



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

NOVEMBER TERM, 2021

In re E.P., Juvenile* (C.P., Mother*)	} } } } }	APPEALED FROM: Superior Court, Addison Unit, Family Division CASE NO. 56-5-19 Anjv Trial Judge: Thomas Carlson
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In the above-entitled cause, the Clerk will enter:

Mother and E.P. appeal the family division's order terminating mother's parental rights to E.P. We affirm.

E.P. was born in March 2015 and is now six years old. In May 2019, the Department for Children and Families (DCF) filed a petition alleging that E.P. was a child in need of care or supervision (CHINS) due to mother's methamphetamine use and cohabitation with men who posed a safety risk to E.P. The court issued an emergency care order transferring custody of E.P. to DCF. Later that month, mother stipulated to the merits of the CHINS petition.

In July 2019, the court approved a case plan with a goal of reunification with mother after six to nine months. The case plan required mother to seek mental health treatment and medication, maintain sobriety and safe and stable housing, and work on creating a daily schedule and routine for E.P. In April 2020, DCF filed a new case plan with a goal of adoption, followed by a petition for termination of parental rights.

A hearing took place in April 2021 and the court issued a written decision granting the petition in June 2021. The court found that mother had lived in a two-bedroom apartment in Middlebury throughout the CHINS proceeding. Shortly before E.P. came into DCF custody, in April 2019, a DCF worker visited the home and found it to be dirty and cluttered. Mother kept several cats and rabbits and the home smelled so strongly of pets and pet droppings that the DCF worker had to change her clothes afterward. In addition to using methamphetamine, mother allowed a series of men who also used drugs to reside in the home. One of the men was suspected of sexual abuse of children. Mother described another as a "sociopath." Mother risked losing her housing by allowing these men to live in the home.

When E.P. entered custody at the age of four, her speech was delayed and difficult to understand, she was not potty trained, and she displayed physically aggressive behaviors. She

lived in four different foster homes her first year in custody due to her difficult behaviors, which included smearing feces and aggression toward other children. Since August 2020, she has lived with a family where she is the only child and has made significant progress in the above areas. The foster family indicated that they were willing to adopt E.P.

Mother did not initially engage in the services recommended by the case plan. In December 2019 and January 2020, mother relapsed in her drug use after two of her siblings died. She reported her relapse to DCF, and a DCF worker drove her to an inpatient treatment facility. At a post-disposition review hearing in February 2020, the court noted that it had been nearly nine months since disposition and mother had not yet demonstrated sobriety or consistency in her time with E.P. or addressed her mental health needs.

In the termination order, the court found that mother had begun to address these issues. The court found that at the time of the hearing, mother had been taking her prescribed psychiatric medication for the past six months. She had regularly attended mental health counseling since August 2020 and had been mostly consistent in attending visits with E.P. since February 2020. She appeared to be making progress in mental health treatment. The court expressed concern about the stability of mother's progress, however. It noted that mother had struggled with methamphetamine abuse for over sixteen years and had a relapse in the spring of 2020 that she did not report to DCF, and that she had only recently managed to establish a meaningful therapeutic relationship with a clinician.

The court found that mother had lived with the same partner for two years. She provided the housing and he paid other bills from his disability income. Mother's partner has dissociative behavior disorder and is focused on competitive videogaming. Mother planned to coparent with him, although he had not seen E.P. for more than two years and had voluntarily relinquished his own child several years previously. Mother had acquired a car but did not have a driver's license due to an outstanding ticket. At the time of the hearing, mother had two guinea pigs, two cats, and a rabbit living in her home. She continued to struggle to keep her home clean, although conditions had improved since the beginning of the case.

At the time of the hearing, mother had supervised visits with E.P. for three hours twice a week. A few unsupervised visits had occurred, which seemed to wear mother out. A DCF worker reported that visits generally went well and E.P. was happy to see mother. However, the worker expressed concern about mother's ability to manage when E.P. "goes off," given mother's own fragile mental health.

The court found that mother's parenting ability had stagnated for more than a year after disposition. The court acknowledged that mother had recently made progress but found that progress to be fragile. It concluded that there had been a change in circumstances sufficient to justify modifying the existing disposition order. The court then assessed the best-interests factors set forth in 33 V.S.A. § 5114(a). It found that E.P. had an important relationship with her current foster family and was well adjusted to their home. It found that E.P. had an important relationship with mother, but that mother had not played a constructive role in her life and was unlikely to be able to resume parenting E.P. within a reasonable time. The court found that mother's present stability was still fragile, E.P. had special needs, and mother had not progressed beyond supervised visits. It therefore concluded that termination was in E.P.'s best interests. Both E.P. and mother appealed.

On appeal, E.P. challenges some of the court's factual findings and argues that its conclusions concerning stagnation and its assessment of whether mother could resume parenting

within a reasonable time were not supported by the evidence. Mother joins in E.P.'s appeal and argues separately that the court should have given mother more time to work toward reunification.

By statute, the family court is required to conduct a two-step analysis when considering a petition to terminate parental rights after initial disposition. In re B.W., 162 Vt. 287, 291 (1994); 33 V.S.A. §§ 5113(b), 5114(a). First, the court must find that there has been a substantial change in material circumstances; if so, the court must then consider whether termination is in the child's best interests. In re K.F., 2004 VT 40, ¶ 8, 176 Vt. 636. "We will uphold the trial court's findings of fact unless they are clearly erroneous, and we will uphold the court's conclusions of law if supported by the findings." Id.

We first address E.P.'s challenges to the court's factual findings. E.P. claims that the court erred in finding that the behaviors she exhibited when she came into custody were attributable to mother's neglect because the evidence did not support such a conclusion. We disagree. The uncontroverted testimony of the DCF worker was that when E.P. entered DCF custody at the age of four, her speech was difficult to understand, and she was receiving services for that issue. She was not toilet trained, which the DCF worker testified was unusual. She was unable to regulate her emotions. She was moved from her first foster placement after a week due to fecal smearing and numerous toileting accidents. She had extreme tantrums lasting from fifteen to thirty minutes, during which she cried, threw objects, and refused to move. After several foster placements, E.P. was placed in a home with no other children, and these issues began to improve. She was eventually diagnosed with lactose intolerance, which may have caused some of the toileting issues. Mother had been E.P.'s sole caregiver until she entered DCF custody and admitted that E.P. was in need of care or supervision due to mother's drug use and conditions in the home. From these facts, the court could reasonably infer that E.P.'s developmental issues were due in large part to mother's neglect. Cf. In re L.M., 2014 VT 17, ¶ 30, 195 Vt. 637 (explaining that in determining that child was CHINS due to parents' drug use, the court could properly "draw upon its own common sense and experience" (quotation omitted)). We disagree with mother's contention that expert testimony was required to establish this connection. See In re B.C., 169 Vt. 1, 14 (1999) ("The adverse impacts upon a child resulting from the drug addiction of the child's care-giver hardly needs explanation."), abrogated on other grounds by In re C.P., 2012 VT 100, 193 Vt. 29.

E.P. further argues that the court mischaracterized the nature of mother's addiction. The court found that at the time E.P. entered DCF custody, mother engaged in "persistent abuse of methamphetamine and marijuana." We agree that there was little evidence presented to support the court's finding that mother engaged in persistent use of marijuana. The DCF worker testified that mother was assessed for marijuana use during her third trimester of pregnancy, but there was no other evidence presented to show that mother was a heavy user of marijuana. Accordingly, we agree that this finding is erroneous.

However, the error does not warrant reversal because the court's remaining findings support its conclusions. See In re B.S., 163 Vt. 445, 454 (1995) (explaining that Court will only reverse for error that resulted in prejudice). There was ample evidence to support the court's finding that mother was a longtime user of methamphetamine. Mother testified that she had started using methamphetamine, which she characterized as "[m]y drug of choice and my biggest downfall," when she was eighteen. She continued to abuse the drug for several years, causing her to lose her home, her husband, and her son. She testified that she stopped using methamphetamine for about ten years before relapsing. She relapsed on methamphetamine

during the winter of 2019 and again during the spring of 2020. These relapses coincided with stressful family events, such as the death or illness of family members. Mother also testified that when E.P. entered custody in May 2019, mother was abusing drugs. She stated that she finally stopped using methamphetamine in 2020 because she realized that she would die if she continued, and “[i]t’s not a drug that you have much control over.” This testimony was sufficient to support the court’s findings that mother had persistently abused methamphetamine in the past and that her sobriety was fragile.

E.P. further argues that the court improperly based its stagnation finding on mother’s history of welcoming other drug users to live in her home. This argument lacks merit. The court’s finding of stagnation was based on mother’s failure to engage in services at all for approximately a year after disposition and the uncertain stability of her recent progress. The court acknowledged that at the time of the hearing, mother was no longer living with individuals who were using drugs.

Next, E.P. challenges the court’s findings that E.P. was sometimes upset after visits with mother and that mother had not progressed to unsupervised visits. However, the foster father testified that after visits with mother, E.P. would often become more defiant and aggressive. The DCF worker testified that mother had a few unsupervised visits in 2019, but mother struggled to regulate E.P.’s behavior and seemed tired out by the visits. Since mother’s relapse, visits had been supervised. The court’s finding is supported by the record.

Finally, E.P. argues that the court erred in finding that mother made almost no progress toward the case plan goals “for more than a year after disposition in July 2019.” The court’s determination is not clearly erroneous. The evidence showed that after completing inpatient treatment in February 2020, mother relapsed again in April or May of 2020. She resumed visits with E.P. in February 2020 and had been mostly consistent in attending them, but these visits remained supervised. She did not consistently attend mental health counseling until August 2020, over a year after disposition. The court evidently viewed this as the time when mother began to make forward progress, and its finding is not clearly erroneous.

We turn to E.P.’s arguments regarding the court’s application of the law to these facts. E.P. first contends that the evidence presented was insufficient to support the court’s determination that mother had stagnated in her parenting ability. As noted above, to modify the existing disposition order, the court was required to find changed circumstances. 33 V.S.A. § 5113(b). “The change of circumstances most commonly found in termination cases like this one is parental stagnation. Stagnation may be found if the parent has not made the progress expected in the plan of services for the family despite the passage of time.” *In re D.M.*, 2004 VT 41, ¶ 5, 176 Vt. 639 (citation omitted). E.P. argues that the court erred in concluding that mother had stagnated because the evidence showed that she had been sober for nearly a year, was engaged in mental health treatment, had attended most visits since February 2020, was no longer living with unsafe individuals, and had somewhat improved the conditions in her home.

“The key question for the court when considering whether stagnation has occurred is whether the parent has made progress in ameliorating the conditions that led to state intervention.” *Id.* ¶ 7. Here, the court recognized that after initially failing to engage with the case plan, mother had recently made significant efforts to address her issues with substance abuse, mental health, and maintaining a safe home. The court found, however, that mother’s progress was still relatively new and, in light of her history, it was not yet clear if she would be able to maintain her present stability. The court therefore concluded that stagnation had

occurred. This conclusion is supported by the court's findings and the evidence. See *id.* (affirming finding of stagnation despite fact that mother followed recommendations of case plan and service providers, because mother was unable to apply lessons she learned or to acknowledge or understand impact of sexual abuse her children experienced).

E.P. argues that the court erred in failing to consider the impact of the COVID-19 pandemic in its stagnation analysis. She points to evidence that the pandemic made it difficult for mother to contact service providers and restricted parent-child contact for a period. It is true that "stagnation caused by factors beyond the parents' control could not support termination of parental rights." *In re D.S.*, 2016 VT 130, ¶ 7, 204 Vt. 44 (quotation omitted). We are not persuaded that this was the case here, however. The pandemic did not strike Vermont until March 2020, eight months after disposition. At that point, mother had not made a meaningful attempt to follow the recommendations in the case plan. Mother's failure to reach out to service providers until the spring or summer of 2020 was her choice. And while the pandemic interrupted in-person visits from March to June of 2020, and again from December 2020 to February 2021, mother was afforded many months of in-person visits prior to the final hearing, yet failed to progress beyond supervised visitation. The DCF worker testified that she had not yet discussed increasing the scope of visitation with mother because mother had not demonstrated that she could consistently attend visits and engage in weekly substance abuse and mental health treatment for a significant length of time. The timing of mother's engagement with the case plan, and her own subsequent behavior, were factors within mother's control. See *In re D.M.*, 2004 VT 41, ¶ 6 (explaining that mother's inability to engage in therapy for period of time with particular therapist due to circumstances beyond her control did not prevent stagnation finding where evidence showed mother failed to change own behavior or implement lessons she received).

E.P.'s final claim is that there was insufficient evidence to support the court's conclusion that mother would not be able to resume parenting within a reasonable amount of time. This is "[t]he most important" of the four statutory factors listed in 33 V.S.A. § 5114(a). *In re C.P.*, 2012 VT 100, ¶ 30. "The reasonableness of the time period is measured from the perspective of the child's needs, and may take account of the child's young age or special needs." *Id.* (citations omitted). E.P. argues that the court's determination was based solely on the DCF worker's speculative testimony about mother's ability to manage E.P.'s tantrums or coparent with her partner, and that this evidence was insufficient to support its finding in light of the other evidence of mother's progress. We disagree. The court concluded that due to E.P.'s young age and special needs, she needed permanency as soon as possible. The court found that it would likely take many more months for mother to be able to resume a full parental role, and that this was not a reasonable amount of time from E.P.'s perspective. The court's conclusions are supported by the evidence, which showed that mother had only recently begun to address her substance abuse and mental health issues in a focused manner. Mother continued to have difficulty keeping her home in a sanitary condition. Her partner had no relationship with E.P. and it was unclear whether he would be able to help co-parent E.P. Finally, mother had not progressed beyond supervised visits or demonstrated an ability to manage E.P. when she became dysregulated. Meanwhile, E.P. herself had only recently overcome the behavioral issues that she exhibited when she first left mother's care. On this record, we cannot say that the court erred in its assessment of the resumption-of-parental-duties factor. See *In re J.S.*, 168 Vt. 572, 574 (1998) (mem.) (affirming family court's conclusion that reunification would not occur within reasonable time where evidence showed parents had "delayed too long before making limited progress toward complying with the case plan").

Lastly, we address mother's claim that the court's assessment of what a "reasonable time" was from E.P.'s perspective did not have a rational basis. Mother argues that the court placed too much weight on the permanency that was seemingly available through E.P.'s foster placement because E.P. had only been in that placement for eight months, and previous placements had failed after initially appearing to be promising. Mother argues that more time was necessary to show that this placement could succeed, and therefore mother could be afforded more time to work toward reunification.

As discussed above, there was ample evidence to support the court's conclusion that mother would not be able to resume parenting within a reasonable time. While mother argues that E.P.'s foster placement was still too new and unproven to be relied on as a permanent placement, "[j]uvenile proceedings often involve difficult predictions about the future. Best judgment, rather than perfection, is our standard." *In re J.D.*, 165 Vt. 440, 444-45 (1996). The court's judgment was within its discretion and we will not disturb it.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice