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. 2019-081

AUGUST TERM, 2019

In re C.H. (aka C.C.), Juvenile (A.H., Mother*)	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 199-12-17 Bnjv
		Trial Judge: John W. Valente

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

Mother appeals from the termination of her parental rights in C.C. We affirm.

Mother and father are the parents of C.C., who was born in December 2017. C.C. was taken into custody at birth pursuant to an emergency care order. The Department for Children and Families (DCF) alleged that C.C. was without proper parental care necessary for his well-being given parents' history of having numerous other children removed from their care for neglect and failure to thrive. Mother has had five other children removed from her care; in each of those cases, she failed to make progress in meeting DCF's expectations. Between 2013 and 2017, mother failed to meet any case-plan goals beyond completing a nurturing parenting class. She never engaged with service providers to the degree that would allow the children to be placed with her. Father has had two other children removed from his care. He too failed to follow through with service providers and minimally engaged in visitation.

After C.C. was taken into custody, DCF recommended services to facilitate reunification of C.C. with parents and worked with parents to make those services available. The recommendations included, among other things, maintaining sobriety, engaging in mental-health and substance-abuse treatment, attending family time visitations, and working cooperatively with recommended service providers. These recommendations were similar to those previously recommended to parents with respect to their other children. Mother, the custodial parent at the time of DCF's petition, admitted that C.C. was a child in need of care or supervision. DCF sought termination of parents' rights at initial disposition.

Following a hearing, the court terminated parents' rights. It found that during the year that C.C. was in custody, parents failed to address the issues that brought C.C. into custody—either by following DCF's recommendations or proposing alternative strategies to address the identified deficits. In particular, the parents showed a lack of commitment to visitation with C.C. Parent-child contact was stopped three separate times due to parents' lack of participation. In addition, despite efforts by DCF and other service providers to encourage and support parents' engagement in services, parents had very little engagement with service providers.

In a footnote, the court addressed father's assertion that DCF should have done more than just encourage parents to engage in services and assist them in doing so. The court noted that "the best interest factors do not include an evaluation of DCF's conduct during the case; the best interest factors focus on the parents' conduct." The court cited In re N.L., which states this principle explicitly. 2019 VT 10, ¶ 26 ("In making a disposition order, the family division is guided by the child's best interests, 33 V.S.A. § 5318(a), which do not include an evaluation of DCF's conduct during the case."). The court explained that the State did not need to show a change of circumstances given that termination was sought at initial disposition. Id. ("[W]hen termination of parental rights is sought at the initial disposition stage, the family division is not being asked to modify a previous disposition order and thus does not initially consider whether there has been a substantial change of circumstances from an earlier order."); 33 V.S.A. § 5317(d) ("If the Commissioner . . . seeks an order at disposition terminating the parental rights of one or both parents and transfer of legal custody to the Commissioner without limitation as to adoption, the Court shall consider the best interests of the child in accordance with section 5114 of this title.").

In evaluating the statutory best-interest factors, the court made numerous findings and conclusions that we do not repeat here. The court concluded that parents could not resume their parental duties within a reasonable period of time and that termination of their rights was in C.C.'s best interests. Mother appealed.*

Mother argues for the first time on appeal that § 5371(d), which requires the court to consider "the best interests of the child" when DCF seeks to terminate parents' rights at initial disposition, is unconstitutionally vague and overly broad. She raises various sub-arguments related to this overarching theme, asserting that allowing termination at initial disposition "undoubtedly deprives Vermont parents of their parental rights without due process." She appears to suggest that because a finding of changed circumstances, and in particular stagnation, is not required at initial disposition, and given the absence of a mandatory timeframe for holding a disposition hearing, the State is incentivized to provide subpar services and seek termination at initial disposition. She urges this Court to adopt a distinct best-interests standard for terminations of parental rights at initial disposition.

We do not address mother's challenges to the statute and this Court's application of it because they were not raised below. In re A.S., 2016 VT 76, ¶ 5, 202 Vt. 415 ("Arguments not raised below will not be addressed for the first time on appeal."). We note, however, that mother wrongly suggests that under the approach applied by the trial court a court has no ability to evaluate DCF's efforts if termination occurs at initial disposition. In fact, we have repeatedly held that "the level of assistance provided to parents is relevant in determining whether a parent is unlikely to be able to resume parental duties within a reasonable period of time." In re C.P., 2012 VT 100, ¶ 38, 193 Vt. 29 (quotation omitted); In re J.M., 170 Vt. 587, 589 (2000) (concluding that DCF's "assistance is a factor in determining whether [it] met its burden of showing that a parent is unlikely to be able to resume parental duties within a reasonable period"). The court here considered such evidence in evaluating whether mother could resume her parental duties within a reasonable time. It found that DCF made various services available to parents to help them improve their parenting skills and tried to help them follow through with these services. Parents did not avail themselves of those services. Mother missed half of her visits with C.C. and while she expressed a willingness to work with providers, she was inconsistent, did not follow through, and did not participate to completion with the service providers. Mother failed to follow through with services with respect to five other children who were removed from her care, evidence that the court reasonably relied

* Father did not appeal.

upon in evaluating this best-interest factor. See J.M., 170 Vt. at 589 (similarly concluding that trial court "clearly and reasonably relied upon mother's well-documented history of resistance to [DCF] services in connection with" other children removed from her care). In short, the court's best-interests analysis here took into account the extent of DCF's efforts to help parents address their parenting deficits as well as parents' own conduct in addressing, or failing to address, those deficits.

Moreover, the court did not, as mother argues, shift the burden to parents to essentially develop and follow their own case plan. The court's passing reference to parents' failure to suggest alternate approaches to improving their parenting abilities did not reflect a burden-shifting. The court had discussed at length DCF's extensive efforts to identify and support a variety of services for parents and C.C. Insofar as parents were critical of DCF's efforts, the court noted, accurately, that parents had not proposed any specific alternatives. The court's observation did not signify that DCF was relieved of any obligation to proactively support reunification efforts.

Mother next argues that the court erred in concluding that the State made reasonable efforts to finalize the permanency plan for C.C. She appears to suggest that the court should not have made this finding because it did not evaluate DCF's conduct in its TPR decision. Mother asserts that the court indicated that it could provide no oversight of DCF's efforts but then proceeded to make a reasonable-efforts finding based in part on parents' failure to comply with a plan of services "that it did not purport to oversee, and on which it never held a hearing." According to mother, the statute contemplates that, when reunification is not part of the case plan, the court make a finding that "no services were appropriate" under the circumstances. 33 V.S.A. § 5102(25). She argues that the court instead "shifted the burden to the parents to somehow make progress toward the goal of adoption, or to propose their own reunification plan to DCF."

We reject this argument. As previously discussed, the court appropriately considered DCF's conduct as relevant, that is, in evaluating whether mother could resume parenting C.C. within a reasonable time. We further reject mother's interpretation of the reasonable-efforts factfinding process and her characterization of the court's decision here.

We discussed the reasonable-efforts requirement in detail in C.P., 2012 VT 100, ¶¶ 32-40. As we explained, to receive federal funding for child-welfare-related programs, states must "adopt certain practices, including making reasonable efforts to prevent removing children from their home and, after removal, to helping the child to return home." Id. ¶ 32. "To implement these federal requirements, both reasonable-efforts determinations have been incorporated into Vermont law." Id. ¶ 33 (citing 33 V.S.A. § 5102(25) (defining reasonable efforts as "the exercise of due diligence by the department to use appropriate and available services to prevent unnecessary removal of the child from the home or to finalize a permanency plan")). "The first reasonable-efforts determination—to prevent removal—must be made as part of a temporary care order." Id. (citing 33 V.S.A. § 5308(c)(1)(B) [now 33 V.S.A. § 5308(e)(1)(B)]). The second requires the court, "upon the filing of a petition by DCF, . . . [to] determine whether DCF 'has made reasonable efforts to finalize the permanency plan for the child that is in effect at the time of the hearing.' " Id. (citing 33 V.S.A. § 5321(h)). "This can include efforts towards reunification or an alternate permanent living arrangement, depending on the goals of the permanency plan." Id. (citing 33 V.S.A. § 5321(h)(1)-(2)).

The court here made its reasonable-efforts finding in the context of a permanency hearing. Thus, it was asked to determine if DCF "has made reasonable efforts to finalize the permanency plan for the child that is in effect at the time of the hearing." 33 V.S.A. § 5321(h). By statute, reasonable efforts in this context may consist of either efforts to reunify the child with the parents

where the permanency plan is reunification or efforts to "arrange and finalize an alternative permanent living arrangement for the child" when the plan does not include reunification. Id. Although there was never an approved plan for reunification, the court's reasonable efforts findings noted both DCF's efforts to engage and identify services for the parents, foster parents and child, as well as its efforts to find a foster placement that is a strong option for a permanent living arrangement. The court's reasonable-efforts findings, made by a preponderance of the evidence, are supported by the evidence. The record does not support mother's suggestion that the reasonableness of DCF's conduct here was insulated from court review.

Nor was the court required in this case to make a finding that no services were appropriate. See 33 V.S.A. § 5102(25) (" 'Reasonable efforts' means the exercise of due diligence by the Department to use appropriate and available services to prevent unnecessary removal of the child from the home or to finalize a permanency plan. When making the reasonable efforts determination, the court may find that no services were appropriate or reasonable considering the circumstances."). As noted above, DCF did provide services, and the court found them to be reasonable. This was not a no-services-needed case.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice