

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-141

JULY TERM, 2003

} APPEALED FROM:

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Washington Family Court

<http://www.vermontjudiciary.org/UPEO2001-2005/eo032052.aspx>

In re D.M. and D.M., Juveniles

DOCKET NO. 9258/9259-11-00 WnJv

Trial Judge: Jane G. Dimotsis

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

Mother appeals an order terminating her residual parental rights in her twin boys, D.M. and D.M.. We affirm.

Mother gave birth to D.M. and D.M. on May 1, 1996. She has three other children in the custody of the Commissioner of the Department of Social and Rehabilitation Services (SRS). Her three other children have resided with relatives since coming into SRS custody. In September 2000, the juvenile court adjudicated D.M. and D.M. children in need of care and supervision (CHINS). At that time, mother was homeless, and father, who has since voluntarily relinquished his parental rights in the twins, was incarcerated. The boys have been in the care of the same foster mother since the CHINS adjudication.

In November 2000, the juvenile court adopted SRS= s case plan to reunify the twins with mother. The following April, SRS moved to terminate mother= s rights because mother was not fulfilling the case plan= s requirements. SRS withdrew the termination petition on the first day of hearing, however, and the parties thereafter entered into a stipulated reunification plan, which the court approved.

In June 2002, SRS filed a second request to terminate mother's rights. The court took evidence on the petition over five days in December 2002 and January 2003. The court made numerous findings of fact. The court found that the twins have exhibited A sexually reactive@ behavior such as trying to kiss other people and each other with their tongues out, trying to touch each other= s penis, attempting to kiss another person= s penis, talking about seeing a woman sit on the lap of a naked man, and trying to touch other children= s genitals. When they first entered foster care at approximately four years of age, they used a tremendous amount of profanity in their speech. The boys exhibited anti-social and aggressive behaviors, and their therapist diagnosed them with post-traumatic stress disorder. The court found that mother was consistently unable to control their behavior. In addition, the court found that mother continued a relationship with, and later married, a man that the court had prohibited from being present during mother= s visits with the children, thus putting her own needs ahead of her children= s.

The court found that although mother fulfilled nearly all of the case plan requirements, her parenting did not improve. As visitation with mother increased in 2002, so did the children= s problematic behaviors at school and their foster home. During the summer of 2002, one of the twins B who were only six-years old B told the foster mother that he wanted to die. On one occasion before visiting mother, the child laid down in front of his foster mother= s car and asked her to run him over. He told her that he did not want to go to his mother= s house and wanted to die. Before another visit, the twins locked themselves inside a car hoping they could avoid the visit. The court found that, eventually, only

one of the twins would attend the supervised visits with mother. The court determined that, due to the twins' extreme behavior issues, mother could not adequately parent them despite having commendably executed nearly every case plan requirement. It was unlikely that mother could resume her duties to parent the twins within a reasonable amount of time considering that they have been in the State's care for roughly thirty-two months at the time the court issued its findings. Ultimately, the court found that the children needed permanency and that it was in their best interests to terminate mother's rights so they could be freed for adoption. Mother appealed the decision to this Court.

On appeal, mother claims that the court made several erroneous findings that leave its legal conclusions unsupported, and, hence, reversal is required. The standard of review for mother's claim is instructive here. A We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence. @ In re A.F., 160 Vt. 175, 178 (1993). Thus, we will not strike factual findings on appeal if they are supported by credible evidence and are not clearly erroneous. Id. If the legal conclusions are supported by the findings, we will uphold them. Id. Even an erroneous finding will not, however, justify reversal if the remainder of the court's findings support the legal conclusions. See id. (reversal of termination not required when erroneous factual finding is deleted and remainder of findings support court's legal conclusions). We turn now to mother's specific claims of error.

Mother first argues that the court improperly compared the foster mother's parenting skills with mother's. Mother correctly notes that the issue before the court was whether she could adequately parent the twins and not whether someone else could do better, and that the availability of an adoptive home is irrelevant to the question of termination. We find no error, however, in the court's findings on the care mother and the foster mother provided for the children.

In any termination proceeding, the court must decide whether termination is in the child's best interests, as guided by the factors set forth in 33 V.S.A. ' 5540. The first statutory factor requires the court to assess a child's relationship with his or her foster parents and the child's birth parents. 33 V.S.A. ' 5540(1). Section 5540(2) asks the court to evaluate A [t]he child's adjustment to his home, school, and community.@ The fourth statutory factor examines the role the child's natural parents have played in the child's life, including the parents' expressions of love and affection for the child. Id. ' 5540(4). Thus, the contested findings were required by statute, and they form the basis for the court's conclusions that mother and the children do not have a positive relationship, mother has not played a constructive role in the boys' lives, and the children are doing well overall in the care of their foster mother. There was no error.

Mother next claims that the court relied on a preponderance of the evidence, rather than clear and convincing evidence, to find the children's relationship with their therapist of two years A would, unfortunately, probably not continue should the twins be sent to live with their mother in Barre as it is unlikely that [mother] would have the time or ability to take them to Chittenden County to see@ their therapist. Even if the court's finding is based on a preponderance of the evidence, we find no reversible error. The finding is a single finding among nearly one hundred. If we exclude the contested finding from consideration, the remainder of the court's findings lend ample support for the court's decision to terminate mother's parental rights. See In re C.M., 157 Vt. 100, 103 (1991) (citing cases for proposition that erroneous finding does not require reversal where other evidence supported termination of parental rights). Despite months, even years, of assistance to remedy her deficient parenting, mother remains unable to resume her parental duties in a time frame necessary to secure the children's well being or to address their needs appropriately. See 33 V.S.A. ' 5540(3) (when evaluating child's best interests court must address whether parent can resume her parental duties within a reasonable amount of time); In re D.B., 161 Vt. 217, 219 (1993) (parent's ability to resume parental duties within a reasonable amount of time is a key statutory factor to consider when determining whether termination is in child's best interests).

Mother further argues that the record does not support the court's finding that her parenting teacher believed her to be A cognitively challenged@ because the teacher testified that she did not hold that opinion. The record does not bear out mother's claim. The teacher was asked whether she told an SRS worker that mother was cognitively challenged, and the teacher responded that she did not recall using those words. The teacher further testified that the term A cognitively challenged@ is a A loaded expression@ , but that she thought mother was A cognitively struggling with [the parenting] program.@ The teacher explained that her statement was A true in part as long as that part reflects [her] overlying impression that [mother] struggled with the abstract messages of th[e] program.@ The court used the term A cognitively challenged@ consistent with the teacher's testimony when it found that mother A cannot comprehend even simply abstract concepts, like rewarding a child for good behavior.@ We find no error because mother misreads both the

transcript of the teacher= s testimony and the court= s findings based upon that testimony.

According to mother, the court also committed reversible error by issuing contradictory findings on mother= s grasp of the twins= sexually reactive behavior. She asserts that the court found that mother both failed to recognize the behavior and that she was aware of it. We disagree with mother= s characterization of the court= s order. Viewed in context, the findings, which are underscored below, are not contradictory:

Clearly the twins are sexually reactive, something that [mother] claims not to have noticed. [Mother= s] failure to recognize the fact that the twins are sexually reactive is quite concerning to the court. In addition, it is the court= s conclusion that [mother= s new husband] would not know how to handle these children who need extra vigilance around that issue. [Mother] was aware that the children had been sexually reactive at school with other children, yet, she did not inform her counselor of this or question him regarding how she should handle these issues. (Emphasis added.)

The above paragraph reflects the court= s concern that mother herself claims not to have noticed the behavior although she was aware that the boys had acted out sexually at school. The court= s concern is well-founded in light of the many examples of the twins= sexual behavior set forth in the record and the evidence suggesting that mother lacks the skills necessary to address the boys= problem. The findings are not contradictory, and mother= s claim to the contrary must fail.

Finally, mother argues that several fact findings regarding her new husband were either based on a preponderance of the evidence or lack support in the evidence. Again, even if the findings are erroneous, mother fails to demonstrate that they prejudiced her. The court= s order to terminate mother= s rights is supported by the remainder of its findings and conclusions, including: mother has demonstrated an inability to put the twins= needs before her own; she has consistently failed to employ appropriate disciplinary measures to address the boys= aggressive and sexually reactive behavior; the children need permanency now; one of the twins expressed a desire to die rather than see mother; the children= s negative behaviors increased when the parties attempted to increase mother= s visitation with them; and it is unlikely that mother will be able to resume her parental duties within a reasonable time. Because the record supports the court= s key findings, and those findings support the court= s conclusions, we find no reason to reverse the court= s decision to terminate mother= s residual parental rights in D.M. or D.M.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned