VERMONT SUPREME COURT
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Case No. 22-AP-052

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

AUGUST TERM, 2022

In re E.A., Juvenile*	}	APPEALED FROM:
(M.A., Mother*)	}	
	}	Superior Court, Rutland Unit,
	}	Family Division
	}	CASE NO. 21-JV-00036
		Trial Judge: Howard A. Kalfus

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

E.A. and mother appeal from the family division's order denying E.A.'s request for a protective order prohibiting the Department for Children and Families (DCF) from placing her at a certain facility. We conclude that the court acted within its discretion and affirm.

E.A. was born in 2006 and is nearly sixteen years old. In January 2021, when E.A. was fourteen, the State filed a petition alleging that she was a child in need of care or supervision (CHINS) based on reports of substance abuse by mother, unstable housing, E.A.'s truancy, and allegations that E.A. was involved in drug deals and stayed in hotels with adult men and drug dealers. E.A. was placed in DCF custody. She was subsequently adjudicated to be a CHINS based on the parties' stipulation that mother "struggles with substance misuse disorder and is underhoused."

E.A. was initially placed at the Girls Adolescent Program (GAP) in Bennington. After a few weeks, she became suicidal and was admitted to the Brattleboro Retreat. She was then placed at the Southern Peaks Treatment Facility, a residential treatment facility in Colorado. E.A. moved for review of her out-of-state placement, and the court scheduled a hearing for February 25, 2022. Two days prior to the hearing, Southern Peaks notified DCF that it was discharging E.A. due to lack of progress.

At the hearing, E.A.'s case worker testified that Southern Peaks offered treatment for youth suffering emotional, behavioral, psychological, and social problems, including trauma therapy, and provided a highly structured environment. E.A. had initially done well there but had more recently experienced some struggles. The DCF worker testified that the previous weekend, she learned during a treatment team meeting that E.A. had been making plans to "go AWOL" from the facility with some of her peers. She had also been hiding her medications and giving them to others. The DCF worker stated that E.A.'s mood was initially flat during the

meeting but then she "started cussing and saying that if, you know, she would come back to Vermont, that she would run away."

E.A. then testified. She agreed that she had planned to leave the facility with some of the other youths but denied that she was the ringleader. She agreed that she knew how to take care of herself and that she had stated that she could "manipulate anybody" and knew what to say to get what she wanted. She then stated, "And I'm letting y'all know this, you—you step foot, have me set foot in VT, I'm going straight to my mom, bro. I'm not even about to cry right now, but I'm—I'm running straight to my mom, bro. I haven't seen my mom since May." The court asked her where she would go if she had the opportunity to travel anywhere. She responded, "Ohio. So I could see my cousins. I promised them when I was younger that when I turned fifteen, I was—I would—I would invite them to my quinceañera, and I never got a chance."

E.A.'s attorney then called a DCF client placement specialist, to the stand. The placement specialist testified that DCF had begun planning for E.A.'s discharge from the Colorado facility since she was admitted. She stated that an equivalent facility in Vermont was the Vermont School for Girls, a residential treatment facility. However, it had an ongoing wait list due to the COVID-19 pandemic and had had to reduce its census from twenty-four to thirteen. Another program that was previously available now only accepted girls younger than E.A. Two other small programs in Washington County had closed. The placement specialist noted that there were some group homes that were less restrictive, but they would probably not accept E.A. because her needs were too high. When asked what she meant, the placement specialist explained that E.A.'s manipulative behavior, threats to run away, and hiding of medication were safety issues that would "scare" less restrictive programs. Further, E.A.'s discharge letter from the Colorado facility, which stated that she was being discharged for "not investing in the program, contributing to high-risk conflicts, and severely disrupting the treatment and safety of others," would negatively impact her ability to get placement in such programs. The placement specialist doubted that DCF would be able to find a foster placement that could safely manage E.A.'s needs. Southern Peaks staff had recommended to her that E.A. be moved to another residential treatment facility or perhaps a psychiatric residential treatment facility if an evaluation supported that placement. The placement specialist indicated that DCF therefore planned to place E.A. back at GAP when she returned to Vermont.

E.A.'s attorney then orally requested a protective order prohibiting DCF from placing E.A. at GAP. He argued that E.A. had undergone a traumatic experience there that had sent her into crisis, which was the reason she had gone to the Brattleboro Retreat. He suggested that E.A. should have a psychiatric evaluation and perhaps be admitted back to the Retreat. DCF's attorney argued that DCF would need more information regarding the placement at GAP. She stated that DCF was working to place E.A. at a different program but that there was a severe shortage of services and programs for adolescents, and the existing ones had long waitlists, including the Retreat. She stated that DCF agreed that E.A. should have an evaluation and would be arranging for one. The court stated that, in light of the testimony regarding the lack of resources for E.A. in Vermont, it would need more information regarding the basis for the motion for a protective order.

E.A. then testified that while she was at GAP, she became upset about something and stood on her bed to look out the window. She refused staff requests to get down, and they restrained her on the ground. She was pregnant at the time, and they were putting pressure on

her stomach. She was crying and told staff they were hurting "her." Afterward, she went to the bathroom, and was bleeding. She told staff that she was pregnant, and they took her to the hospital. She was informed that she was going into miscarriage.[1] She became depressed and tried to kill herself, and she was subsequently sent to the Retreat. She felt like she was at fault for losing the baby. She worried that if she returned to GAP, it would "all replay all over again." She also stated that GAP was open "like a regular house, and I want to be alone," and that she didn't want to make a "permanent decision for a temporary problem."

DCF and the State opposed the protective order, arguing that the paramount concern was E.A.'s safety and that DCF needed to have all placement options available. E.A.'s guardian ad litem stated that she would not want DCF to be limited from using GAP, and felt that E.A. was stronger than she had been the previous year and would be able to handle a temporary placement there. Mother's attorney indicated that mother supported the protective order.

The court denied the protective order on the record. It stated that it was "really struggling" and was moved by E.A.'s testimony. However, it noted that E.A. had stated that she intended to run, and that she wanted to go to Ohio. It stated that "a fifteen-year-old trying to get herself from Vermont to Ohio is going to be at risk, and I've got to balance which is more harmful." It expressed its hope that DCF could find a different placement than GAP, but explained that "if I tie their hands, I fear that I'm placing you at greater risk." In a subsequent written order, the court stated that the evidence showed "a significant risk posed by [E.A.]'s explicit promises to run away as soon as she is returned to Vermont," as well as "a staggering dearth of placement options for adolescent girls." It reiterated that limiting DCF's placement options for E.A. could create a greater risk than that posed by the potential traumatization of a placement at GAP. E.A. and mother both appealed the court's order.[2]

On appeal, E.A. and mother argue that the court's conclusion that running away posed a greater risk of harm to E.A. than placement at GAP lacked supporting evidence and was purely speculative. They note that there was no evidence E.A. had ever attempted to run away and argue that she had only stated that, if brought back to Vermont, she would run straight to her mother, not to Ohio as the court found. In contrast, they contend, the record showed that she faced a certain risk of harm if she were returned to GAP.

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[1] Mother repeatedly asserts in her brief that the allegedly improper restraint was the reason for E.A.'s miscarriage. However, there was no medical testimony presented to support such a causal link. See Sweet v. St. Pierre, 2018 VT 122, ¶ 26, 209 Vt. 1 (explaining that "expert testimony is ordinarily required to prove medical causation"). It is undisputed that E.A. became suicidal after her miscarriage.

[2] Mother asserts that after her return to Vermont, E.A. was placed at a different facility in Washington County. She argues in her reply brief that because the DCF specialist did not tell the family division at the hearing about this facility, the decision below was based on false testimony and must be reversed. However, there is no evidence demonstrating that the Washington County facility was an available option at the time of the hearing or that the placement specialist's statements were inaccurate when she made them. We therefore decline to disturb the court's decision on this basis.

Section 5115(a) of Title 33 states that "[o]n motion of a party or on the court's own motion, the court may make an order restraining or otherwise controlling the conduct of a person if the court finds that such conduct is or may be detrimental or harmful to a child." We have held that the statute permits the court to issue a protective order prohibiting a DCF placement if the moving party makes the requisite showing. In re E.L., 171 Vt. 612, 613 (2000) (mem.). "The question of whether to issue a protective order is committed to the sound discretion of the trial court." In re J.S., 153 Vt. 365, 370 (1989). The family division's decision on a motion for a protective order "will stand on appellate review unless the record indicates that the court exercised its discretion for clearly untenable reasons or to an extent clearly unreasonable." Id. at 371. Similarly, we will uphold the court's factual findings unless they are clearly erroneous, meaning that there is no evidence in the record to support them. In re D.D., 2013 VT 79, ¶ 34, 194 Vt. 508.

Mother and E.A. argue that there was no support for the court's findings that there was a significant risk that E.A. would run away or that DCF had extremely limited options for safely placing E.A. We disagree. At the hearing, E.A. expressly stated that if she were returned to Vermont, she would run directly to her mother. She also admitted that she had planned to go "AWOL" from the Colorado facility. Her DCF case worker testified that E.A. had threatened to run away during their most recent meeting. This evidence supports the court's finding that E.A. had made multiple threats to run away. Although E.A. argues that these statements should be interpreted simply as bluffing, or as expressing her desire to see her mother after a long separation, as the factfinder, it was for the court to decide how to weigh the statements, and it was not unreasonable for it to believe their literal meaning. See In re M.E., 2019 VT 90, ¶ 22, 211 Vt. 320 (explaining that it is exclusive role of family court to weigh evidence and assess credibility of witnesses).

Appellants contend that the court's decision was without foundation because it concluded that E.A. would run to Ohio, a finding that was not supported by the record. Contrary to appellants' arguments, there was evidence supporting the court's inference that E.A. would attempt to run to Ohio if she got the chance. When the court asked where she would go if she could go anywhere, she responded, "Ohio." Other evidence in the record indicated that E.A. had spent a significant portion of her childhood in Ohio, that she missed her Ohio family, and that her mother planned to go to Ohio. Her attorney also stated at the hearing that E.A. wanted to be with her family in Ohio. While it is true that E.A. did not explicitly state that she planned to run from Vermont to Ohio, it was not unreasonable for the court to infer that she might try to go there. Even if this finding were erroneous, however, the court's decision makes it clear that it was more concerned with E.A.'s threats to run away than her specific destination. Appellants have therefore failed to demonstrate that the finding was prejudicial. See Rogers v. Parrish, 2007 VT 35, ¶ 21, 181 Vt. 485 ("Erroneous or unsupported findings do not require reversal, however, unless they are shown to have been prejudicial.").

The record also supports the court's conclusion that DCF had extremely limited options for safely placing E.A. in Vermont. The DCF placement specialist testified that Southern Peaks had recommended that E.A. be placed in a similar or even more secure facility. The Vermont School for Girls was equivalent to Southern Peaks, but it had reduced the number of beds available and there was a long wait list. She also testified that E.A.'s needs were still too high for a less restrictive facility. She noted that Vermont children needing acute psychiatric care were routinely languishing in emergency rooms due to the lack of beds available at Brattleboro

retreat. There was no evidence presented at the hearing to contradict this testimony, which supported the court's finding that there was "a staggering dearth" of placement options for E.A. in Vermont.

E.A. and mother argue that E.A. demonstrated that she would face a credible threat of emotional and psychological harm, satisfying the standard under 33 V.S.A. § 5115(a), and therefore the court should not have considered any other factors. As we explained above, the decision whether to issue a protective order falls within the court's discretion, and we will affirm discretionary decisions unless they are clearly unreasonable or fall outside the court's authority. In re J.S., 153 Vt. at 370-71. The court acknowledged that E.A. faced a real risk of re-traumatization if she were returned to GAP. However, it concluded that risk was outweighed by the risk that she would run away if not placed in a secure facility. The court explained the basis for its decision, which is supported by the record. Appellants' disagreement with the weight given by the court to the various evidence presented does not render the court's findings erroneous or make its conclusion an abuse of discretion. See In re M.E., 2019 VT 90, ¶ 22 (explaining that "[o]ur role as an appellate court is not to second-guess the family court or to make our own assessment of the evidence, but rather to determine whether the court abused its discretion").

Affirmed.

BY THE COURT:

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice