

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-300

DECEMBER TERM, 2010

In re J.M. and A.M., Juveniles	}	APPEALED FROM:
	}	
	}	
	}	Superior Court, Washington Unit
	}	Family Division
	}	
	}	DOCKET NO. 61/62-4-08 Wnjv

Trial Judge: Dean B. Pineles

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

Mother appeals termination of her parental rights to her children J.M. and A.M., born in December 2004, and April 2006, respectively. Mother was never married to the children’s father and he voluntarily terminated his rights, contingent on mother’s rights being terminated. On appeal, mother argues that: (1) the court erred in admitting a videotaped interview of J.M. in which she discusses sexual abuse by mother’s boyfriend; (2) the court committed plain error in admitting testimony of J.M.’s therapist repeating J.M.’s allegations of abuse; (3) the court’s finding that mother exposed her children to dangerous men lacked sufficient evidence to support it; and (4) mother’s counsel was ineffective for failing to object to admission of the hearsay statements and failing to file a motion for reconsideration. We affirm.

In November 2006, mother met and began a romantic relationship with Ricky Curtis, who is a convicted sex offender of young children. The Department for Children and Families (DCF) learned of the relationship and in December 2006 warned mother of Curtis’s background. DCF told mother not to allow him to have unsupervised contact with the children. Mother continued the relationship and had a third child with him. In April 2008, J.M. revealed to her grandmother that Curtis touched her “pussy.” Based on this allegation, DCF filed a petition alleging that both J.M. and A.M. were children in need of care or supervision (CHINS). The children were placed in foster care. Mother denied that Curtis was ever left alone with the children or that he posed a risk. The CHINS court found that there was insufficient evidence that J.M. was abused by Curtis, but that he represented “a substantial risk of harm” to J.M. and A.M., which was magnified by his lies to mother about his past and mother’s disbelief that he posed any danger. The court further found that mother had neglected the children’s medical needs in that both children had severe dental problems and J.M. had a recurring and serious case of head lice. The court concluded that the children were CHINS. The children remained in DCF custody and foster care.

The case plan prepared in the summer of 2008 focused on educating mother about keeping her children safe, and learning about nutrition and parenting skills. Mother was not to allow Curtis to have any unauthorized contact with the children or allow him into her home. Although mother engaged in counseling and worked with a parent educator, she continued to

believe that Curtis did not pose a risk to the children. In the summer and fall of 2008, mother's neighbor reported that Curtis regularly visited mother's residence. A protective order was issued in January 2009, which required Curtis to remain 300 feet away from J.M. and A.M. In March 2009, mother finally expressed to DCF that she believed Curtis had sexually abused J.M.

The children were returned to mother's care in June 2009, although DCF retained custody. That summer, mother also began a new relationship with someone that had an extensive criminal record, although no sexual offenses. She did this without informing DCF even though she had agreed that she would obtain written approval if she wished to be in a relationship with someone under the supervision of the Department of Corrections (DOC). She also let a child sex offender visit her apartment on numerous occasions, and then lied to DCF about it. In June 2009, J.M. disclosed to her therapist that Curtis had touched her vagina and made her touch his penis. The therapist notified DCF. As part of its ensuing investigation, DCF videotaped an interview of J.M. wherein she repeated the allegations. Curtis was charged with lewd and lascivious conduct with a child in September 2009 and incarcerated. During his incarceration, mother had several telephone conversations with Curtis, which were recorded by DOC. Upon learning of these conversations, in December 2009, DCF again removed the children from mother's care. After the children were removed from the home, on February 9, 2010, a group of men in possession of loaded and stolen guns arrived at mother's residence late at night. Mother's cousin, who was staying there with small children, answered the door and the men told her that mother gave them permission to stay. Mother testified that she was unaware that the men were in her apartment until she was awoken by the police knocking at the door. DCF filed a petition for termination in February 2010.

At the termination hearing, the court heard testimony from J.M.'s therapist, the children's grandmother, two DCF investigators, A.M.'s therapist, the foster parents, a social worker, mother's former neighbor, mother, mother's cousin, and a Barre police officer. In addition, the State introduced the video of J.M.'s interview with no objection from mother.

Following the hearing, the court issued written findings and conclusions. The court found that there was a change in circumstances warranting modification due to mother's stagnation. While the court noted that mother had followed through with some of the recommendations for services in her case plan, the court concluded that mother continued to lack any understanding of how her relationships with dangerous men could harm her children, and was unable to place her children's safety before her own interests. Based on J.M.'s statements to her grandmother and her therapist, as well as during the videotaped interview, the court found that Curtis had sexually abused J.M. The court found that despite this abuse, mother continued to put her children at risk. The court found that the content of the phone calls mother made to Curtis in jail "demonstrate[d] an ongoing relationship between [mother] and Mr. Curtis, as well as denial on her part that Mr. Curtis had sexually abused her daughter, despite her supposed earlier acknowledgement to the contrary." The court did not find credible mother's explanation for her statements during the calls that she was fearful of Curtis. The court also found that mother's behavior in having another man under DOC supervision in her home demonstrated that she "was not able or willing to place her children's safety before her own interests." Finally, the court found that the incident of the armed men entering mother's home demonstrated mother's "propensity to be oblivious to unsafe situations." The court found incredible mother's explanation that she did not know the men were in her house.

The court thus concluded that there was a change of circumstances due to stagnation because despite receiving access to numerous services mother had not made progress on the

main reason the children were in custody—mother’s inability to subordinate her own interest to those of her children and protect them from dangerous men. As to the statutory best-interest factors, the court concluded that they all weighed in favor of termination. The court explained that mother did not play a constructive role in the children’s lives. She criticized and yelled at A.M. She also did not have empathy or support for J.M., even after recognizing the abuse J.M. suffered. She neglected their medical and dental needs. She was unable to place their safety above her own interests. In contrast, the court found the children were thriving in their foster home and that their medical and emotional needs were being met. The court concluded that termination was in the children’s best interests. Mother appeals.

Mother first argues that the court erred in admitting and relying on the videotaped interview of J.M. and the testimony of J.M.’s therapist, both of which described Curtis’s sexual abuse of J.M. According to mother, both were inadmissible hearsay. Further, mother argues that the videotaped interview did not fit the limited exception provided under Rule of Evidence 804a. We conclude that there was no error in admitting the evidence because hearsay is admissible in a termination proceeding. 33 V.S.A. § 5317(b) (“Hearsay may be admitted and may be relied on to the extent of its probative value.”). We do not reach mother’s arguments regarding Rule 804a because mother did not object to admission of the videotape or the testimony of J.M.’s therapist at the termination hearing, and therefore she failed to preserve this argument for appeal. See In re T.R., 163 Vt. 596, 596 (1994) (mem.).

Mother’s parallel argument is that even if the evidence was admissible it was insufficient to support termination because termination may not be based solely on hearsay evidence. In re M.B., 162 Vt. 229, 233 (1994). Indeed, we have held that “hearsay evidence is admissible in making a disposition determination to terminate parental rights as long as there [is] credible, nonhearsay evidence of parental unfitness.” In re R.B., 152 Vt. 415, 424 (1989). In this case, there was no error because the court’s conclusions that a substantial change of circumstances had occurred and that it was in the children’s best interests to terminate mother’s parental rights were not based solely on the hearsay evidence of J.M.’s abuse. See In re A.F., 160 Vt. 175, 177 (1993) (setting forth standard that to terminate parental rights, the court must find that there has been a substantial change in material circumstances and that termination is in the children’s best interests). The court concluded that there was a change of circumstances because mother had failed to make progress on the critical issue of understanding how to protect her children and avoid relationships with men who could harm her children. See id. (explaining that a substantial change in material circumstances includes when the parent’s ability to care for the children has stagnated or deteriorated).

The court based this conclusion on many findings apart from its finding of actual abuse. Mother allowed Curtis to have access to her children, even after she had been warned about his past and her daughter alleged he had abused her. At times, mother lied to DCF about her contact with Curtis. This contact continued even after Curtis was incarcerated and mother apparently believed that Curtis abused J.M. Apart from mother’s relationship with Curtis, the court found that mother engaged in other behavior that demonstrated a lack of understanding as to how to protect her children. She allowed a child sex offender to enter her home when the children were present, she engaged in a relationship with a man with a criminal record without notifying DCF, and she let men carrying weapons enter her home when young children were present. These findings all derive from direct evidence and support the court’s stagnation decision.

As to the court’s finding that termination was in the children’s best interests, direct evidence supported this decision as well. See 33 V.S.A. § 5114(a) (listing statutory best-interests

factors). The court found that the children do not have a healthy relationship with mother and she does not play a constructive role in their lives. They “are unruly and defiant in her presence,” and she has no means to control their behavior. She is overly critical of A.M., screaming and using profanity to criticize him. On the other hand, J.M. and A.M. have a healthy relationship with their foster families and have adjusted well to their new surroundings. Most importantly, the court found that mother will not be able to resume parenting within a reasonable period of time because she is unable to understand how to create safe situations for her children.

Mother next argues that the court’s findings supporting stagnation are not supported by the evidence. “Individual findings of fact will stand unless clearly erroneous, and conclusions of law will be upheld if supported by the findings.” In re A.F., 160 Vt. at 178. Mother contends that the court’s finding of stagnation based on mother’s continued inability to protect her children from dangerous men is not supported by the evidence. According to mother, she acted appropriately given the information she had. Mother contends that she received inadequate warnings regarding Curtis’s past, she did not know about the abuse of J.M., she did not knowingly let a sex offender in her home, and she did not allow the armed men into her home.

While mother offers an alternative interpretation of the evidence, she fails to demonstrate that the court’s findings are not supported by the evidence. The family court has discretion to determine the credibility of witnesses and our role is not to reweigh the evidence. Id. To terminate parental rights, the State has the burden of demonstrating, “by clear and convincing evidence, that there is no reasonable possibility that the causes and conditions which led to the filing of the petition can be remedied and the family restored within a reasonable time.” In re R.B., 152 Vt. 415, 421 (1989) (quotation omitted). In this case, the evidence supports the trial court’s finding that mother failed to address the main cause which led to filing for termination—her inability to protect her children. The evidence indicates that mother was informed about Curtis’s past and, later, J.M.’s allegations of abuse, yet she continued to have a relationship with Curtis and allow him to have contact with her children. This evidence demonstrates a disregard for her children’s safety. In addition, the evidence supported the court’s findings concerning mother’s other interactions with men that had criminal backgrounds. While mother disagrees with the court’s interpretation of the evidence, this is insufficient for reversal.

Finally, mother argues that her counsel was ineffective for failing to object to admission of J.M.’s hearsay statements and failing to file a motion for reconsideration. We have not determined whether, or under what factual or procedural circumstances, a parent may bring a claim for ineffective assistance of counsel stemming from a termination proceeding. See In re A.D.T., 174 Vt. 369, 374-75 (2002) (declining to decide whether parent may raise ineffective-assistance claim in termination proceeding); see also In re E.T., 2008 VT 48, ¶ 18, 184 Vt. 273 (declining to address ineffective assistance claim in context of a direct appeal in involuntary commitment case for lack of factual record). Assuming such a claim could be raised, mother would have to 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) (quotation omitted). In this case, we conclude that even if an ineffective-assistance claim could be brought, it has no merit because mother has not demonstrated there is a reasonable probability of a different result in her case absent introduction of the hearsay evidence. As explained above, the court’s conclusions regarding stagnation and the best interests of the children were based on other direct evidence apart from the hearsay evidence of abuse. In addition, at termination, mother did not contest the fact that Curtis sexually abused J.M.

Therefore, admission of J.M.'s hearsay description of the abuse either on the videotape or through her therapist did not relate to a contested matter and did not prejudice mother.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice