VERMONT SUPREME COURT
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Case No. 22-AP-066

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

JULY TERM, 2022

In re A.K., Juvenile	}	APPEALED FROM:
(K.K., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	CASE NO. 90-7-19 Wmjv
		Trial Judges: Michael R. Kainen, Katherine A. Hayes

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

Mother appeals from the trial court's order terminating her parental rights as to her daughter, A.K. We affirm.

The trial court found in relevant part as follows. Mother has two children with different fathers, A.K. (born 2012) and M.G. (born 2015). Until 2018, mother was the primary caregiver for both children, and moved several times between Maine and North Carolina in various residential situations, including homeless shelters, friends' couches, and with M.G.'s father.* Mother described M.G.'s father as abusive and mean toward her and the children, but she lived with him for an extended period of time because she could not afford to go elsewhere. She struggled to provide adequate housing and food for the family, and the living spaces were generally in an unsanitary and chaotic condition. Mother also struggled with mental health issues. In July 2018, shortly after North Carolina child protective services began an investigation into the condition of the residence where mother and the children were living, mother admitted herself to a psychiatric hospital, and arranged for A.K. and M.G. to live with their respective paternal grandparents.

* A.K.'s father met A.K. only once, was not in a relationship with mother when A.K. was born, and did not participate in proceedings below despite notice by the court. The court terminated his parental rights at the same time as mother, and he has not appealed.

As a result of mother's arrangement, M.G. moved to Maine. In August 2018, A.K. moved to Vermont to the home of grandfather and his long-term partner. Mother and grandfather never established any formal guardianship over A.K., but they found a form on the internet that mother signed, which was sufficient for grandfather to enroll A.K. in school in Vermont. They initially agreed that A.K. would stay in Vermont for only a couple months, but mother later indicated that she would need additional time to get her own affairs in order before taking A.K. back.

A.K. needed to repeat kindergarten because she had missed so much school while under mother's care and was not ready for first grade. She also struggled emotionally and socially. The school psychologist in Vermont diagnosed her with chronic post-traumatic stress disorder, which impaired her daily functioning. The court found it was unclear what specific trauma A.K. had experienced, but whatever it was, it had occurred while she was in her mother's care. Grandfather worked with the school service providers to establish a consolidated services plan to address A.K.'s behavioral and emotional issues. Grandfather also established medical care for A.K., including a mental-health counselor outside of school in addition to the services she received in school.

After mother left the psychiatric hospital, she moved into a hotel in Maine to be closer to M.G. She called regularly to talk to A.K. but did not express interest in A.K.'s mental health or education. In spring/summer 2019, mother indicated to grandfather that she wanted A.K. to come live with her again. Grandfather stated that the hotel would not be a good environment for her. Mother threatened to come retrieve A.K. and bring her back to Maine, at which point grandfather notified A.K.'s therapist about his concerns regarding mother's mental health and the unsuitability of the hotel. The therapist made a report to the Department for Children and Families (DCF). In July 2019, DCF sought and received an emergency care order. Mother did not attend the temporary care hearing held the next day. Mother also did not attend the merits hearing in October 2019, where A.K. was adjudicated a child in need of supervision (CHINS).

DCF proposed a case plan to which mother objected. Mother participated through counsel at a contested disposition hearing, offering several modifications to the proposed plan. The court entered a disposition order in February 2020, which set a goal of reunification with mother by June 2020. It included goals related to securing stable housing, engaging with treatment providers on mental health issues, identifying unsafe individuals, signing all releases requested by DCF, and engaging with A.K.'s school and related service providers. Because mother indicated that Covid restrictions were making it difficult to accomplish case plan goals, the court extended the reunification date to December 2020.

In December 2020, DCF moved for termination of parental rights based on mother's lack of progress in achieving case plan goals. The court held three days of hearings in June, July, and August 2021, and issued an order terminating mother's and father's parental rights in March 2022.

The court found that mother began to put in more effort after the permanency goal was changed from reunification to termination of parental rights, such as securing stable housing and beginning to work more with her therapist. But by the time of the termination hearings, she had still made relatively minimal progress on key case plan goals. The court found that mother still

had not been in contact with A.K.'s school or treatment providers; did not find potentially suitable housing until shortly before the termination hearings such that DCF was still unable to verify the condition of the premises; had not worked with her therapist on issues that led to A.K.'s removal from her care such as identifying unsafe environments and people; and she still lacked an understanding of or willingness to learn A.K.'s basic emotional, educational, and other needs.

A.K. continued to live with grandfather throughout the case—a total of three years at the time of the termination hearings. The court found that A.K. had developed strong bonds with grandfather and his long-term partner, and they had been able to meet all her needs.

The court found that mother would not be able to resume parenting within a reasonable period of time and thus that her progress had stagnated. It evaluated all the statutory best-interests factors and determined, based on mother's lack of progress in key case plan goals and A.K.'s strong relationship with grandfather and his partner, that all factors favored termination of her parental rights.

On appeal, mother first challenges the court's conclusion that her progress had stagnated. She points out that she secured safe, permanent housing before the termination hearings. She also argues that she consistently attended virtual visits with A.K., despite inconsistently attending in-person visits. She contends that she should not be faulted for choosing not to move to Vermont because her son and her job are in Maine and that her work schedule and Covid restrictions made it difficult to travel to Vermont.

To terminate parental rights after an initial disposition order is in place, the family division must first determine by clear and convincing evidence that there has been a "change in circumstances," and then that termination is in the child's best interests. 33 V.S.A. § 5113(b). A change in circumstances is "most often found when the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. 287, 291 (1994) (quotation omitted). The fact that a parent shows "some progress in some aspects of his or her life does not preclude a finding of changed circumstances." Id. (quotation omitted). We will affirm the trial court's conclusions if supported by the findings and uphold the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993).

The court's stagnation conclusion was amply supported by its findings and the evidence. Mother emphasizes her progress in finding an apartment that the court found "look[ed] appropriate" based on photographs, but she did so too late for DCF to be able to coordinate an inspection or verify her housing prior to the termination hearings. And mother does not contest the court's crucial findings regarding other case plan goals. Based on the testimony of grandfather and various service providers, the court found that mother had never inquired about A.K.'s medical appointments or educational needs, and never sought to attend A.K.'s service-plan meetings or psychological-treatment sessions. Mother missed DCF team meetings as well as hearings in this very case. She began therapy for her own mental health in September 2020, but did not attend sessions consistently, and failed to sign a release for DCF to verify medication that she claimed to be receiving through her doctor. Overall, the court found that mother did not understand and was not able to meet A.K.'s needs.

As to in-person visitation, the court found that mother's sporadic attendance was within her control. Through most of the pandemic period, mother was allowed to visit by having a negative test within the past week and wearing a mask. Mother did not explain how these protocols prevented her from traveling to see A.K. Based on the DCF case worker's testimony, the court found that despite DCF's offer to provide bus tickets or gas vouchers, mother visited A.K. only four times between August 2018 and August 2021. To the extent mother challenges the credibility of witnesses or the weight the trial court assigned to certain evidence, we reject those arguments. See In re A.F., 160 Vt. at 178 ("We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence."). All of these findings, based on record evidence, supported the court's conclusion that mother would not be able resume parenting within a reasonable period of time.

Mother additionally argues she was deprived of due process because of her attorney's lack of communication throughout the case. She asserts that she was sometimes unable to get in touch with her attorney, and that if she was able to communicate more regularly with her attorney, she would have had a better understanding of what was expected of her to achieve reunification. She essentially contends that she received ineffective assistance of counsel.

We have yet to decide whether an ineffective-assistance-of-counsel claim may be raised to challenge a decision terminating parental rights. In re K.F., 2013 VT 39, ¶ 21, 194 Vt. 64. The standard for evaluating such a claim in criminal cases is well established. "To establish a claim of ineffective assistance of counsel, the [party] must show by a preponderance of the evidence that (1) counsel's conduct fell short of the prevailing standard of a reasonably competent attorney, and (2) this incompetence was sufficiently prejudicial to create 'a reasonable probability' of a different result." In re M.B., 162 Vt. 229, 234 (1994) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). We need not decide here whether a parent in a termination proceeding has a right to challenge the effectiveness of counsel because we conclude that even if such a claim is viable, mother has not met the Strickland standard.

Mother cites no evidence of her attorney's allegedly delayed communications and alleges only two specific shortcomings: that the attorney entered two pro forma denials in response to DCF's motion for a temporary care order and its termination petition, rather than presenting argument. These allegations are misleading. Mother did not appear at the temporary care hearing, and mother's attorney represented to the court that she had not yet been able to get in touch with her. Thus, there would have been no basis for counsel to make any substantive arguments. As to termination, mother's attorney participated in a three-day trial, where she presented evidence, made objections, and cross-examined witnesses.

The court also made specific findings in its termination order regarding mother's attorney, which mother does not contest on appeal. The court noted that after DCF changed the case plan goal to termination of parental rights, mother contacted her attorney, who did not get back to mother for a couple of days. The court found that this relatively minor delay did not prejudice mother because she already knew what her case plan goals were, and simply "had not done what she was supposed to do for [eighteen] months." The court also noted specific efforts of mother's attorney, including reviewing case plan goals with mother, and asking for several discovery extensions to provide witness lists for trial when mother was not engaged with her attorney. Mother does not assert she was unaware of her case plan goals, and she provides no

specific instances of how her attorney's performance prejudiced her. We see no evidence of counsel being incompetent, let alone incompetence that prejudiced mother.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice