

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. 2018-178

OCTOBER TERM, 2018

In re M.W. & W.P., Juveniles	}	APPEALED FROM:
(A.P., Mother*)	}	
	}	Superior Court, Orleans Unit,
	}	Family Division
	}	
	}	DOCKET NOS. 15-2-17 Osjv &
		42-5-17 Osjv

Trial Judge: Howard A. Kalfus, Acting Superior Judge, Specially Assigned

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

Mother appeals an order of the superior court, family division, terminating her parental rights to her children, M.W. and W.P. We affirm.

M.W. was born in March 2015. In October 2015, the Department for Children and Families (DCF) became involved with the family* after a worker from Women, Infants and Children reported that M.W. was not reaching her necessary weight-gain threshold. DCF investigated the situation but soon closed the case. In October 2016, DCF again became involved with the family after mother reported father being physically abusive to her and endangering M.W. Based on its concerns regarding domestic violence, mother's mental health, her lack of personal hygiene, the unsanitary conditions in which she and M.W. were living at the maternal grandmother's home, and M.W.'s low weight gains, DCF filed a petition in February 2017 alleging that M.W. was a child in need of care or supervision (CHINS). M.W. was placed with a foster family for two weeks, returned to mother's custody under a conditional custody order, but then returned to the same foster family six weeks later pursuant to a temporary custody order.

When M.W. first arrived at the foster home, she was diagnosed as a failure-to-thrive child with reactive-attachment disorder. She weighed only seventeen pounds and had little muscle development. She was hitting herself, pulling out her hair, and screaming in a high-pitched voice. She was nonverbal. The foster family taught her basic sign language, and she eventually learned to form multiple-word sentences.

* The children's father lived with mother and M.W. until just after M.W.'s first birthday, but he has not had any contact with the child since then and has never met W.P. He was represented by counsel at the termination hearing, but he himself has never been involved in the court proceedings, and he did not appeal the termination of his parental rights.

W.P. was born in May 2017. Based on the family's history, DCF sought and obtained an emergency custody order on the day of her birth. She was placed with the same foster family with whom M.W. was living. Throughout the instant proceedings, the girls have remained with that foster family, who wish to adopt them.

Following separate merits hearings in September and October of 2017, M.W. and W.P. were adjudicated CHINS. In November 2017, the parties stipulated to a disposition order that continued DCF custody with concurrent goals of reunification or adoption.

Mother, who herself had been taken into DCF custody at the age of twelve after being sexually abused by her stepfather, suffered from serious mental health issues, including depression, post-traumatic stress disorder, and attention-deficit hyperactive disorder. She has also battled substance abuse. She relied on the support of the maternal grandmother, who was still living with the stepfather who had abused mother.

In light of mother's challenges, the disposition case plan called for mother to: (1) address her mental health needs by participating in a psychological evaluation, following all recommendations, and engaging in individual therapy; (2) maintain safe and stable housing; (3) provide parenting appropriate for M.W.'s developmental, medical, nutritional, and mental health needs; and (4) engage in a substance-abuse assessment and follow all treatment recommendations. Under the case plan, mother had five visits a week with the children.

In January 2018, DCF filed petitions to terminate the parental rights of both parents. Following a hearing over two days in April 2018, the family court granted the petitions. The court found that mother and the children love each other and that mother had made improvement in some areas since the children were taken into DCF custody, including obtaining her own housing, attending most of the children's medical appointments and shared-parent meetings, consistently engaging appropriately with the children during visits, and engaging in some counseling. The court found, however, that mother's parenting skills were "lacking terribly," in that she struggled to provide appropriate supervision during visits and the family time coach needed to intervene every visit to keep the children safe. The court also found that mother was not able to maintain a clean and sanitary home. Further, the court found that although mother was engaged in counseling at the time of the termination hearing, she had resisted doing so for some time and her current counselor was not trained to provide her with the level and type of therapy she needed. The court found that mother participated in a psychological evaluation, which recommended case management services, antidepressant medications, in-home support, a substance-abuse assessment, positive social supports, and a therapist who specializes in a cognitive approach to managing her depression and helping her increase her self-confidence; however, mother did not follow the evaluator's recommendations. The court noted that mother had stated that the recommended therapy was a waste of time and that discussing her being a victim of domestic abuse was stupid.

Based on these findings, the court concluded that mother's parenting skills had stagnated and that termination of her parental rights was in the children's best interests, considering the statutory best-interest criteria, 33 V.S.A. § 5114(a). The court concluded that the first best-interest criterion regarding the children's relationships with the parents and other persons who may significantly impact their interests weighed in favor of terminating mother's rights, "but to a

considerably lesser degree than as to [f]ather,” considering mother’s loving relationship with the children. The court further concluded that the second criterion regarding the children’s adjustment to their home and community favored termination of parental rights. Regarding the critical third criterion—whether the parents will be able to resume their parental duties within a reasonable period of time from the child’s perspective—the court concluded that this criterion favored terminating mother’s parental rights because she had failed to address her own mental health needs and she still could not consistently supervise the children without becoming overwhelmed and frustrated to the point where she needed constant intervention during visits. See In re M.W., 2016 VT 28, ¶ 8, 201 Vt. 622 (stating our repeated emphasis that most critical of best-interest criteria is whether parent would be able to resume parental duties within reasonable period of time from children’s perspective). As for the fourth criterion concerning whether the parents continued to play a constructive role in the children’s welfare, the court noted mother’s demonstrated love for the children and concluded that “[w]hile her inability to consistently supervise both children during visits may call into question the constructive nature of the role that she plays in the children’s lives, on balance, this factor may not support termination of [m]other’s parental rights.” The court then summed up its discussion of the best-interest criteria as follows: “Although the fourth factor may not support the termination of [m]other’s parental rights, the other three factors, including, importantly, the third, do support the termination. On balance the four factors do support the termination of [m]other’s parental rights as to both children.”

On appeal, mother argues that the family court’s use of the phrase “on balance” in discussing the best-interest criteria indicated that the court was applying a preponderance-of-the-evidence standard rather than the governing clear-and-convincing standard. See 33 V.S.A. § 5317(c) (“If the Court terminates the parental rights of one or both parents, the standard of proof on the issue of termination shall be clear and convincing evidence.”). According to mother, the family court’s statement that one factor outweighed another failed to provide an adequate explanation for its decision.

We find no merit to this argument. The family court explicitly stated that its findings were made based on clear and convincing evidence and that, in order to grant DCF’s petitions, it must determine by clear and convincing evidence that there had been a substantial change in circumstances and that termination of the parents’ rights was in the best interests of the child based on the statutory criteria. See In re C.L., 151 Vt. 480, 489 (1989) (“[T]he better practice is for the trial court to specify in its order that it is using the ‘clear and convincing evidence’ standard of proof when adjudicating these cases. That way there is no margin for error and this Court is saved the burden of searching the record to determine whether the correct standard was applied.”) Moreover, the court’s use of the phrase “on balance” on two occasions does not suggest that it was applying a preponderance-of-the-evidence standard to its termination decision. The court’s first use of the phrase was simply to state that notwithstanding mother’s continued questionable ability to supervise the children during visits, the factor might not support termination of her parental rights, given the consistent love and affection that mother had shown the children. In its second use of the phrase, the court essentially indicated that even if that criterion did not support termination of parental rights, the other three criteria did, including the most important third criterion. In its findings and conclusions, the court acknowledged mother’s love for the children, but it concluded that termination was in the children’s best interests because mother’s ongoing inability to parent the children and keep them safe, along with the children’s strong connections to the home and community in which they had lived for most of their lives, precluded mother from

being able to resume her parental duties within a reasonable period of time from the children's perspective. The court's decision plainly indicates the standard underlying, as well as the bases for, its termination decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice