VERMONT SUPREME COURT
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Case No. 2021-114

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

SEPTEMBER TERM, 2021

In re Z.P., Juvenile	}	APPEALED FROM:
(P.P., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	CASE NO. 20-JV-00128
		Trial Judge: Michael R. Kainen

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

Mother appeals the family division's merits and disposition orders adjudicating her son, Z.P., a child in need of care or supervision (CHINS) and removing him from her custody. We affirm.

As the result of an August 24, 2020 incident involving police, during which mother appeared to be having a mental breakdown, mother's then-eleven-year-old son, Z.P. was taken into the custody of the Department for Children and Families (DCF) pursuant to an emergency-care order. The State filed a petition alleging that Z.P. was CHINS on August 25, 2020, because he was without proper parental care necessary for his well-being. See 33 V.S.A. § 5102(3)(B) (defining CHINS, in part, as child "without proper care or subsistence, education, medical or other care necessary for his or her well-being"). Based on the facts contained in the emergency care order, the family division issued a temporary care order continuing DCF custody pending a merits hearing.

Following the August 24 incident, mother was hospitalized at the Brattleboro Retreat from August 28 to September 9, 2020. On September 24, 2020, mother had what appeared to be another mental breakdown during an incident that began in a market close to her residence and ended with police entering her residence, which mother had significantly damaged, to take her into custody pursuant to a mental-health order. As the result of this second incident, mother was hospitalized at the Vermont Psychiatric Care Hospital, after brief stays at other facilities, from September 29 to October 20, 2020. In mid-November 2020, the family division allowed the State's amended petition alleging that Z.P. was CHINS "between August 2, 2020 and September 24, 2020."

On January 14, 2021, following a two-day contested merits hearing, the family division filed an order granting the State's CHINS petition. After detailing the events of both the August 24 and September 24 incidents, the court concluded that during that month-long period mother was suffering a mental-health crisis that "shook her grasp on reality" and placed Z.P. at risk of harm.

On May 17, 2021, following a contested disposition hearing two weeks earlier, the family division issued a disposition order rejecting mother's request for a conditional custody order (CCO) and instead adopting DCF's disposition report and plan of services, which called for reunification with mother, Z.P.'s primary caregiver. The action steps in the disposition case plan called for mother, among other things, to follow all discharge recommendations made by the Vermont Psychiatric Care medical staff, engage in individual therapy with a therapist approved by DCF, take prescribed medication, engage in a substance-abuse evaluation and follow the assessment's recommendations, refrain from taking nonprescribed drugs, and take a parenting class to better understand Z.P.'s developmental needs and how her actions put him at risk of harm.[*]

Mother appeals both the merits and disposition orders. She argues that: (1) neither the evidence nor the court's findings support the family division's CHINS determination, which she contends was based on an incorrect legal standard; and (2) at disposition, the family division improperly shifted the burden to her to show her parental fitness through testimony or expert reports. We consider each argument in turn.

Mother first argues that neither the evidence nor the court's findings support the family division's determination that Z.P. was CHINS at the time the CHINS petition was filed, and that the family division applied the wrong legal standard in adjudicating Z.P. CHINS. According to mother, at the time the State filed the original petition, the undisputed evidence showed that although Z.P. felt uncomfortable when she became angry at people on the internet, she was meeting all his needs and she was able to act rationally, as demonstrated by the fact that: (1) her home was clean and habitable; (2) Z.P. was well-nourished; (3) she was able to communicate to Z.P. that the police had entered her home without a warrant; (4) she acted rationally when she was later presented with a warrant; and (5) she acted rationally by allowing the police to take Z.P. to his maternal grandmother's house up the street. She challenges as clearly erroneous the court's findings that she "carried on for hours" and behaved in a threatening manner. Further, she asserts that the family division improperly relied on her mental state during the September 24 incident, a month after Z.P. was taken into state custody, as evidence of what Z.P. might have witnessed had he not been taken into custody. In mother's view, the court relied on its self-assessed "common sense" rather than a causal nexus, supported by expert evidence, between her behavior during the later September 24 incident and her ability to care for Z.P. at the time he was taken into custody. We reject these arguments, which rely on selectively chosen facts and fail to acknowledge much of the evidence upon which the court relied in making the findings and conclusions upon which it based its CHINS determination.

[*] DCF filed the initial case plan, which also had a goal of reunification and the same action steps, with the court on October 12, 2020.

Before examining those findings and conclusions, we set forth the relevant law. The "focus of a CHINS proceeding is the welfare of the child." In re B.R., 2014 VT 37, ¶ 13, 196 Vt. 304 (quotation omitted). "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 L.M., 2014 VT 17, ¶ 20, 195 Vt. 637 (alteration and quotation omitted). As noted, "[a] child is CHINS when he or she 'is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being.' " In re B.R., 2014 VT 37, ¶ 15 (quoting 33 V.S.A. § 5102(3)(B)). The language of § 5102(3)(B) "must be liberally construed" to further the purpose of the statute to protect children. Id. "Because the critical focus in a CHINS proceeding is on the child's well-being, the State is not required to demonstrate that the child has suffered actual harm, but rather is subject to a risk of harm." In re J.C., 2016 VT 9, ¶ 7; 201 Vt. 192. The State's burden to prove CHINS by a preponderance of the evidence "balances the State's interest in ensuring the safety and welfare of the child with the parents' interest in maintaining family integrity." In re B.R., 2014 VT 37, ¶ 13 (quotation omitted).

Although the family division must determine if a child was CHINS at the time the petition was filed, that "does not mean that the court's analysis is limited only to the child's well-being on the precise day that the CHINS petition was filed." In re L.M., 2014 VT 17, ¶ 20. "Obviously, the circumstances leading up to the filing of the CHINS petition are relevant in the court's assessment," in that it "allows the court to have a full picture of the child's well-being and to base its decision on all relevant information." Id. Further, the court can consider events, such as a medical evaluation, that take place after the filing of the CHINS petition in assessing whether the child was CHINS at the time of the filing of the CHINS petition.

Whether a child is CHINS is a question of fact, and it is within the exclusive province of the family division to weigh the facts on a case-by-case basis. See In re S.B., 174 Vt. 427, 429 (2002) (mem.); In re G.C., 170 Vt. 329, 334 (2000). "When reviewing a CHINS decision, we uphold the court's factual findings unless clearly erroneous and the court's legal conclusions when supported by those findings." In re D.D., 2013 VT 79, ¶ 34, 194 Vt. 508.

With that law in mind, we now summarize the family division's key findings and conclusions set forth in its CHINS merits decision. On August 24, 2020, eleven-year-old Z.P. was living alone in an apartment with mother, his primary caregiver. A maintenance man at the apartment building called the property manager to report screaming and smashing sounds coming from mother's apartment. When the property manager arrived around 9:00 a.m. at the maintenance man's office, which was located below mother's apartment, she heard someone screaming "I am going to F*ing kill you," constant swearing, and hitting sounds. The property manager called state police because she thought the behavior was beyond what she could handle, and she was concerned that mother's son might be in danger. The screaming was still going on when a state trooper arrived around 10:45 a.m. After noticing Z.P. waving out of an apartment window, the trooper asked him to come outside to talk. Mother then yelled at Z.P. to get back into the room, and she began to close the windows and pull drapes across them. The trooper called in another trooper and a mental-health professional, who attempted to speak to mother. Mother continued to rage, yelling at the troopers to get a warrant. When the mental-health professional asked mother if she could see Z.P. to make sure he was okay, mother yelled at Z.P. to lock his door and not speak to police. While believing that they lacked a basis at that point to

take mother into protective custody pursuant to a mental-health warrant, the troopers decided to enter the apartment and take custody of Z.P. for his own protection. See 33 V.S.A. § 5301(2) (providing that officer may take child into custody "when the officer has reasonable grounds to believe that the child is in immediate danger from his or her surroundings and that removal from the child's current home is necessary for the child's protection").

When the troopers entered the apartment, which appeared to be generally clean, they smelled a strong odor of burnt marijuana. Mother became more relaxed after the police entered the apartment. The troopers noticed mother talking to her wrist as if there was a recording device or microphone there, which there was not, and talking to a mirror as if it were a camera. She hardly acknowledged Z.P. being taken into custody, instead focusing on a business card that the mental-health professional gave her. DCF approved the troopers leaving Z.P. at his grandmother's residence down the street, where his adult sister was present, and where DCF later placed him.

Z.P. told police at that time that he felt safe but uncomfortable. He appeared healthy and well-nourished. He later told a social worker that he wanted to live with mother and stated that she could get therapy.

Two days after the August 24 incident, mother was taken by ambulance to a hospital pursuant to a mental-health warrant that was obtained after more information concerning her state of mind was obtained from mother's adult daughter and the daughter's boyfriend.

As second incident occurred on September 24, 2020. Mother, who was back in her apartment after having been released from the Brattleboro Retreat approximately two weeks earlier, walked into a nearby market carrying a baseball bat. She was not coherent and kept repeating the phrase, "guilty, die, unforgiven." She did not respond to store employees asking her to put on a mask and she called one of the employees and others in the store "dirty white-trash whores." When one of the employees moved toward her, mother raised the bat at him in a threatening manner, before leaving the store. A store employee called police. After a trooper arrived at the market to take statements, a dispatcher informed the officer of a report that a woman had smashed out windows of a nearby apartment with a baseball bat. When the trooper arrived at mother's apartment, he observed a smashed window, personal property strewn across the lawn outside the smashed window, and a mess inside the apartment, with the phrase "guilty die unforgiven" written on the wall. Mother chanted that phrase towards the trooper over and over hundreds of times. At one point, she picked up the baseball bat, pointed it at the trooper, and screamed, "die." She banged on anything metal she could find, continually chanting the phrase. The trooper observed an overturned couch in the apartment and noticed that mother was sweating profusely. The trooper called in another trooper and a mental-health professional to communicate with mother, who continued to bang on metal and chant the phrase. Eventually, the trooper obtained another mental-health warrant and took mother to a hospital in protective custody. Mother deescalated at the hospital and expressed concern that her apartment was open.

Based on these findings, the family division concluded that there was "compelling evidence that in the period of August 24 through September 24, 2020 mother was suffering a mental health crisis which shook her grasp on reality." Acknowledging that it did not have expert testimony as to a specific diagnosis, the court stated that it did not need a specific

diagnosis to conclude, based on its own common sense and experience, that her bizarre behavior during the period between August 24 and September 24 rendered her unable to properly parent Z.P. at that time. See In re L.M., 2014 VT 17, ¶ 30 (in determining that child was without proper parental care necessary for his well-being, "the court could draw upon its own common sense and experience" (quotation omitted)). While recognizing that the fact of a parent having a mental illness, in and of itself, was not enough to establish CHINS, the court concluded that in this case Z.P. was CHINS at the time of the petition because mother was not in a state of mind to care for him.

We conclude that these findings, which are supported by the evidence presented at the merits hearing, support in turn the family division's conclusions and CHINS determination. None of the facts that mother relies upon—that at the time of the first incident her home was clean, that Z.P. appeared to be well-nourished, that Z.P. felt he was safe, that she was able to communicate with Z.P., and that she calmed down after the police entered her residence—undermines the court's CHINS determination based on its weighing of all the evidence. As for the challenged findings, there was ample evidence that on both dates, mother's rage continued for hours, and even if mother's conduct on August 24 could not be considered threatening, notwithstanding the testimony of the property manager that she heard mother use threatening language, the court's CHINS determination was based primarily on the potential danger to Z.P. arising from mother's behavior indicating her thinking was divorced from reality. See In re A.F., 160 Vt. 175, 178-79 (1993) (holding that erroneous finding does not require reversal where other evidence supports termination-of-parental-rights decision); accord In re B.A., 2014 VT 76, ¶ 19, 197 Vt. 169. Although evidence of the September 24 incident could not support a determination that Z.P. was CHINS on that date—at a time when he was not in his mother's care—the evidence shows the extent to which mother's manic episodes placed Z.P. at risk of harm, including at the time the State filed its original petition. In short, the September incident supported the notion that the August 24 incident was not a brief, transient event. Moreover, the court did not need to have a specific medical diagnosis to support its determination that mother's bizarre behavior put her minor child at risk of harm. Finally, in concluding that mother's mental state on August 24 placed Z.P. at risk of harm absent state intervention, the court applied the correct legal standard, as set forth above.

We reject mother's argument that at disposition the family division improperly shifted to her the burden of showing her parental fitness. See In re B.R., 2014 VT 37, ¶ 14 ("It is at the disposition hearing where the determination of parental unfitness, which triggers the transfer of custody away from the parents, must be made." (quotation omitted)). At the time of the disposition hearing in May 2021, mother had been hospitalized twice in the previous eight months for weeks at a time as the result of acute psychotic episodes, and she had been diagnosed with a bipolar disorder. Mother continued to have no insight into the risk of harm that these manic episodes posed to Z.P., and she had not engaged in any therapy or mental-health treatment, as recommended in her discharge summary. At the January 2021 CHINS hearing, mother downplayed the two incidents that led to Z.P. being placed in state custody and asserted that her hospital stays were unnecessary. Similarly, at the May 2021 disposition hearing, mother stated that Z.P. was not at risk of harm as the result of her state of mind or behavior during either the August or September 2020 incidents. Mother acknowledged taking medication for her mental-health needs in the past, but she stated that the medications did not provide any benefits

beyond what she could get through a healthy diet and proper exercise. When asked, she responded that she would feel free to reach out to medical providers if she got to the point where she needed help with medication. Notably, however, she did not do so at any time during the August and September 2020 incidents, and in fact she denied she needed any help or that her state of mind placed Z.P. at risk of harm, notwithstanding ample evidence to the contrary.

The court rejected mother's request for a CCO based on its determination that mother's engagement in therapy was a critical factor in assuring Z.P.'s safe return to her home and that mother continued to lack insight on how her mental-health crises placed Z.P. at risk of harm in her care. Although the court cited mother's lack of participation in therapy, its obvious and stated concern, as demonstrated by its merits findings adopted in the disposition order, was that mother continued to have no insight into how her manic episodes posed a danger to Z.P. The court's findings on the nature of mother's two previous episodes within the previous eight months and her continued denial that those episodes posed any danger to Z.P. supported the court's disposition order concluding that mother was not fit to resume care of Z.P. at that time. The court did not place any burden of proof on mother, but rather decided, based on the evidence before it, to maintain DCF custody with a continued goal of reunification with mother.

Contrary to mother's assertion, a remand is not required for the family division to schedule a further hearing on its own motion "to obtain reports or other information necessary for the appropriate disposition of the case." See 33 V.S.A. § 5317(e). The court indicated that a CCO would be appropriate if mother engaged in therapy and her therapist believed she could safely care for Z.P. This was not information that would be available to the court in another hearing. The court was explaining why a CCO was not appropriate at that time, not indicating a need for further existing information.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice