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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-328

JANUARY TERM, 2009

In re K.S.-M., Juvenile	}	APPEALED FROM:
	}	
	}	
	}	Bennington Family Court
	}	
	}	
	}	DOCKET NO. 128-8-06 Bnjv
		Trial Judge: David Suntag

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

Mother appeals from a family court order terminating her residual parental rights to the minor K.S.-M. She contends that the court erred in: (1) rejecting the alternative disposition of a permanent guardianship; and (2) discounting the importance of preserving the parent-child bond. We affirm.

The facts may be summarized as follows. K.S.-M. was born in May 2000 and was eight years old at the time of the underlying termination proceeding. Father's paternity was established in a parentage proceeding in 2002, at which time mother was awarded sole legal and primary physical rights and responsibilities and father was granted limited, supervised contact. Although aware of father's history of sexual misconduct, mother allowed the child to spend unsupervised time with father at his residence in August 2005. Father sexually assaulted the child during that time, resulting in a conviction and prison sentence of four-and-a-half to twenty years. He voluntarily relinquished his parental rights to the minor in January 2008.

K.S.-M. suffered sexual abuse on several subsequent occasions as well. In June 2006, K.S.-M. disclosed to mother that the child had been repeatedly sexually abused by the son of mother's boyfriend. Mother was aware that the son had entered K.S.-M.'s bedroom at night and heard the minor cry out, but took no steps to protect her. The child had been previously sexually abused by mother's stepfather in 2004, when this child was four years old. Although mother had been abused by her stepfather as well and was well aware of the risk, she had allowed K.S.-M. to stay with her stepfather and mother, with abuse resulting. Despite the minor's disclosure of abuse by the stepfather, mother again allowed the child to stay with her mother and stepfather in August 2006, just two months after K.S.-M. had reported the abuse by her boyfriend's son. Upon learning of the situation, the Department for Children and Families obtained an emergency

detention order and took custody of the minor. K.S.-M. was eventually placed in a foster home with an aunt and uncle, where the child has remained to this date.

Mother stipulated to an adjudication of CHINS in October 2006 based on a failure to protect. The goal at the disposition proceeding in November 2006 was reunification, with mother to engage in counseling and parental education and services; to obtain stable housing; and to ensure that K.S.-M. be kept away from sex offenders and provided a safe and protected environment. The same month, mother obtained an abuse prevention order barring contact with her boyfriend, who had repeatedly physically and emotionally abused her over their three-year relationship. Nevertheless, two months later, in January 2007, mother successfully moved to vacate the order, and shortly thereafter obtained another order against him, which she subsequently again vacated in May 2007. Despite the boyfriend's repeated abuse and violations of the order, mother has maintained their relationship. Similarly, in February 2007, under pressure from her own mother, mother submitted sworn statements to the police recanting all sexual abuse allegations against her stepfather and her belief in the accuracy of the child's abuse allegations.

Mother attended counseling for several months until she abruptly stopped in May 2007. She completed one parenting education class but failed to complete others, and was unable to maintain employment. She made sufficient progress during supervised visits with the child that DCF allowed unsupervised visits starting in May 2007, but these were rescinded when DCF learned that mother had repeatedly allowed the child to have contact with her boyfriend despite assurances by mother to the contrary. By June 2007, mother had disengaged from most services, and the parent education service was discontinued. A petition to terminate parental rights was filed in August 2007.

Following a four-day evidentiary hearing in February and March 2008, the court issued an exhaustively detailed written decision in July 2008, granting the State's petition. The court found a substantial change of circumstances based on mother's failure to make any real or lasting progress toward the case plan goals. The court further concluded that the best interests of the child militated clearly and convincingly in favor of termination. The critical consideration, the court found, was mother's pattern of repeatedly allowing the child to be placed at risk of sexual abuse with the result that K.S.-M. had been repeatedly victimized sexually by at least three separate individuals by the age of seven, and mother's demonstrated failure—despite the efforts of counselors, case workers, and parent educators—to gain any real understanding of, or assume responsibility for, her own or the child's victimization. "At no time during her testimony," the court noted, "did [m]other acknowledge that she bore any responsibility for harm to her [child] or even for having placed her [child] at any risk of harm." This supported, in turn, the conclusion that mother could not safely resume parental responsibilities within a reasonable period of time. The court acknowledged the evidence of a close parent-child relationship, but concluded that "[m]other's inability to care properly for [K.S.-M.] so as to keep [the child] safe from serious repeated harm must outweigh the benefit of assuring maintenance of her bond with [K.S.-M.]." The court further noted that K.S.-M. had developed a strong and healthy bond with the child's foster parents (an aunt and uncle), who had expressed a commitment to maintaining some relationship with mother, and was doing well in school. Accordingly, the court concluded that termination was in the best interests of the child.

Mother asserts that the court considered a permanent guardianship to be in the best interests of K.S.-M. but rejected the option based upon an erroneous finding that the child's foster parents had "expressed a willingness and desire to adopt" the child. The claim is unpersuasive. First, although the court noted that there had been "some discussion" regarding the possibility of establishing a permanent guardianship—presumably with the child's aunt and uncle—it noted that there had been no agreement reached or presented to the court concerning this option. Accordingly, it is unclear whether the issue was preserved. See In re A.G., 2004 VT 125, ¶ 25 (holding that the argument that the court should have considered the permanent guardianship option is waived when not raised with the trial court).

Furthermore, we have repeatedly recognized the public policy, expressed in 14 V.S.A. § 2664(a)(2), that before issuing an order for permanent guardianship the court must find that adoption of the child is not "reasonably likely during the remainder of the child's minority." See In re M.W., 2007 VT 90, ¶ 7 (quoting 14 V.S.A. § 2664(a)(2)); In re A.S., 171 Vt. 369, 373 (2000). In this case, the court specifically found that this was not an option because it could not make the finding that adoption was not reasonably likely during the child's minority, the foster parents "having expressed a willingness and desire to adopt [K.S.-M.] during the hearing." Although mother claims that the evidence does not support the finding, the record demonstrates otherwise, showing that DCF considered the aunt and uncle to be prospective adoptive parents and that the aunt expressed an unequivocal desire for the child to remain with them and assumed that adoption was an available option. Mother's claim that the aunt was "not prepared to state a position" on the subject references a colloquy with the court in which the aunt expressed uncertainty only as to whether she would consider a permanent guardianship as an alternative to adoption. Accordingly, we conclude that the record supports the court's finding, and that it properly determined that a permanent guardianship was not a viable option on the facts presented. Mother's related claim that the court should have considered long term foster care as an alternative suffers from a similar deficiency, as the statutes and case law make clear that the Legislature considers this to be the least desirable disposition, available only when adoption is not a viable alternative. See 33 V.S.A. § 5531(d)(4) ("planned permanent living arrangement" shall be considered only when there is demonstrated "a compelling reason" that other dispositions are not in a child's best interests); accord In re A.G., 2004 VT 125, ¶ 24; In re A.S., 171 Vt. at 372-4.[1]

Mother also contends that the court misread this Court's decision in In re J.F., 2006 VT 45, to have held that a close parent-child bond can never outweigh a demonstrated inability to

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[1] Mother also suggests that the court's focus on termination to the exclusion of other options may have been influenced by an erroneous finding that the child's therapist was "very supportive" of termination. Although mother is correct that the therapist expressed no opinion directly regarding termination, the witness testified that K.S.-M. was concerned about safety with mother, that the child wanted to stay with the aunt and uncle, and that K.S.-M needed to live with an adult who was responsible and whom the child could trust, qualities which the aunt and uncle offered. There is no indication that any error in the court's characterization of the therapist's testimony played any role in the court's decision, which was amply supported by the remainder of the evidence and findings. See In re A.F., 160 Vt. 175, 178 (1993) (upholding court's decision to terminate parental rights despite erroneous factual finding where the remainder of the findings was sufficient to sustain decision).

resume parental responsibilities where other dispositions might be available. On the contrary, the court expressly recognized that, as stated in J.F., "in some cases a loving relationship will override other factors," id. at ¶ 13, but properly concluded in reliance on that case and others that public policy does not compel maintenance of the bond regardless of the safety and welfare of the child. See, e.g., In re M.B., 162 Vt. 229, 238 (1994) ("Public policy . . . does not dictate that the parent-child bond be maintained regardless of the cost to the child."). As noted, the court here fully recognized the close parent-child relationship and the potential emotional trauma of severing it, but concluded that mother's demonstrated inability to safely resume parental responsibilities outweighed them. The court properly exercised its discretion in reaching this decision, and we discern no basis to disturb it. In re A.D.T., 174 Vt. 369, 376 (2002) (stating that whether it is in a child's best interests to terminate parental rights is "a matter left to the trial court's discretion").

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice