

*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. 2018-172

OCTOBER TERM, 2018

In re L.S., Juvenile	}	APPEALED FROM:
(S.S., Father* & T.S., Mother*)	}	
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
	}	DOCKET NO. 122-10-17 Wrjv
		Trial Judge: Elizabeth D. Mann

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

Mother and father separately appeal an order of the superior court, family division, adjudicating their daughter, L.S., a child in need of care or supervision (CHINS). We reverse.

L.S. was born prematurely on June 12, 2017, after only twenty-four weeks of gestation. She was the smallest child to have survived birth at Dartmouth-Hitchcock Medical Center (DHMC). She spent approximately four months in the hospital's intensive-care nursery (ICN) before being discharged on October 9, 2017, in the care of her parents. Her parents had roomed with her in the ICN for two days and two nights before L.S.'s discharge so they could manage her feedings while she was still in the hospital.

When the parents brought L.S. to the doctor two days later for a follow-up, the infant had lost approximately thirty grams in weight in the two days since her discharge. This fell well short of the goal that L.S. would gain fifteen-to-twenty grams in weight per day per kilo. A social worker in the neonatal follow-up program reported the circumstances to the Department for Children and Families (DCF). The next day, October 12, 2017, the State filed a request for an emergency-care order and a CHINS petition alleging that L.S. was without proper parental care necessary for her well-being. See 33 V.S.A. § 5102(3)(B). The petition alleged that, upon L.S.'s discharge from the hospital, the parents had been instructed to feed L.S. every three hours, but that mother admitted she had failed to do so on at least two occasions, thereby endangering the child. The petition also cited mother's history with an older child, who had been removed from her care based on allegations of medical neglect and who had been freed for adoption a year earlier after mother voluntarily relinquished her parental rights. The petition further stated that DHMC would not provide more information because mother had not signed a release for DCF to obtain information regarding L.S. The petition alleged that L.S. was at imminent risk of harm because of mother's history of untreated mental illness and her inability to meet her children's medical needs, the lack of information concerning father's parenting ability, and the concerns reported by DHMC that L.S. might be in danger because of mother's medical neglect, as indicated by the fragile child's failure to thrive after being released to the parents' care.

That same day, October 12, 2017, the family division issued an emergency-care order placing L.S. in DCF's temporary custody. L.S. was readmitted to DHMC. On November 8, 2018, L.S. was discharged again from DHMC, this time to foster parents. L.S. has remained with those foster parents since then.

The family division held a merits hearing on the CHINS petition over three partial days in November 2017, January 2018, and March 2018. The court heard testimony from Dr. Taylor Hartman, L.S.'s neonatologist at DHMC; Erin Swasey, a clinical social worker at DHMC; Catherine Driscoll, a nurse in the ICN; Karolina Fowler, the DCF case worker who wrote the affidavit that formed the basis for the State's CHINS petition; and Kelly French, a nurse who worked with mother at The Family Place. Neither parent testified at the hearing. At the end of the last day of hearings, the court made some oral findings and announced its decision to grant the petition. The court concluded that the following evidence, in combination, demonstrated by a preponderance of the evidence that L.S. was CHINS: the significant weight loss to an extremely vulnerable infant in mother's care; questions regarding mother's adherence to the required feeding schedule; DCF's knowledge of mother's medical neglect of her older child; and DCF's inability to obtain updated information concerning mother's current mental health because of mother's failure to sign releases. The day after the hearing ended, the court issued a written merits decision reiterating the same reasons for granting the petition. After the family court issued a disposition order continuing DCF custody and adopting a case plan with concurrent goals of reunification and adoption, each parent separately appealed the CHINS merits decision.

On appeal, mother argues that the evidence does not support the family court's finding of medical neglect and that the court's other reasons for adjudicating L.S. CHINS were legally infirm. For his part, father argues that the family court erred by adjudicating L.S. CHINS without making any findings as to the impact of his parenting presence on the question of whether L.S. was CHINS, by considering the best interests of L.S. in the context of a merits decision, and by basing its CHINS determination on historical concerns about mother when both parents were involved in L.S.'s care and there was no evidence of medical neglect at the time the child was discharged into their care.

We conclude that the State did not present sufficient evidence of medical neglect to support a determination that L.S. lacked proper care or supervision when the State filed its CHINS petition on October 12, 2017, and the other grounds supporting its petition are likewise legally insufficient.

Although the State presented medical evidence that L.S.'s weight loss following discharge from DHMC was concerning, not one witness testified that that weight loss was the result of improper care or medical neglect by the parents.

One of the neonatologists who cared for L.S. at the ICN testified that L.S. lost about thirty grams in three days<sup>1</sup> following her October 9 discharge, and that the infant was readmitted to DHMC on October 12 because of concerns about the lack of appropriate weight gain. He also testified that the ICN team continued to have a hard time feeding L.S. after her readmission and that, following a November 8 discharge to the foster parents, L.S. had to be readmitted again to the ICN because of her not taking in enough food. The neonatologist emphasized that even the

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<sup>1</sup> The family court also found that L.S. had lost thirty grams of weight in the three days after her discharge to parents, but, as indicated below, the record reveals that the thirty-gram loss was noted when mother brought L.S. in for a check-up two days, not three days, after her discharge. On the third day after the discharge, when L.S. was readmitted to DHMC, the record indicated that L.S. had actually gained some of that weight back while in the parents' care.

neonatal nurses were not able to feed the baby well, noting that “our nurses can feed almost anyone.” He also noted the risks of pushing feeding too hard with such infants because they are vulnerable to developing oral aversion. Given that everyone, including the medical team, was “struggling feeding L.S.,” they eventually surgically placed a G-tube in her so they could ensure that L.S. got the calories and nutrients she needed without making her orally aversive. When asked if he thought L.S.’s loss of weight was due to mother’s medical neglect, the neonatologist testified that he and a nurse practitioner “initially . . . had some concerns, but the fact that when [L.S.] was readmitted our nurses couldn’t feed her well and then . . . the foster parents couldn’t feed her well” led him to believe “that L.S.’s not feeding well was not something the parents did” but rather “something that was related to how premature she was.”<sup>2</sup>

A DHMC clinical social worker who works in the ICN and worked with mother and father during L.S.’s hospitalization and discharge planning testified that she had no concerns with mother’s and father’s parenting or their ability to meet L.S.’s needs at home. She acknowledged that she was quite concerned when L.S. was born because of her significant medical needs and her firsthand knowledge of mother’s history with her older child, but she “found it striking that [mother] was so participatory in L.S.’s care, [and] seemed to really understand L.S.’s needs and advocate appropriately for her with her medical team.” The social worker also testified that L.S. had had weight loss and gain in the ICN in the two weeks leading up to her discharge to her parents. Regarding the feeding protocol, the social worker testified that timing between feedings—for example the difference between feeding a premature child every one-to-two hours as opposed to every three-to-four hours—was less important than the daily number of calories that the infant received.

A neonatal nurse who had cared for L.S. also testified that after September 2017, when L.S.’s oral feedings began, the infant had weight fluctuations. She also testified that from the time that the parents brought L.S. for a check-up on October 11 and the next day when L.S. was readmitted to DHMC—during which time the infant remained in her parents’ care—L.S. had gained back half of the weight that she had lost between October 9 and 11. The nurse testified that in her opinion L.S.’s net loss of weight during the first three days after her discharge was not uncommon for a premature infant getting used to a new feeding rhythm and was not the result of medical neglect.

The DCF case worker who wrote the affidavit that formed the basis of the State’s CHINS petition testified that she wrote the affidavit because of her concerns about L.S.’s welfare after the reported loss of weight while in mother’s care. She further testified that on the basis of her interactions with mother from June to October 2016, she was concerned that mother had mental-health problems and had neglected the medical needs of her older child. The case worker acknowledged that neither she nor anyone else from DCF consulted with any of the medical providers who cared for L.S. during her four months at DHMC as to whether L.S.’s post-discharge weight loss was normal under the circumstances, but she stated that mother had denied her June

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<sup>2</sup> The hearing record reflects some confusion as to whether the family court could properly rely on evidence of L.S.’s difficulties post-CHINS petition. It is true that post-petition events cannot generally form the basis for a CHINS decision, see *In re M.L.*, 2018 VT 32, ¶ 16 (“[I]n evaluating the State’s CHINS petition, we focus on the circumstances at the time the State filed the petition.”), but that does not mean that evidence of events that took place after the CHINS petition cannot be considered in assessing whether, at the time of the CHINS petition, the child was CHINS. Post-petition investigation or, in this case, medical evaluation may reveal additional evidence that can support or counter the conclusion that the child was CHINS at the time of the CHINS petition.

2017 request for a release for her to talk to L.S.'s medical providers. She acknowledged that she had no basis to believe that either parent was failing to follow medical advice in the way they fed their daughter at the time she wrote the affidavit supporting the CHINS petition.

The State relied heavily on evidence that mother acknowledged to the pediatrician at the follow-up visit that the child went more than four hours between feedings on two occasions, in violation of the providers' recommendations that the baby be fed at least every three hours. Whether such evidence is properly in the record is itself a subject of dispute, and what, exactly, mother admitted is not clear in the record, but our resolution of this appeal does not in any event hinge on this evidence. None of the qualified witnesses validated the State's contention that this admission was evidence of medical neglect. The neonatal physician testified that this admission gave him pause at first, but once he saw the infant's subsequent course and realized how difficult it was to feed this baby, he did not endorse the allegation of medical neglect. The neonatal social worker likewise explained that the timing of the feedings was less critical than the total calories consumed. She explained, "[w]hether that happens via feedings every three to four hours or whether it happens with smaller feeds every one to two hours . . . or a little bit longer than four, if L.S. won't [feed] at the four-hour mark, that's okay as long as you're keeping track of how much she's eating and communicating with the medical professionals." And the neonatal nurse testified that she would not be concerned if a child like L.S. went longer than four hours between feedings for one time, but would worry if the baby didn't eat for five hours continually. The child's total consumption in a twenty-four hour period is the more important consideration. She also testified that getting L.S. to feed was trial-and-error and that there are short-term and long-term problems with forcing a baby to feed.

The State's evidence of medical neglect is essentially that L.S., an extremely vulnerable infant, lost rather than gained weight during the first two days in her parents' care and that mother admitted feedings had occurred up to or over four hours apart on one or two occasions. The State failed to present any evidence suggesting that the loss of weight was due to the parents' improper care, that the parents did not take appropriate steps in seeking medical intervention for L.S., or that their conduct was neglectful in any other way. Indeed, the testimony presented at the merits hearing indicated that even experienced medical providers, as well as the foster parents, had difficulty feeding L.S., to the point where a G-tube had to be surgically placed in the infant. In short, at the merits hearing, the State presented virtually no evidence of medical neglect, or that L.S. was without proper care at the time of the CHINS petition.

Without evidence of medical neglect, the general evidence of mother's past mental-health issues and her past medical neglect of her older child cannot support the family court's CHINS determination. The evidence with respect to mother's older child was that in the summer of 2016 mother failed to understand the severity of his medical needs—specifically, his asthma and the importance of obtaining the required medication and having an inhaler available in case he had an attack. At the time, mother was also experiencing mental-health problems. The testimony presented at the merits hearing, however, was that the parents were very attentive and tuned in to L.S.'s needs. There was no evidence suggesting that mother's mental health was interfering with her ability to care for L.S. In fact, the neonatal social worker, who had some knowledge of mother's issues involving the prior child, testified that she "found it striking that [mother] was so participatory in L.S.'s care, seemed to really understand L.S.'s needs and advocate appropriately for her with her medical team, and particularly knowing the history, that was profound for me."

The family court noted that neither father nor mother testified at the merits hearing, but it was the State's burden to prove that L.S. was CHINS, which it failed to do by a preponderance of

the evidence. Given our conclusion that the State failed to meet its burden of proving medical neglect, we need not consider the other arguments raised by father.

Reversed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice