

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2016-429

APRIL TERM, 2017

|                                      |   |                                |
|--------------------------------------|---|--------------------------------|
| In re M.S., M.K. and C.S., Juveniles | } | APPEALED FROM:                 |
|                                      | } |                                |
|                                      | } | Superior Court, Windham Unit,  |
|                                      | } | Family Division                |
|                                      | } |                                |
|                                      | } | DOCKET NOS. 82-8-14, 50-4-14 & |
|                                      |   | 126-11-15 Wmjv                 |

Trial Judge: Karen R. Carroll

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

Parents appeal from the termination of their rights in M.K. and M.S., and the court's decision that C.S., a newborn, was a child in need of care or supervision (CHINS). We do not address parents' challenges to the CHINS decision for C.S. We affirm the court's decision to terminate parents' rights in M.K. and M.S.

M.K. was taken into emergency custody of the Department for Children and Families (DCF) in April 2014 when he was five years old. His brother, M.S., was taken into DCF custody in August 2014 at age one. DCF alleged that mother had physically abused M.K. and that M.S. was at risk of similar abuse. The boys were adjudicated as CHINS at separate times, M.K. due to abuse and M.S. due to being without proper parental care. This Court affirmed both decisions on appeal. See In re M.K., 2015 VT 8, 198 Vt. 233; In re M.S., No. 2014-449, 2015 WL 1760558 (Vt. April 10, 2015) (unpub. mem.). C.S. was taken into emergency DCF custody upon her birth in November 2015, and the State filed a CHINS petition.

The court held a joint hearing on DCF's termination and CHINS petitions. It issued a lengthy opinion, much of which we do not repeat here. The court recounted mother's physical assault of M.K. and the history of the CHINS proceedings with respect to the older children. It discussed the case-plan requirements for both parents, mindful that mother had always been the children's primary-care provider, a role that father did not want. The court found that M.K. and M.S. had both suffered trauma while in their parents' care based largely on their parents' toxic relationship and their out-of-control behaviors. The boys had significant developmental and mental health issues as a result.

M.S. is profoundly developmentally delayed and has microcephaly. He requires a high level of supervision and support and a structured living environment that is free of fighting and rancor. M.S. showed dramatic improvement in his foster placement. M.S.'s pediatrician expressed her concern that his developmental delay and previous failure to thrive might recur if he did not have a consistent routine, clear expectations, and a responsive caregiver. M.K. has been diagnosed with ADHD, post-traumatic stress disorder, and generalized anxiety disorder. A clinician authored

a plan for M.K. and mother, but mother later informed the clinician that she was unsure whether she wanted to continue with the recommended services because she was overwhelmed. She informed the clinician that she was not interested in long-term support from her, and she did not contact the clinician again. Mother showed no insight into her physical abuse of M.K., and she did not accept responsibility for it. Like M.S., M.K. made remarkable progress after coming into DCF custody and being placed in a foster home.

An expert conducted a forensic evaluation of the family. The expert diagnosed mother with mixed personality disorder. The expert's greatest concern was mother's inability to read the children's cues and to understand their need for attachment. This was particularly problematic considering the extent of the boys' needs. Mother demonstrated a lack of empathy toward M.K., which was of great concern due to M.K.'s emotional dysregulation and neediness. The expert indicated that mother would need a great deal of time to overcome her parenting shortcomings, and until she did so, her behavior would continue to have a negative impact on the children.

Mother's behavior led to difficulties with visitation. The visit supervisor witnessed mother yell, throw things, and collapse on the floor. In December 2015, mother engaged in explosive and inappropriate behavior that led to decreased visitation. She was aggressive with the children, causing one to fall, and she was physically and verbally aggressive with the visit supervisor. The children were hysterically crying and had bright red faces; M.K. appeared terrified. The boys' foster parent reported that the negative repercussions from this visit continued at home. The foster parent reported a significant positive difference in the children's behavior after visitation with parents was reduced. After eighteen months of working with the family, the visit supervisor observed that little progress had been made due to parents' behaviors.

Once visitation was reduced, father's attendance dropped off significantly. Father was not in touch with M.K. and M.S.'s service providers. Once the TPR petition was filed, mother lost contact with the boys' service providers as well. Neither parent contacted DCF for updates on the boys. Father failed to complete a substance-abuse assessment, did not engage in anger-management counseling, and failed to make himself available for all appointments when the family was evaluated. He did not attend all required meetings. Mother stopped seeing her individual therapist, indicating that she had learned all that she could. In all other respects, the court found that mother had significantly complied with the case plan.

Based on these and numerous additional findings, the court found that both parents' ability to parent the boys had stagnated and that there had been no improvement in their capacity to care for the boys. Reunification with father was never contemplated, and father did not comply with the case plan, he visited with the children only rarely, and he was in no position to care for the children. Mother had complied with some aspects of her case plan and had visited the children. Nonetheless, after more than two years, she still failed to appreciate why the children were in DCF custody. She had no insight into the fact that she physically abused M.K. out of anger or the effect that this had on him. She lacked empathy toward the children and her emotional dysregulation and outbursts continued. Although mother had been able to work with some providers without resorting to screaming and tumultuous behavior, she remained unable to take advice from anyone who she believed was challenging her or her ability to parent, including DCF. After the TPR petitions were filed, mother refused to be in contact with DCF even though the boys remained in DCF custody. Both the physical abuse and emotional dysregulation caused both children to be traumatized to the point that there are significant and long-lasting effects on their lives. Although mother's own expert witness recommended several months prior to the TPR hearing that mother needed intensive therapy and medication to overcome her mental health problems, mother failed

to engage in these remedies. Mother was still unable to parent both of her children together and could not manage their extreme behaviors by herself. The court made numerous additional findings in this regard. The court also evaluated the statutory best-interest factors, and concluded that they all supported termination of parents' rights. In a separate ruling, the court concluded that C.S. was CHINS. These appeals by parents followed.

With regard to the termination order, mother challenges the court's finding that she had stagnated in her ability to parent. According to mother, she consistently engaged in the case plan requirements and any failure to improve was DCF's fault. Mother maintains that the court's findings show that she was participating and improving. Mother also asserts that the disposition case plan did not clearly state what was expected of her or identify what DCF must do to assist her.

Mother misreads the court's order. The court did not find that she was participating and improving, as she asserts. To the contrary, it found, among other things, that she continued to be unable to read the children's cues and respond to their needs; she continued to exhibit emotional dysregulation, which led to a decrease in visitation; and she failed to address her mental health needs. Mother may have been "open to learning" as she asserts, but she was not in fact acquiring the skills and insight necessary to resume parenting the children. See In re B.W., 162 Vt. 287, 291 (1994) (explaining that "[s]tagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child," but "mere fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances" (quotation omitted)); see also In re D.M., 2004 VT 41, ¶ 7, 176 Vt. 639 (explaining that fact that mother followed case plan and cooperated with service providers is "not determinative of whether stagnation may be found;" key question for court "is whether the parent has made progress in ameliorating the conditions that led to state intervention"). The responsibility for this lies with mother, not DCF, which provided mother with ample support services. See In re D.M., 2004 VT 41, ¶ 6 (rejecting similar argument, and explaining that "[c]hanging her own behavior and implementing the many parenting lessons she received from other service providers was and remains fully within mother's control," and her inability "to engage in therapy for a period of time with particular therapist because of circumstances that were admittedly out of her control is, ultimately, irrelevant to whether she made progress in improving her parenting skills"). We reject mother's assertion, moreover, that there could be no stagnation because the case plan did not specifically state that mother needed to demonstrate insight into her physical abuse of M.K., the effect this abuse had on M.K., that she must demonstrate empathy toward the children, and cease her emotional dysregulation and outbursts. These are the issues that brought the children into custody, and the court made these expectations clear to mother in its disposition order. The court did not err in finding that mother had stagnated in her ability to parent. See In re B.W., 162 Vt. at 291.

Parents also seek to appeal the court's decision that C.S. was CHINS. By statute, a CHINS order is "not a final order subject to appeal separate from the resulting disposition order." 33 V.S.A. § 5315(g). A disposition order for C.S. is not before us, and this appeal is therefore premature. We thus do not consider the merits of the CHINS decision here.

Turning to father's argument—father asserts that "termination should be invoked only as a last resort and that point has not been achieved in this case." The trial court concluded otherwise, engaging in the appropriate statutory analysis, and its decision is amply supported by the record. This Court does not reweigh the evidence on appeal. In re S.B., 174 Vt. 427, 429 (2002) (mem.) ("Our role is not to second-guess the family court or to reweigh the evidence . . . ."). Father, who

was a noncustodial parent, primarily ties his arguments on appeal to mother's. He has never sought custodial responsibilities, but instead argues to preserve his role supporting mother as a parent to the boys. For the reasons discussed above, the trial court did not err in terminating mother's parental rights. We find no error in the court's decision as to father.

Affirmed.

BY THE COURT:

---

Marilyn S. Skoglund, Associate Justice

---

Beth Robinson, Associate Justice

---

Harold E. Eaton, Jr., Associate Justice