the guilt or innocence of the defendant.