

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. 2019-058

MAY TERM, 2019

In re H.L., Juvenile	}	APPEALED FROM:
(K.S., Mother* & R.L., Father*)	}	
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
	}	DOCKET NO. 53-10-16 Cajv
		Trial Judge: Thomas J. Devine

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

Mother and father appeal the court’s order terminating their rights to their daughter, H.L., born in October 2016. On appeal, they argue that the court erred by relying on excluded testimony, prior factual findings which were not made to the appropriate standard of proof and finding that their parenting ability had stagnated. We affirm.

The court found the following facts by clear and convincing evidence. H.L. was removed from parents’ care when she was three days old for risk of harm and placed in the custody of the Department for Children and Families (DCF). Parents both have been diagnosed with having borderline intellectual functioning and father has been diagnosed with mild-to-moderate alcohol-use disorder and post-traumatic stress disorder. Parents have had their parental rights to older children terminated. In January 2017, parents admitted that H.L. was a child in need of care or supervision (CHINS). The disposition order had concurrent goals of reunification and adoption and the plan of services for parents included maintaining consistent contact, demonstrating an ability to meet H.L.’s needs, engaging in parent education, participating with H.L.’s service providers, and participating in family-engagement meetings. There were additional goals for father, including abstaining from alcohol and participating in mental-health treatment.

H.L. has several special medical needs. She has had trouble feeding since infancy and sees a gastroenterologist. She was diagnosed with “duplicate gene syndrome,” a disorder linked to low IQ, slow growth, immune-system issues, seizures, and “coloboma,” an eye condition. She has asthma and is particularly sensitive to dust and cigarette smoke. H.L. receives services from a wide variety of medical professionals. Father attended only one of H.L.’s medical appointments. Mother regularly attended but did not ask questions or absorb the recommendations about H.L.’s needs. H.L. also has delays in language, gross motor, and fine motor skills. H.L.’s conditions require consistency and a committed caretaker.

DCF offered parents several services to aid with achieving the case-plan goals. A child-development specialist met twice a month with parents and foster mother to assess H.L.’s needs and provide developmental education. The specialist modeled techniques to practice. Mother attended for a time and then stopped attending after a while; father attended only a handful of

meetings. The foster mother continued to attend. Mother's failure to attend impeded her understanding of H.L.'s needs. DCF recommended the Safe Babies program to allow the treatment team to convene and share information. Father did not sign the Safe Babies agreement form. Father attended some Safe Babies meetings and stopped altogether in September 2017. Mother attended through February 2018, but then stopped. By failing to attend, parents missed opportunities to learn about H.L.'s needs and the services available. Parents had a Family Time coach to help with learning about diapering, feeding, play, and affection. Parents had difficulty sustaining attention for the full two-hour session. Father was able to interact for less than half the time. Mother had difficulty reading the child's cues. Mother required prompting regarding the child's needs for food and safety. Mother did not bring appropriate snacks even after the Family Time coach explained the need for healthy snacks. In delivering services, DCF made reasonable efforts to accommodate the parents' learning styles.

There were several services offered to parents that they declined after time. A communications specialist was provided to parents to assist in comprehending information, but parents discontinued this service. Parents also discontinued Child Parent Psychotherapy (CPP). Parents skipped the post-visit meetings with the Family Time coach, stating that the feedback was not useful. In the spring of 2017, they discontinued Family Time coaching altogether. After that, parents regularly attended visits without coaching and were able to handle basic tasks, but the visits were not a sufficient foundation for demonstrated, sustained caregiving.

The court concluded that there was a change of circumstances due to parents' lack of progress in attaining the goals of the case plan and in gaining the necessary skills to parent H.L. The court noted that parents had discontinued critical services that would assist them in learning parenting skills and in forming an emotional bond with H.L. The court also found that mother continued to deny that there was a need for services and failed to gain insight into the causes for the CHINS case. As to the child's best interests, the court found that parents played a constructive role in H.L.'s life, but that the other factors favored termination. Parents' relationship with H.L. was in its formative stages. H.L. had a trusting, loving relationship with her foster mother and her siblings and a strong adjustment to her foster mother's home, and foster mother had consistently provided for H.L.'s medical needs. Most importantly, the court found that parents would not be able to assume parenting responsibilities for H.L. within a reasonable period of time. The court explained that H.L. had a strong need for stability and permanence and that parents still had not developed the skills to read H.L.'s cues, to provide sustained care, or to understand H.L.'s medical needs. The court granted termination of parental rights. Parents appeal.

When termination of parental rights is sought after initial disposition, the trial court must conduct a two-step analysis. In re B.W., 162 Vt. 287, 291 (1994). The court must first find that there has been a change in circumstances, and second, that termination of parental rights is in the child's best interests. Id. In assessing the child's best interests, the court is guided by the statutory criteria. 33 V.S.A. § 5114. The most important factor is the likelihood the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.). On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993).

On appeal, parents first argue that the court made findings about H.L.'s medical conditions, particularly her diagnosis of duplicate gene syndrome, based on hearsay testimony that was excluded at trial. Parents contend that father objected to admission of testimony regarding H.L.'s condition and that "[d]espite sustaining the objection at trial," the court made findings based on the evidence. Upon review of the record, we conclude that parents' argument is without merit and misrepresents what occurred at the hearing.

At the termination hearing, H.L.'s foster mother stated that H.L. has "some physical and developmental issues." She explained that H.L. was "followed by the genetics department down at Dartmouth-Hitchcock Medical Center. She's been diagnosed with duplicate gene syndrome. She has two duplicate genes . . ." Father's attorney objected on hearsay grounds and for lack of foundation for the diagnosis. The court did not sustain father's objection but inquired whether there would be medical testimony. The State explained that it was not planning to have the doctor testify but would establish more of a foundation for the reliable hearsay testimony. The court allowed the State to proceed with questioning. In response to questions from the State, foster mother went on to testify in detail about the genetics clinic, the diagnosing physician, the number of times H.L. had been at the clinic, and the results of the genetic screening, including that the syndrome could cause "low IQ, slow growth, issues around immunity, could cause seizures, and that it was a thing that [the doctors] would continue to monitor." During this testimony, neither parent objected and consequently the court did not exclude any testimony. In response to additional questions, foster mother stated that H.L. also has "coloboma in her eye," which means that the pupil of one eye is larger and misshapen. The State inquired whether there were other physical problems for which H.L. was receiving treatment and foster mother testified that she had asthma and was being followed by a pulmonologist. Foster mother explained H.L.'s asthma and her treatment plan in detail, including that H.L. was sensitive to "any type of cigarette smoke." The State inquired how far removed the cigarette smoke had to be and when foster mother began to explain about second- and third-hand cigarette smoke, father's attorney objected that it was expert testimony. The court sustained this objection. This was the only objection that was sustained during foster mother's testimony about H.L.'s medical conditions.

There is no basis for parents' allegation that the court "committed clear error in relying solely on the excluded evidence in making key findings about [H.L.'s] special needs" and that this error resulted in a denial of due process to parents. The objection that was sustained was far removed from the testimony that parents now seek to exclude on appeal. As the transcript indicates, the foster mother's testimony concerning H.L.'s diagnosis and additional testimony about her genetic condition were not excluded at trial. Therefore, it was proper for the court to rely on this testimony in its findings. Moreover, parents had adequate notice that the evidence had not been excluded and had an opportunity to rebut it or challenge it. If parents believed that foster mother's testimony was inadmissible, it was incumbent on them to object.

To the extent that parents' argument is based on the fact that mother's statements were hearsay, we also conclude there was no error. Hearsay is admissible in a termination proceeding, 33 V.S.A. § 5317(b), but may not be "the sole basis for termination of parental rights." A.F., 160 Vt. at 181. Here, the hearsay was properly admitted, and it did not form the sole basis for termination.

Parents also argue that the court impermissibly adopted factual findings from the disposition order that were made by a preponderance of the evidence. The court found that H.L. had been diagnosed with coloboma, an eye condition, and that its presence "may correlate to other genetic illnesses which can affect [H.L.'s] kidneys and heart." Parents contend that there was no evidence presented at the termination hearing as to the fact that coloboma can affect the kidneys and heart and that the court improperly adopted this finding from the disposition order. We need not reach this argument because any error in including this fact in the findings was harmless insofar as it played no role in the court's conclusions that there was a change of circumstances and that termination was in H.L.'s best interests. In re B.S., 163 Vt. 445, 454 (1995) (explaining that reversal is "appropriate only if the findings of the court, apart from the findings based on the improper evidence, did not support the court's conclusions").

Parents next contend that the court erred in finding that there was stagnation, including that the finding was based on mother's continued lack of insight into the reasons that H.L. was removed from her care because this was caused by mother's immutable disability. We conclude that the court's decision regarding stagnation was adequately supported and not in error. The court found stagnation based primarily on parents' lack of progress towards accomplishing the goals in the case plan and secondarily on mother's continued denial of the need for services. Although parents had made some initial progress, parents had discontinued Family Time coaching, CPP, and the Safe Babies team meetings. Without these critical services, they were unable to make progress in learning parental skills and in forming an emotional bond with H.L. This basis alone supports the court's decision regarding stagnation.

Because stagnation is supported by parents' lack of progress, we need not reach parents' argument that the court impermissibly based its finding of stagnation on mother's denial of the need for services or her inability to gain insight into the causes for the CHINS case.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice