

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. 2020-004

AUGUST TERM, 2020

In re C.S., Juvenile
(C.D., Mother*)

} APPEALED FROM:
}
} Superior Court, Windham Unit,
} Family Division
}
} DOCKET NO. 79-7-19 Wmjv

Trial Judge: Katherine A. Hayes

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

Mother appeals from the trial court’s determination that her son C.S. is a child in need of care or supervision (CHINS). She argues that the court’s conclusion is not supported by its findings or by the record. We affirm.

C.S. was born in June 2012. C.S.’s older brother ran away from mother’s home in June 2019. On July 2, 2019, the Department for Children and Families (DCF) filed a petition alleging that C.S. was CHINS, the third such petition filed with respect to C.S. since his birth. C.S. was taken into emergency DCF custody and continued in DCF custody following a temporary-care hearing.

The court held a CHINS merits hearing in November 2019. Two of C.S.’s older half-sisters, C.W. and J.W., testified. C.W. was eighteen at the time of the hearing and she stated that she moved out of mother’s home when she was sixteen. She described domestic violence in the home, including having witnessed, more than once, mother’s boyfriend grabbing mother by the throat and pushing mother against the wall. While C.W. had not lived in mother’s home since around November 2017, she witnessed the choking incident in November 2018 when she stopped by to visit. C.S. was with father, who had previously lived with mother but had moved out by the time of this incident. C.W. also recounted that when she lived in the home, mother would send her to a drug dealer to sell C.S.’s prescribed medication (Adderall). C.W. stated that from when she first lived in mother’s home until she left, mother was violent toward her and toward her siblings.

J.W. testified that she lived in mother’s home between August 2017 and September 2018. She stated that she witnessed physical violence in the home “throughout the entire time” that she lived there and that “there was never a gap between the abuse.” While mother did not hurt C.S. enough to require medical attention, “there were marks left.” J.W. described mother as reacting to C.S.’s behavior by slapping and restraining him. J.W. witnessed mother slapping C.S. in the face and forcibly putting him in the corner and holding him there. She testified that father once hit C.S. so hard that he had a welt for four days. J.W. reported this incident to the police and provided them with photographs. She described mother as the primary abuser of C.S. in the home.

In response to the abuse, J.W. stated that C.S. would cry or engage in self-harm such as hitting his head against the wall; he would also scream and throw himself down on the floor.

J.W. also testified that there were drugs in the home. She saw C.S. with crushed up Adderall that he had found in father's pack of cigarettes; their brother grabbed the medicine from C.S.'s hand. J.W. detailed the various medications that C.S. took and testified that mother sold C.S.'s medication to others and gave it to his older brother. She stated that she last saw C.S. several months before the CHINS hearing.

A DCF social worker also testified. She explained that DCF began an investigation in June 2019 based on two reports from C.S.'s sisters. She stated that during her investigation, C.S. was living full-time with mother but that on July 2, 2019, when she spoke to mother, C.S. was with father. She testified that, to her knowledge, mother was the custodial parent. As indicated above, C.S.'s older brother ran away from mother's home in June 2019 and he was living with one of his sisters. DCF sought custody of C.S because it believed he was at risk of harm from physical abuse, domestic abuse, and substance abuse in mother's home, and the diversion of his prescribed medication (Adderall).

The court made findings on the record at the close of the evidence and essentially reiterated these findings in a written order. It acknowledged that the evidence was thinner than it would like but it found the evidence sufficient to establish by a preponderance that C.S. was without proper parental care necessary for his well-being at the time the CHINS petition was filed. It found compelling J.W.'s testimony regarding continual abuse in the home during the time she lived there. It found that the preponderance of evidence established a pattern of physical abuse of C.S. by mother during this period and by father when he was around, including regularly slapping C.S. in the face. The court also credited the testimony of C.S.'s sisters about the sale of C.S.'s medication.

The court stated that the question before it was whether the evidence of behavior in 2017 through September 2018 was sufficient to demonstrate that C.S. was at risk of harm at the time of the petition. The court found the evidence sufficient to show that C.S. was a child in need of care or supervision at that time. It pointed to the pattern over a lengthy period of time, witnessed by two credible, caring, family members, of C.S. being exposed to and subjected to violence, drug use, drug abuse, and domestic violence in the home. It also relied on evidence that mother had sold C.S.'s prescribed medications. The court determined that the risk of all of this conduct continuing between September 2018, when J.W. moved out, and June and July 2019 was high, particularly because by that point, his siblings, who had protected him, had left mother's home. Following the issuance of a disposition order, this appeal followed.

Mother argues that the court relied on stale evidence in reaching its decision. She contends that the court could not infer that because C.S. was allegedly abused between 2017 and September 2018 that he remained at risk of harm in July 2019. She asserts that the fact that C.S.'s brother ran away from home was not probative of whether C.S. was at risk of harm. Mother suggests that C.S. could not have been at risk of harm because he was with father on the day the CHINS petition was filed, and there was no evidence that he continued to live with mother. Without citing any specific evidence submitted at the hearing, mother argues that father moved out of the home in 2017 and thus could not have abused C.S. between 2017 and 2018. She asserts that the court's finding that father abused C.S. was a "key" finding and it cannot be considered harmless error.

As we have often repeated, "the focus of a CHINS proceeding is on the child's welfare." In re B.R., 2014 VT 37, ¶ 20, 196 Vt. 304 (quotation omitted); see also In re L.M., 2014 VT 17, ¶ 20 n.2, 195 Vt. 637 (reiterating this and noting that question of parental fitness is issue for

disposition hearing, not CHINS proceeding). A child is CHINS if the 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). This language “must be liberally construed.” In re B.R., 2014 VT 37, ¶ 15. The State must prove that a child is CHINS by a preponderance of the evidence and “[t]his standard is satisfied when the equilibrium of proof is destroyed, and the beam inclines toward [the person] who has the burden, however slightly. A bare preponderance is sufficient, though the scales drop but a feather’s weight.” In re M.L., 2010 VT 5, ¶ 25, 187 Vt. 291 (quotation and alterations omitted).

In reaching its conclusion, “the court’s analysis is [not] limited only to the child’s well-being on the precise day that the CHINS petition was filed.” In re L.M., 2014 VT 17, ¶ 20. Instead, the court may properly consider “the circumstances leading up to the filing of the CHINS petition” so that it may have “a full picture of the child’s well-being and to base its decision on all relevant information.” Id. The court may also “draw upon its own common sense and experience” and draw reasonable inferences from the facts. Id. ¶ 30 (quotation omitted); see also State v. Kerr, 143 Vt. 597, 603 (1983) (“[P]roof of facts includes reasonable inferences properly drawn therefrom.”).

On review of a CHINS determination, “we will uphold the court’s findings of fact unless they are clearly erroneous” and “we will uphold the court’s legal conclusions where supported by its findings.” In re M.L., 2010 VT 5, ¶ 8. We emphasize that it is the exclusive role of the family division “to weigh the evidence and assess the credibility of witnesses.” Id. ¶ 29. We do not reweigh the evidence on appeal.

With these standards in mind, we affirm the court’s decision. The court recognized that the evidence before it related to events that occurred at least nine months before the CHINS petition was filed. It recognized that this was a close case. It nonetheless concluded that the State met its burden of proof. It credited the testimony of C.S.’s sisters regarding violence in the home, including physical abuse of C.S., drug use, and mother’s sale of C.S.’s prescription medicine. It could reasonably conclude, based on this longstanding pattern of conduct last personally observed nine months earlier, that C.S. remained at risk of harm from this conduct after his siblings left the home. It acted within its discretion in finding the risk of harm exacerbated by the absence of C.S.’s older siblings who had protected him, or tried to protect him, in the past.

The fact that C.S. happened to be with father at the time the CHINS petition was filed does not undermine the court’s conclusion that he was at a risk of harm. As indicated above, the court may properly consider the circumstances leading up to the filing of a CHINS petition in reaching its conclusion. To the extent that mother intimates that there is no evidence that C.S. was in her care during the period leading up to the filing of the CHINS petition, she misapprehends the record. The DCF social worker testified that C.S. lived full time with mother and happened to be with father on the day the CHINS petition was filed. Moreover, the trial court reviewed the most recent court order in the domestic docket involving the parents and C.S. and determined that the order provided that C.S. would spend all overnights at mother’s house.¹ This evidence was sufficient to support the inference that C.S. remained in mother’s care for significant periods through the period leading up to the CHINS petition, and thus remained at risk of the violence and other conduct mother had committed the year before. This evidence is sufficient to support a CHINS determination. Where the evidence supports an inference that C.S. remained in mother’s care during the period leading up to the CHINS petition, and the inference that C.S. was at risk of serious harm while in mother’s care, the court could reasonably conclude that he was CHINS. The

¹ The order apparently assigned the parents joint legal and physical rights and responsibilities, but limited father’s contact time with C.S. to daytime hours rather than overnights.

court did not need to find both parents incapable of caring for C.S. before concluding that he was CHINS. See In re B.R., 2014 VT 37, ¶ 15 (“We have expressly recognized that because a child’s well-being is the central concern in a CHINS proceeding, a court may adjudicate the child as CHINS even if the allegations are established as to one parent but not the other.” (quotation omitted)).

That said, the court did not commit clear error in finding that father abused C.S. between 2017 and 2018. J.W. testified that father hit C.S. so hard that it left a welt for four days and the court could reasonably infer that this conduct occurred between 2017 and 2018 when J.W. lived in the home. More importantly, mother was identified by both sisters as C.S.’s primary abuser and her abuse was described as continuous. The court’s findings regarding parents’ abuse of C.S. between 2017 and 2018 is supported by the evidence.

As previously noted, the court recognized that this was a close case. It did not base its decision on a “generic risk of harm,” as mother asserts, but rather found a risk of harm based on what it considered compelling evidence of a longstanding pattern of abuse and other harmful conduct witnessed by C.S.’s sister, which she last personally observed nine months before the CHINS petition. We cannot conclude, as a matter of law, that this evidence was too stale to support the court’s CHINS determination. See In re M.M., 2015 VT 122, ¶¶ 3, 25, 200 Vt. 540 (similarly rejecting argument that evidence was too “stale” to support CHINS determination, including evidence of mother’s longstanding addiction history and a driving-while-intoxicated arrest with her child in the car approximately eight months prior to the filing of the CHINS petition); see also id. ¶ 12 (“It is not our role to second-guess the family court or to reweigh the evidence.” (quotation omitted)). This is not a case in which a court has concluded that a child is CHINS based on evidence of isolated incidents that occurred well before the CHINS petition; the court heard testimony of a longstanding pattern of abuse of C.S. by mother. Based on this testimony, the court could reasonably infer that the risk of continued abuse persisted. We find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice