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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-215

SEPTEMBER TERM, 2005

In re T.M., Juvenile	}	APPEALED FROM:
	}	Washington Family Court
	}	DOCKET NO. 119-8-04 WnJv
		Trial Judge: M. Kathleen Manley

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

Mother appeals from the family court=s order terminating her residual parental rights in T.M. Father voluntarily relinquished his rights. Mother argues that the order should be reversed because she was denied her right to effective assistance of counsel. We affirm.

Mother and father are the biological parents of T.M., born in July 2004. Shortly after T.M.=s birth, a pediatrician contacted the Department for Children and Families, expressing concern that parents were not properly caring for the child. DCF took custody of T.M. in August 2004 pursuant to an emergency detention order and, after a detention hearing, T.M. remained in DCF custody. In September 2004, T.M. was adjudicated CHINS due to mother=s mental illness and her resistance to mental health treatment, and her inability to care for or provide safety for T.M. or provide him with proper nutrition. In January 2005, DCF filed a petition to terminate parental rights. After a hearing, which mother did not attend despite receiving notice, the court terminated mother=s residual parental rights.

In reaching its conclusion, the court explained that mother had completely failed to comply with the terms of the DCF case plan. She had not maintained regular contact with T.M.; she had visited him only three times since August 2004, and she had not seen him at all since September 2004. Mother had not engaged in services to address her serious mental illness, and her illness clearly interfered with her ability to provide for herself and her ability to care for an infant. Mother had also refused to treat her thyroid problem, a requirement of the case plan. The court found that mother had not undertaken any efforts to make herself available to T.M. as a parent. She remained unable to focus on tending to T.M.=s needs over a sustained period of time, and she had not engaged in any of the team meetings regarding T.M. or in team meetings regarding her mental illness.

Based on numerous findings, the court concluded that mother=s parenting ability had stagnated, as evidenced by her failure to engage in services and to improve, and termination was in T.M.=s best interests. The court explained that mother would not be able to parent within a reasonable period of time, she played no constructive role in T.M.=s life, and T.M. would benefit from placement with, and adoption by, mother=s relatives.

Mother does not challenge any of the court=s factual findings. Instead, she argues that the family court=s order should be reversed because she was denied effective assistance of counsel. Mother was represented by counsel at the termination hearing, but she maintains that her attorney was incompetent because he did not call any witnesses, he barely cross-examined the State=s witnesses, he elicited adverse evidence or marginally relevant evidence during cross-examination, and he failed to raise more than one evidentiary objection during the hearing. Mother also asserts that

certain statements that counsel made during his closing argument undermined her case.

To establish her claim, mother needs to show by a preponderance of the evidence Athat (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.@ <u>In re M.B. & E.B.</u>, 162 Vt. 229, 234 (1994) (quoting <u>Strickland v. Washington</u>, 466 U.S. 668, 694 (1984)). Mother fails to meet her burden.

Assuming, for argument=s sake only, that mother=s attorney=s conduct fell short of the prevailing standard of a reasonably competent attorney, mother fails to show or even assert that this alleged incompetence was sufficiently prejudicial so as to create a reasonable probability of a different result. Mother generally asserts that counsel=s shortcomings cast into doubt whether the termination proceeding Aestablished the truth. She does not identify how a different result would have obtained had counsel acted differently, nor does she identify any evidence that would have contradicted the testimony of numerous witnesses regarding mother=s severe parental shortcomings and her absolute failure to comply with the DCF case plan. The family court based its decision on the factors set forth in 33 V.S.A. '5540, and its findings appear overwhelmingly supported by the evidence and are hardly contested, if at all, by mother. See id. at 236 (rejecting similar claim of ineffective assistance of counsel where record contained clear and convincing evidence on all the relevant criteria of 33 V.S.A. '5540, and evidence supported the termination of parental rights). The court=s findings support its conclusion that mother had stagnated in her ability to parent, that she would not be able to resume parenting in a reasonable amount of time, and that termination was in T.M.=s best interests. We find no error.

Affirmed.

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Paul 1	L.	Reiber,	Chief	Justio	
Denise 1	R. Jo	ohnson, As	sociat	e Just	ice
 Brian	L.	 Burgess	s, Asso	ociate	 Justice

As in In re M.B. & E.B., we do not reach the issue of whether ineffective assistance of counsel may be raised to challenge a judgment terminating parental rights and we express no opinion as to the viability of such a claim, or the appropriate procedure to hear it. 162 Vt. at 233 n.3. We consider mother=s claim of ineffective assistance of counsel in this case because our resolution of the claim does not require evidence about trial counsel=s competence and because we conclude that mother=s claim has no merit. See id.

We note that, according to the record of mother=s refusal to participate in proceedings below, her counsel had little to work with in terms of protecting mother=s interests or attacking the State=s position.