

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. 2018-338

JANUARY TERM, 2019

In re A.R., Juvenile
(B.W., Mother*)

} APPEALED FROM:

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} Superior Court, Franklin Unit,
} Family Division

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} DOCKET NO. 218-12-17 Frjv

Trial Judge: Mary L. Morrissey
(CHINS); Thomas Carlson (TPR)

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

The trial court found A.R. to be a child in need of care or supervision (CHINS) and it terminated mother's parental rights at initial disposition. Father is deceased. Mother argues on appeal that the court's CHINS finding is not supported by the evidence.¹ Based on this assertion, mother also asserts that the termination of her rights was improper. We affirm.

I. CHINS Proceeding

A.R. was born in February 2012.² In December 2017, A.R. was taken into emergency custody of the Department for Children and Families (DCF) following an investigation into allegations that mother's boyfriend physically abused him. Following a hearing, the court adjudicated A.R. as CHINS. It made the following findings. Parents lived together intermittently. After they broke up, A.R. lived primarily with father. A.R. spent some time with mother, who lived with her boyfriend. Mother told paternal grandmother that boyfriend was abusive and mean to her. She showed grandmother a bruise that boyfriend inflicted. While mother testified that boyfriend never physically hurt her, the court found grandmother's testimony more credible. Father was concerned about A.R. being in the same home as boyfriend due to boyfriend's aggressiveness. In a parentage case between mother and father, the family court issued a no-contact order prohibiting A.R. from having any contact with boyfriend. Mother's request to vacate the no-contact order was denied. Mother nonetheless allowed A.R. to have contact with boyfriend in violation of the court's order. The court credited mother's testimony that, at some point, father

¹ By law, a CHINS determination cannot be appealed until the issuance of a disposition order. See 33 V.S.A. § 5315(g).

² Mother has two other children with her boyfriend, one born in August 2014 and another born in 2018. Both children have been or remain in the custody of the Department for Children and Families.

acquiesced to this contact. The court found it unclear if the no-contact order was later modified or vacated at father's request.

The court made numerous additional findings recounting the history of DCF's involvement in this matter. It explained that at the time of his suicide in August 2017, father had primary legal rights and responsibilities for A.R. After father's death, DCF received numerous reports expressing concern about A.R. being placed in mother's custody. After conducting a risk assessment, DCF opened a family-support case. One reported concern was mother's living conditions. A DCF social worker conducted a home visit and observed the porch of mother's home to be "highly cluttered" with bags of garbage and a box of old food items. The amount of garbage on the porch made it difficult to move around. Mother allowed DCF inside the home once after DCF provided her advance notice of the visit; she refused to allow any unannounced visits. The social worker did not observe any safety issues inside the home during the single announced visit. When the social worker visited again, she observed even more trash on the porch, as well as an old mattress and debris. The court rejected mother's explanation for the garbage as not credible.

DCF was also concerned that mother might be unstable in her medically assisted drug treatment. The social worker asked mother if she would let DCF verify her compliance with treatment to assess if other services might be helpful. While mother initially denied having a drug problem, she subsequently admitted that she was using buprenorphine illicitly, indicating that she was getting it for free from people in the community. Mother told the social worker that she would like to participate in medically assisted treatment and she said that she had asked a doctor for a referral to an addiction-treatment clinic. During a visit several weeks later, mother reported that she was engaged in the clinic, had been prescribed Suboxone, was seeing a counselor, and was providing three urine-analysis tests a week. Mother refused, however, to sign releases for her providers. DCF observed behavior, including rambling speech and "pinpointed" eyes, that seemed inconsistent with mother's claims of being fully engaged in drug treatment.

In December 2017, A.R.'s teacher contacted DCF to report her suspicion that A.R. had been physically abused. A DCF investigative-assessment worker and a police officer responded. Upon meeting A.R. at his school, they observed an open scratch on his left ring finger, a visible scratch on his cheek, and a bruise on his right ear. When the DCF employee pushed A.R.'s ear back to look at his injury, A.R. "grimaced" and said, "don't touch it." After meeting with A.R., the police officer and DCF employee went to mother's apartment to discuss A.R.'s injuries. A.R. was apparently home from school at that point. When mother answered the door, she denied that boyfriend was in the apartment. Boyfriend was there, however, and appeared shortly thereafter. Mother would not let the officer or DCF employee inside. She told investigators that A.R. came home from school with his injuries and that A.R. said that a classmate pushed him. The employee attempted to create a safety plan with mother but both mother and boyfriend were highly agitated. The DCF employee understood that boyfriend would be remaining in the home. It was at this point that A.R. was taken into emergency custody. Based on the police investigation, boyfriend was subsequently charged with domestic assault and cruelty to a child. These charges were pending at the time of the court's CHINS decision.

Based on these and other findings, the court concluded in an April 2018 order that A.R. was CHINS. With respect to the physical-abuse allegations, the court reiterated its findings above and concluded that A.R.'s injuries had been recently sustained, the injuries were inconsistent with mother's explanation for them, and mother's initial denial to investigators that boyfriend was in her home suggested mother's awareness that boyfriend might have been involved in injuring A.R. As indicated, DCF understood that boyfriend would remain in mother's home.

The court also concluded that, given the extent of the garbage and debris piled on mother's porch, DCF investigators were reasonably concerned about the living conditions inside the home. Mother refused to allow unannounced visits, raising concerns about the condition of mother's home when mother was not expecting DCF. The court also found that DCF reasonably had continuing concerns regarding mother's substance abuse, noting that mother had admitted to using illicit buprenorphine, she was aloof and rambling several weeks later while ostensibly fully engaged in treatment, she refused to provide releases regarding her alleged treatment, and a social worker observed mother's "pinpointed" eyes at the time A.R. was taken into emergency custody. The court found that the coinciding of these issues on the date that the CHINS petition was filed supported the conclusion that A.R. was at risk of harm and therefore CHINS.

II. TPR Proceeding

The court terminated mother's rights in September 2018 at initial disposition. Mother did not attend the hearing. The court found that despite DCF's persistent efforts, mother had minimal contact with A.R. while he was in DCF custody. She made no progress with respect to the initial case plan. She struggled with housing and drug abuse, and she incurred new criminal charges. Mother continued her relationship with boyfriend, who also struggled with substance abuse and had numerous criminal convictions, including assault, cruelty to animals, burglary, passing bad checks, and false pretenses. The court found that mother's home was in deplorable condition. Photographs of the home taken three months after A.R. was removed from mother's custody showed a dog carcass inside the home with a substantial portion of his head carved out, trash everywhere, and every fixture in the bathroom overflowing with excrement.

The TPR court made more detailed findings about the December 2017 incident. It found that A.R. reported in school that boyfriend hit him; he told the DCF employee and police officer who interviewed him that boyfriend, whom A.R. called "daddy monster," "hurt me." A.R. said that boyfriend hit him because A.R. would not go away and allow boyfriend and mother to have "adult time" so they could "do [their] medicine." A.R. also described having to urinate and defecate in the fixtures in the bathroom. The court found that mother tried to protect boyfriend and refused to cooperate with an investigation into abuse allegations. A.R. disclosed other horrific abuse by boyfriend to his therapist, who described A.R. as one of the most traumatized children she had ever seen. The court found clear and convincing evidence that boyfriend had inflicted physical and emotional abuse on A.R. and mother did nothing to protect him.

The court found that mother failed to make progress in addressing the goals of a plan discussed in January. She missed most of her scheduled visits with A.R., broke off meetings with DCF, became homeless and lost her housing subsidy due to the condition of her last apartment, was charged with more crimes, failed to follow through with a substance-abuse assessment and treatment, and failed to engage with the Nurturing Parent Program or with Family Time Coaching. She lied about her ongoing relationship with boyfriend, denied being pregnant, and falsely claimed she was in counseling and living with a friend in St. Albans. Perhaps most importantly, the court found, in her relatively few visits with A.R., she showed little relationship with him, talking to the supervisor instead of A.R. Mother showed little affection or interest in A.R.'s needs. The court made numerous additional findings that we do not repeat here. It evaluated the statutory best-interest factors and concluded that they all supported termination of mother's rights. This appeal followed.

III. Analysis

Mother argues on appeal that at the time the CHINS petition was filed in December 2017, there was insufficient evidence to prove that A.R. was at risk of harm from mother's untreated drug problem, chronic filth in the home, or from her failure to protect A.R. from abuse by boyfriend. With respect to drug use, mother argues that the State did not present evidence establishing that she had an untreated drug problem that put A.R. at risk. The court instead relied on unsubstantiated "concerns" about her drug use, her refusal to voluntarily sign a release of her medical records to allow DCF to monitor her treatment, and the fact that she was observed to have "pinpointed pupils" on one occasion and was rambling and aloof on another. She further complains that there was no evidence to explain the definition or significance of "pinpointed" pupils, and she asserts that rambling speech and aloofness did not establish drug use. As to the condition of her home, mother emphasizes that the only evidence of observations by a DCF caseworker concerning the inside of her home attested to the absence of safety risks. She maintains that DCF had no basis for concern about A.R.'s well-being, and that she was not required to allow unscheduled home visits. Turning to concerns about physical abuse, mother cites In re J.W., 2016 VT 78, ¶ 10, 202 Vt. 424, and argues that the State was required to prove that she believed boyfriend posed a danger to A.R. based on specific, factual circumstances she allegedly observed, and that she still sought to expose A.R. to boyfriend. Mother further argues that the court should not have drawn any negative inferences from her false statement to investigators that boyfriend was not home. Mother contends that the court should have instead viewed her false statement as consistent with her desire for DCF to schedule appointments with her rather than make unannounced visits. Mother also challenges as clearly erroneous the court's findings regarding the order prohibiting her from exposing A.R. to boyfriend and her violation of that order and/or father's subsequent acquiescence to A.R.'s contact with boyfriend.

As we have explained, the trial court's "primary concern" in a CHINS proceeding "must be with the welfare of the child." In re M.L., 2010 VT 5, ¶ 6, 187 Vt. 291 (quotation omitted). The State must prove by a preponderance of the evidence that, as relevant here, a child is "without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being." 33 V.S.A. § 5102(3)(B). The preponderance standard recognizes "that both parents and the State have substantial, legitimate, and compelling interests at stake in CHINS proceedings—the State in ensuring the safety and welfare of the child and the parents in maintaining family integrity." In re M.L., 2010 VT 5, ¶ 7 (quotation omitted); see also In re A.D., 143 Vt. 432, 436 (1983) ("[T]he State's interest in protecting a child from the risk of serious and potentially irrevocable harm counterbalances the parents' interest in avoiding an erroneous curtailment of their rights." (quotation omitted)).

"On review of the court's CHINS decision, we will uphold the court's findings of fact unless they are clearly erroneous; we will uphold the court's legal conclusions where supported by its findings." In re M.L., 2010 VT 5, ¶ 8. "We must read the evidence in support of the findings if reasonably possible, when considered as a whole." In re M.O., 2015 VT 120, ¶ 7, 200 Vt. 384 (quotation and alteration omitted). "We will construe the findings to support the judgment if they may reasonably be so construed." Id. "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 M.L., 2010 VT 5, ¶ 8.

With these principles in mind, we turn to the CHINS decision here. We conclude that the court's findings regarding mother's past admissions that boyfriend was abusive, mother's past failure to adhere to a court order prohibiting her from allowing her boyfriend contact with A.R., A.R.'s physical injuries and his report as to their source, and mother's response to the investigation into those injuries support the court's CHINS determination, and that those findings are supported

by the evidence. We need not address mother's challenges to the court's findings regarding her living conditions and suspected substance abuse.

At the outset, we reject mother's assertion that we held in In re J.W., 2016 VT 78, ¶ 10, that absent actual harm, the State may prove risk of harm only by demonstrating that a parent believed another person was dangerous to her child based upon her own observations and that the parent nonetheless exposed the child to that person. The language on which mother relies merely states the holding of the trial court in that case. We did not suggest that this particular fact pattern must always exist before the trial court can find, by a preponderance of the evidence, that a child is "without proper parental care . . . necessary for [the child's] . . . well-being." 33 V.S.A. § 5102(3)(B).

In this case, boyfriend lived with mother and A.R. The State established through admissible evidence that mother had previously described boyfriend as physically abusive and showed grandmother a bruise that he had had given her. The court found that the family division had previously prohibited boyfriend from having any contact with A.R. and that mother had previously violated the order and allowed contact. On the day he was taken into custody, A.R. had an obvious scratch on his face, one on his hand, and a bruise behind his ear. When investigators came to her home in connection with the injuries, mother offered what the court reasonably found to be an implausible explanation for A.R.'s injuries. She then lied and told the investigators boyfriend was not home, when he was. The court drew a permissible inference from all of the evidence that mother lied to investigators about boyfriend's presence in the home to protect boyfriend and shield him from being investigated. See In re L.M., 2014 VT 17, ¶ 30, 195 Vt. 637 (recognizing that in conducting its analysis, trial court may "draw upon its own common sense and experience" (quotation omitted)); see also State v. Kerr, 143 Vt. 597, 603 (1983) ("[P]roof of facts includes reasonable inferences properly drawn therefrom."). The court found that mother and boyfriend were "highly agitated" during the conversation with investigators and were unable or unwilling to engage in safety planning for A.R. The DCF investigator testified to her belief that boyfriend would remain in the home, and indeed, mother's behavior gave her no reason to believe otherwise.

Based on all of these findings, the court could properly conclude by a preponderance of the evidence that at the time of the CHINS petition, A.R. was "without proper parental care . . . necessary for his . . . well-being." 33 V.S.A. § 5102(3)(B). There was evidence wholly apart from A.R.'s physical injuries to support the conclusion that mother knowingly allowed A.R. to live in the presence of a boyfriend who was abusive. After A.R. was physically injured, mother lied to investigators that boyfriend was not home, she offered an implausible explanation for his injuries, and she refused to take any action to engage in a safety plan to protect him. Given mother's prior admitted violations of a court order restricting A.R.'s contact with boyfriend, her prioritizing protecting boyfriend over safety planning for A.R., and DCF's reasonable understanding that boyfriend would continue living with mother and A.R. in the home, the court's conclusion was supported by its findings.

And the court's findings were supported by the evidence. In particular, we reject mother's argument that the court's findings concerning the court order in her domestic case prohibiting her from exposing A.R. to boyfriend were not supported by sufficient evidence. Mother testified that father had concerns about boyfriend's aggressiveness and that based on this concern, he obtained an order from the family court prohibiting contact between A.R. and boyfriend. Mother also testified that she allowed contact between A.R. and boyfriend in violation of the order. While she stated that father later told her that the order "was dropped," she acknowledged that she did not contact the court to find out if this was true. She described father as allowing A.R. to have contact

with boyfriend four months after the no-contact order was issued. Based on this evidence, the court did not err in finding that, at some point, father “acquiesced” to A.R.’s contact with boyfriend, whether because he had the no-contact order modified or for some other reason. For these reasons, mother’s challenge to the relevant findings of fact fails.

Finally, we reject mother’s challenge to the TPR ruling as it rests solely on her challenge to the CHINS decision.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice