

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

SUPREME COURT DOCKET NO. 2019-102

AUGUST TERM, 2019

In re A.B., Juvenile	}	APPEALED FROM:
(M.L., Mother* & T.B., Father*)	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 397-10-17 Cnjv

Trial Judges: Alison S. Arms, Kirstin K. Schoonover, Thomas J. Devine

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

Father and mother each appeal the family division’s orders finding their daughter to be a child in need of care or supervision (CHINS) and placing her in the custody of the Department for Children and Families (DCF). We affirm.

The day after A.B.’s birth on October 17, 2017, the infant was taken into DCF custody pursuant to an emergency-care order based on the family division’s findings that father was incarcerated and mother had been convicted of voyeurism with respect to the oldest of her three other daughters, was on probation for that offense, and had not participated in a psychosexual evaluation to determine her risk to reoffend. On October 19, 2017, the State filed a CHINS petition alleging that: (1) a CHINS petition had been filed with respect to mother’s three older daughters in November 2014 when it was discovered that she was complicit in her then-partner’s criminal activities, which involved the sexual exploitation of her daughters; (2) mother herself filmed her oldest daughter undressed; (3) she was substantiated in 2015 for sexual exploitation of her three older children and was still on probation for the voyeurism conviction; (4) in July 2016, she voluntarily relinquished her parental rights to the youngest of her three older children and had not had recent contact with her two other older daughters, one of whom was in DCF custody based on mother’s sexual exploitation of her and one of whom was in her father’s custody; (5) mother’s therapist reported that mother’s counseling was focused on mother’s current functioning rather than the sexual exploitation of her older daughters; (6) mother had not participated in a psychosexual evaluation to determine her risk to reoffend; and (7) father was incarcerated after pleading guilty to possessing cocaine and resisting arrest, and therefore he was not available to parent A.B.

At the initial temporary-care hearing on October 20, 2017, mother and her attorney participated by telephone and requested a contested hearing. On October 27, 2017, the family division ordered DCF to do a custodial-suitability report on a former partner of father’s, as requested by the parents, before scheduling a contested temporary-care hearing. At a November 7, 2017 hearing, the court noted that father remained incarcerated and his attorney reported a conflict of interest. The court stated that a contested CHINS-merits hearing would be held at the same

time as the contested temporary-care hearing scheduled for December 19, 2017. The December 19 hearing, for which ninety minutes had been allotted, started late due to the tardiness of mother's attorney and the need for mother to confer with her attorney before the hearing commenced. The court indicated that an additional two hours would be needed for the continued hearing. The combined merits and temporary-care hearing did not resume until February 27, 2018 due to attorney conflicts. The State rested its case at the conclusion of that hearing, but it was continued for additional testimony.

The combined hearing resumed on April 10, 2018, after which the family division granted the State's CHINS petition. The court found that father was incarcerated at the time of A.B.'s birth for a drug offense and had been paroled in November 2018, but that he had not signed a release that allowed DCF to have access to his urinalysis results. The court further found that mother had failed to protect her older children from past criminal activity and that she had participated in the sexual exploitation of one of her daughters. The court noted that mother had pled guilty in September 2017 to federal drug charges based on her participation in heroin sales and had not yet been sentenced for those offenses. The court expressed its concern that rather than fully accepting responsibility for her past criminal conduct, mother blamed partners with whom she had been involved at the time she engaged in that conduct. Regarding the question of temporary care, the court found that A.B. was not currently at risk of substantial harm because mother was not involved in a dangerous relationship at that time. The court concluded, however, that it could not return custody to mother or father at that time because it did not have any information regarding the parents' living situations. The court also expressed concern that mother would not be able to parent A.B. after sentencing on the federal charges, stating that it did not have enough information to determine when she would be sentenced or how long she would be unavailable to parent A.B. Accordingly, the court ordered DCF to explore both mother's and father's living situations before a further hearing was held on what a return of custody to either parent would look like. The court indicated that it expected to proceed to a disposition hearing within thirty-five days.

On June 29, 2018, DCF filed a disposition case plan. The plan called for DCF custody and initially recommended reunification with mother or father within six to nine months. After A.B. objected, DCF amended the case plan to recommend concurrent goals of reunification or adoption. All parties filed either objections or proposed modifications to the case plan, and an initial disposition hearing was held on August 13, 2018, after which the court made several changes to the case plan and ordered a continued contested hearing to address the parents' objections. That hearing was held over two days on November 22, 2018 and January 31, 2019. On February 5, 2019, the family division approved DCF's case plan recommending concurrent goals of reunification and adoption. The court recognized that the parents had made measurable progress towards reunification, but it concluded that concurrent goals were appropriate given the length of time that had passed with A.B. in state custody. The court opined that the concurrent goals would result in better preparation for permanency, whatever the outcome. The court further determined that a goal of reunification within six months would give the parents sufficient time to demonstrate that they are capable of assuming parental responsibilities.

On appeal, father argues that: (1) the family division's factual findings in support of its CHINS adjudication were unsupported by any evidence and that its merits decision deprived the parents of due process by adopting an unnoticed alternate theory of neglect; (2) the court committed plain error and exceeded its limited jurisdiction by declining to return A.B. to mother's care despite finding that mother posed no substantial risk to the child; and (3) structural errors and delays in the proceedings deprived the parents of due process because the cumulative effect of the court's plain error was a modified disposition plan that contemplated the potential termination of

parental rights based on nothing more than the passage of time. In addition to joining father's latter two claims of error, mother argues that the family division's CHINS adjudication is based on an unsupported finding that she had not fully accepted responsibility for the abuse of her older children, which was inconsistent with its finding with respect to temporary care that A.B. was not at substantial risk of harm from mother.

We first consider father's and mother's arguments concerning the family division's CHINS adjudication. At a CHINS-merits hearing, the State must prove by a preponderance of the evidence that at the time the CHINS petition was filed the subject child was in need of care or supervision. In re L.M., 2014 VT 17, ¶¶ 19-20, 195 Vt. 637. It is exclusively within the family division's province "to weigh the evidence and assess the credibility of witnesses." In re M.L., 2010 VT 5, ¶ 29, 187 Vt. 291. On review of a CHINS determination, "we will uphold the court's findings of fact unless they are clearly erroneous" and "we will uphold the court's legal conclusions where supported by its findings." Id. ¶ 8.

Father argues that the family division deprived the parents of due process by adjudicating A.B. CHINS based upon a theory that was not alleged by the State in its petition and that was unsupported by the record. According to father, because the court did not find that DCF had established its CHINS allegations, it was required to "dismiss the petition and vacate any temporary orders in connection with this proceeding." 33 V.S.A. § 5315(f). In father's view, DCF's theory was that mother was unable to protect her children from dangerous partners, but the court adjudicated A.B. CHINS based upon its conclusion that mother blamed her former partners rather than accept full responsibility for the past abuse of her children. Father asserts that the parents lacked notice of what the State was alleging at the CHINS proceeding, and that, as a result, they were deprived of a meaningful CHINS-merits hearing. Further, he argues that it was counterintuitive for the family division to grant the State's CHINS petition while at the same time concluding that mother posed no substantial risk of harm to A.B. For her part, mother argues that the court's finding that she blamed her partners rather than accept responsibility for her past actions was not supported by the record and that court's CHINS and temporary-care determinations were inconsistent because the circumstances at the time of April 2018 hearing were the same as those at the time the CHINS petition was filed—mother was not involved with a dangerous partner at either time.

We conclude that the record supports the family division's CHINS adjudication. As noted, the question at a CHINS merits hearing is "whether, at the time of the filing of the petition, the juvenile is a child in need of care or supervision." L.M., 2014 VT 17, ¶ 20 (quotation omitted) (noting that court's analysis is not "limited only to the child's well-being on the precise day that the CHINS petition was filed" because "the circumstances leading up to the filing of the CHINS petition are relevant in the court's assessment"). The State alleged in its October 2017 CHINS petition that mother had been convicted of voyeurism with respect to conduct towards an older daughter less than three years earlier. The petition also alleged that mother had not participated in a psychosexual evaluation to determine her risk to reoffend. Further, mother had pled guilty to federal drug charges prior to the CHINS petition and was awaiting sentencing. The petition alleged that father was incarcerated and unavailable to parent A.B. These allegations, which are supported by the record, amply demonstrate that A.B. was CHINS at the time the petition was filed. The State's concerns were related to how mother had exercised her judgment in the past, with respect to her choice of partners and her engagement in criminal activity, in a manner that endangered her children. The State's concern from the beginning, as evidenced at the CHINS hearing, was that mother had not engaged in the necessary assessments and counseling to assure that she still did not pose a risk of harm to A.B.

At the conclusion of the April 2018 hearing, with respect to its CHINS determination, the family division stated that the issue was the risk of harm to A.B. because of mother's past failure to protect her other children from her former partners' criminal activity, as well as her own engagement in criminal behavior. The court reviewed each of mother's past partners, including father, who was incarcerated at the time of A.B.'s birth following his guilty plea to possessing cocaine and resisting arrest. The court then stated that it was finding CHINS based in part on mother blaming her earlier partners instead of accepting responsibility for her past actions. There is support in the record for this finding. Although not the focus of the CHINS proceedings, mother's own testimony suggested that she blamed her partners for her past criminal conduct. She testified that one partner threatened her if she did not help him sexually exploit her children, and she challenged the relevance to A.B. of the prosecutor's direct examination regarding her relationship with another partner that led to the federal drug charges. In any event, as noted, the court's other findings and conclusions amply support its determination that A.B. was CHINS at the time of the petition.

Further, we find no merit to father's due process argument based on a lack of notice. The parents were fully aware that one of the critical issues at the April 2018 combined hearing was whether mother posed a risk of harm to A.B. Thus, mother's attitude towards her past conduct was open to scrutiny, and her own testimony raised some doubt as to whether she had fully accepted her responsibility for that conduct. In short, there was no due process violation due to a lack of notice as to what the State was alleging. See In re F.P., 164 Vt. 117, 122 (1995) ("Notice to parents in CHINS cases is sufficient if the supporting affidavits recite the substance of the allegations plainly and with particularity so that the parties are afforded an adequate opportunity to respond.").

Nor is there necessarily an inconsistency in a court concluding in the context of a temporary-care determination that a child is not at substantial risk of harm but adjudicating a child CHINS because of the circumstances at the time the petition was filed. As noted, a CHINS adjudication examines the circumstances at the time the petition is filed, while a temporary-care order depends on whether placing a child with the custodial parent at that particular time will pose a substantial risk to the child. See 33 V.S.A. § 5308. Mother argues that the circumstances were exactly the same at the time of the October 2017 CHINS petition and the April 2018 hearing when the court stated, with respect to its temporary-care determination, that A.B. was not at substantial risk of harm because mother was not at that time involved with a partner engaged in criminal behavior. Putting aside the six months separating the CHINS petition and the April 2018 hearing, a fair reading of the family division's findings at the conclusion of the April 2018 hearing is that the court expected to return temporary care to mother, but before doing so it needed more information from DCF on mother's and father's living situations. The court stated that it "may . . . gradually return custody" to mother, but it first needed "to know what the living arrangements are like before that." In its written order following the hearing, the court cited mother's pending sentencing hearing and the parents' uncertain living situations. The court stated that it would hold a later hearing "to determine what a safe transition home would look like."

The parents argue, however, that the family division committed plain error and exceeded its limited jurisdiction. by keeping A.B. out of their care after finding that mother posed no substantial risk to the child. They contend that there is no statutory authority to hold children outside of their parents' care absent a finding that a return home would be contrary to the children's best interests because of a substantial risk of harm. Assuming that the plain error doctrine applies in a civil CHINS proceeding, it is reserved for the "exceptional case" where the error affected fundamental rights and had a prejudicial impact on the outcome of the case. In re D.C., 157 Vt. 659, 660 (1991) (mem.); see State v. Oscarson, 2004 VT 4, ¶ 27, 176 Vt. 176. That is not the case

here. Even if the temporary care order was infirm, any error was cured when the family division held a contested disposition hearing and issued an order transferring custody of A.B. to DCF. Cf. In re A.M., 2017 VT 5, ¶ 10, 204 Vt. 198 (stating that disposition hearing “effectively moot[ed] question of the children’s placement pending disposition”). Following the April 2018 order, both mother and father had ample opportunity during the two-day contested disposition hearing to challenge DCF’s custody recommendation for A.B.

The parents argue, however, that structural errors and delays deprived them of due process because the culminating effect of the court’s plain error was a modified disposition plan with concurrent goals that contemplated adoption as one possibility based on nothing more than the passage of time. According to the parents, the court failed to adhere to statutory timeframes and failed to protect their rights by adopting the concurrent goals at disposition following long delays not attributable to them. The record does not support the parents’ assertions. “It is settled that juvenile proceedings should be resolved as quickly as reasonably possible, but the time limits established by governing statutes . . . are directory and not jurisdictional.” In re M.B., 158 Vt. 63, 67 (1992) (quotation omitted); see In re D.D., 2013 VT 79, ¶ 24, 194 Vt. 508 (noting that disposition “timeline is not mandatory”). The record reveals that the judges strived to reduce delay in this case. The family division consolidated the contested CHINS and temporary-care hearings to reduce delay. A written order followed immediately after that combined hearing was completed. The court concluded that a further hearing on temporary care would be required primarily because of a lack of information on the parents’ living conditions. No such hearing occurred before the disposition hearing, but the reason for that is unclear. The record, however, indicates that mother’s and father’s living situations were unsettled and in flux during that period. When mother’s counsel withdrew shortly before the first day of the disposition hearing, the court immediately appointed new counsel and granted a short delay so that the new counsel could meet with his client and familiarize himself with the case. Multiple days were required for the contested disposition hearing, but the court issued its ruling shortly after the final day of hearing. We find no due process violation.

Father further argues that the family division impermissibly modified the DCF case plan instead of rejecting it or accepting it as it was originally proposed by DCF. DCF recommended the concurrent goals of reunification or adoption to be resolved in six to nine months. In response to father’s objections, the court approved a six-month timeframe and struck the requirements that he participate in Family Time coaching and parent education and that he refrain from using alcohol. The court’s failure to send the matter back to DCF for a revised case plan was harmless error in this case, insofar as father requested the changes, and those changes benefitted him. Cf. In re D.F., 2018 VT 132, ¶ 5 n.1 (stating that although court should have rejected case plan and ordered DCF to prepare new one rather than add concurrent goals on its own initiative, appellant did not appeal disposition order or challenge imposition of concurrent goals). Moreover, the family division was not compelled to reject the case plan’s concurrent goals based solely on another judge’s expectation ten months earlier at the conclusion of the consolidated CHINS and temporary-care hearing that custody would be returned to mother following further investigation of the parents’ living situations.

Finally, father briefly argues that the parents’ trial attorneys provided ineffective assistance of counsel by failing to detect the family division’s plain error in not issuing a temporary-custody order returning A.B. to mother’s care. This Court has not yet decided whether ineffective-assistance-of-counsel claims are reviewable in CHINS cases. See In re K.F., 2013 VT 39, ¶¶ 21-22, 194 Vt. 64 (declining to address whether ineffective-assistance-of-counsel claims may be raised to challenge termination decisions in CHINS proceedings because in that case father could not meet standard for establishing such claims set forth in Strickland v. Washington, 466 U.S. 668

(1984)). Assuming these claims can be raised in CHINS proceedings, father has not demonstrated either ineffective representation at the proceedings below or any prejudice stemming from the alleged ineffective representation. The record reveals that neither parent's living situation was stable between the April 2018 hearing and the February disposition hearing, and it is not clear what the attorneys could have done to get the family division to place A.B. in the care of either one of them during that period.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice