Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-450

JANUARY TERM, 2002

In re A.L., E.L. and T.L., Juveniles	}	APPEALED FROM:
	}	
	}	Chittenden Family Court
	}	
	}	DOCKET NO. 94/95/96-2-00 Cnjv
	}	
	}	Trial Judge: Ben W. Joseph

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

Mother appeals the family court's order terminating her residual parental rights with respect to her three children, arguing that the judge was not fit to preside over the matter because statements he made at the outset of the termination hearing indicated that he had prejudged the case. We affirm.

Mother's three children, A.L., E.L., and T.L., were born between June 1989 and June 1992. The family has a history of intervention by the Department of Social and Rehabilitation Services (SRS), dating back to 1995. In 1997, the family moved to Virginia, where state intervention continued due to the neglect and abuse of mother and her boyfriend. In December 1999, mother left her abusive boyfriend and returned to Vermont with the children to stay with a family friend. Early in 2000, mother returned to Virginia to be with her boyfriend, leaving the three children behind with her friend. In February 2000, mother told her friend that she intended to bring the children back to Virginia to live with her and her boyfriend again. When the children expressed fear about returning to that situation, SRS became involved, and the children were placed in state custody.

In May 2000, the children were found to be in need of care and supervision due to the neglect and abuse of mother. Following a disposition hearing in June 2000, mother agreed to a reunification plan calling for her to remain in Vermont away from her boyfriend and to engage in a plan of services that included participation in a parenting program, individual therapy, family counseling, and a substance-abuse evaluation. In July 2000, mother left Vermont and has not seen her children since then. Mother continued to contact the children, but the contact was halted because the children's therapist and pediatrician reported that mother was emotionally harming the children by blaming them for what had occurred and for coaxing them to communicate with her boyfriend.

In January 2001, SRS filed a petition seeking termination of residual parental rights. A hearing was held on August 6, 2001. Mother's court-appointed attorney appeared, but mother did not. The children's father relinquished his parental rights voluntarily. Following the hearing, on September 14, 2001, the family court filed an order terminating mother's parental rights based on its conclusion that mother had made no progress in dealing with the issues that led to the children being placed in state custody, and that there was no likelihood that she would be able to resume parental duties within a reasonable period of time.

On appeal, mother argues that statements by the family court judge at the outset of the termination hearing indicated that he had prejudged the case and thus was not fit to preside over it. Mother further argues that the failure of mother's counsel to object to the judge's statements or to file proposed findings amounted to the attorney's concession of his

client's entire case. According to mother, the court's prejudgment of the matter, and the attorney's failure to object, require reversal of the termination order.

At the outset of the termination hearing, in the course of addressing the father concerning his decision to voluntarily relinquish his parental rights, the court indicated that the foster parents who had cared for the children for the previous twenty months would be adopting them, and that hopefully the father would still be able to maintain contact with the children. Mother relies on these and other statements in contending that the court prejudged the case. We find no basis for disturbing the court's order. The court's statements stemmed primarily from its desire to assure itself that father was knowingly and voluntarily relinquishing his parental rights. At that point in the proceedings, the court had access to its own merits findings, the adopted disposition report, the prefiled direct testimony of the SRS case worker, and SRS's permanency plan and case report. The court was also aware that mother had been given notice of the termination hearing but had failed to appear in court to oppose the termination of her parental rights. Under these circumstances, it is not surprising that the court had a good idea as to where the case was heading. Because mother has failed to allege, let alone demonstrate, that the court's remarks stemmed from favoritism or antagonism rather than on the evidence submitted in the proceedings, her claim of bias must fail. See Liteky v. United States, 510 U.S. 540, 555 (1994) (opinions formed by judge based on facts introduced during course of current or prior proceedings "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible"); Leonard v. Wilcox, 101 Vt. 195, 215 (1928) (party cannot prevail on claim of judicial bias merely by showing that judge expressed opinion during discharge of judicial duty based upon evidence presented to court); see also State v. Streich, 163 Vt. 331, 354 (1995) (to prevail on bias claim, party must show that adverse rulings were based on improper motivation).

Mother's complaint that her trial counsel conceded her entire case by failing to object to the court's remarks or to file proposed findings is, in effect, a claim of ineffective assistance of counsel. This Court has not determined whether an ineffective-assistance-of-counsel claim can be brought in a juvenile proceeding, and, if so, what the appropriate procedure or standard of review would be. See In re M.B., 162 Vt. 229, 233 n.3, 234 n.4 (1994). But even if we assume that the claim is appropriately raised here on direct appeal of the TPR order, and that it should be considered under the same standard as that applied in criminal cases, mother cannot prevail because she has not, and cannot, demonstrate that there is "a reasonable probability that, absent the prejudicial effect of counsel's representation, [her] parental rights and responsibilities would not have been terminated." Id. at 234. The record amply demonstrates by clear and convincing evidence that mother's failure over time to address the issues that led to state intervention constitute a substantial change of material circumstances, and that the best interests of the children require termination of parental rights. Even assuming ineffective assistance of counsel, mother has failed "to specify how trial counsel's presumed incompetence prejudiced [her] case sufficiently to create the reasonable probability of a different outcome." Id. at 236.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice