

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. 2020-251

JANUARY TERM, 2021

In re H.R, K.R., J.R., Juveniles	}	APPEALED FROM:
(G.B., Mother* & S.R., Father*)	}	
	}	Superior Court, Addison Unit,
	}	Family Division
	}	
	}	DOCKET NO. 34/35/36-4-19 Anjv
		Trial Judge: Alison S. Arms

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

Mother and father separately appeal the trial court’s decision terminating their parental rights to their three children H.R., K.R., and J.R., born in August 2018, May 2017, and August 2014, respectively. On appeal, mother argues that the court failed to make findings regarding racial issues that were material to the statutory best-interests factors. Father joins mother’s argument and separately claims that the court erred in relying on a substantiation of sexual abuse from Nevada to support the termination order. We affirm.

The court found the following. Mother and father have lived in several different states and describe themselves as travelers. In April 2019, parents and the children were living in a homeless shelter in Vermont. The three children were placed in the custody of the Department for Children and Families (DCF) after father hit J.R. twice on the head while at the shelter. Based on the incidents, father was convicted of cruelty to a child in September 2019. Father made excuses for his conduct, but the court found that father had assaulted J.R. by striking him on the head and that mother was present and did not intervene. Father did not accept responsibility for the assault and mother minimized the incident. Parents also used marijuana and alcohol while at the shelter. When the children came into custody, they had physical and emotional challenges. J.R. had rotten teeth that eventually required dental surgery. J.R. also was diagnosed with ADHD and adjustment disorder with mixed emotions and conduct. J.R. had behavioral issues. Both J.R. and H.R. had sleep issues when they came into DCF custody. H.R. was vomiting and had an upset stomach and diarrhea. Her piercing holes for earrings were infected. K.R. was unvaccinated when she came into custody. She had diarrhea and vomited multiple times a day. She exhibited sexualized behavior. All of the children were detoxing from a diet of predominately processed and high-sugar food.

Parents stipulated that the children were in need of care or supervision (CHINS), agreeing that parents’ homelessness and physical and emotional abuse of the children lead to “an unstable stressful environment.”

In June 2019, the court issued a disposition order which adopted a case plan with a goal of reunification. To address the various risks to the children the case plan required parents to, among

other things, complete substance-abuse assessments and follow recommendations, complete psychological assessments and follow recommendations, participate in Easter Seals Family Time coaching to improve their parenting skills, exhibit nurturing parenting, refrain from using physical force or rough discipline, learn about proper nutrition, and meet with a provider in a homelessness-prevention program. In addition, father was expected to get an evaluation to address his use of violence toward his children, establish a relationship with a mental-health provider, and schedule an intake with Vermont Forensic Assessment.

In September 2019, DCF received documentation indicating that father was involved in a child-protection proceeding in 2012 in Nevada, which resulted in father being substantiated for sexual abuse of a biological daughter and a biological son. Father's rights to those children were terminated in 2015. In October 2019, DCF moved to suspend father's parent-child contact until he completed a psychosexual evaluation. The court granted the request and suspended father's parent-child contact.

The State filed a petition to terminate parental rights in December 2019. Shortly thereafter, father moved to resume parent-child contact. The court began the hearing on father's request to resume parent-child contact on February 4, 2020, but because of the COVID-19 pandemic, completion of the hearing was delayed and ultimately the court consolidated the evidentiary hearing on father's motion with the termination hearing. Father has significant mental-health needs and has been psychiatrically hospitalized. He was diagnosed with bipolar disorder and post-traumatic stress disorder. Father completed a psychosexual evaluation and risk assessment to determine his risk of sexual harm to children. The evaluation suggested that father had a deviant sexual interest in male and female children. The evaluator recommended sex-offense-specific treatment and supervised contact as well as individual therapy and psychiatric services.

The court found that there was a change in circumstances due to parents' lack of progress towards achieving the goals of the case plan. At the time of the final hearing, parents were living in a motel despite receiving a housing voucher. Both parents were unemployed. Parents completed substance-abuse assessments but did not engage in the treatment recommended. Father was assessed for counseling but did not attend therapy appointments. He also did not engage in mental-health, substance-abuse, or sexual-offender treatment. Mother also did not consistently engage in therapy until shortly before the final hearing. Father minimized his physical abuse of J.R. Father did not follow the recommendations regarding counseling or follow-through on addressing concerns in the psychosexual evaluation. Neither parent regularly participated in Family Time coaching. Mother failed to reliably attend visits. After his visits were suspended, father waited two months to ask for visits to resume and had not seen the children since October 2019.

The court further found that termination was in the children's best interests. The children had a minimal relationship with parents. H.R. and J.R. were in the same foster placement and had developed strong attachments to their foster family. They both experienced dysregulation after visits with parents. K.R. was in a different foster family and had adjusted well to life with the foster family. She demonstrated fear and anxiety after visits with mother. Neither parent was likely to be able to resume parental duties within a reasonable time, as measured from the children's perspective. Parents had not addressed the risks to the children. They did not have stable housing or employment. They had not meaningfully engaged in counseling to address mental health and substance abuse, as well as sexual abuse for father. Father did not accept responsibility for the assault on J.R. and parents had not prioritized visits with the children. Therefore, the court granted termination. Both parents separately appeal.

Mother argues that the family court failed to address issues regarding race that were raised by the evidence. Parents are a biracial couple and mother asserts that the family court failed to make findings on the racial issues raised by the evidence and material to the statutory best-interests factors. Mother points to testimony by the DCF caseworker that she did not take the fact that the juveniles were biracial into account when placing them in foster homes. Mother asserts that the court's assessment of the statutory factors may have differed if the court had considered the suitability of the placements and the relationships with the foster families in light of racial factors.

Mother did not raise this issue in the family court and has therefore failed to preserve it for appeal. See In re A.M., 2015 VT 109, ¶ 28, 200 Vt. 189 (“[T]o properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it.” (quotation omitted)). At the termination hearing, father's attorney questioned the DCF social worker as to why parents' two fair-skinned children were placed in a white family and parents' darker-skinned child was placed in a mixed-race home. The DCF social worker explained that the decision was unrelated to skin tone, that she did not know what the children looked like when she made the placements, and that the placements were controlled by the children's ages and need for childcare. At no point did mother or father argue that the children's race required the court to assess the best-interests factors in a different manner or warranted an additional analysis by the court.

In any event, the trial court's weighing of the evidence in evaluating the best-interests factors was well within its discretion. See In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325 (explaining that trial court has discretion to “determine the credibility of the witnesses and to weigh the evidence”). The court made findings regarding the statutory factors, including the children's relationships with parents and foster parents, the children's adjustment to their foster homes and communities, parents' role in the children's lives, and, most importantly, the likelihood that parents would be able to resume parenting in a reasonable period of time. See id. (identifying likelihood that parent can resume parental duties in reasonable time as most important factor). Given that the evidence supported the court's analysis, there are no grounds for reversal.

Father argues that the court improperly relied on the Nevada substantiation of sexual abuse in evaluating stagnation and the children's best interests because the substantiation was made by a preponderance of the evidence. When there has been a prior disposition order and termination of parental rights is sought, the court must determine whether there has been a change of circumstances and whether termination is in the children's best interests. 33 V.S.A. §§ 5113, 5114. “The State has the burden of proof at both stages and, as to each point, must meet its burden by clear and convincing evidence.” In re R.W., 2011 VT 124, ¶ 15, 191 Vt. 108 (quotation omitted).

We conclude there was no error. Father is right that the fact of his substantiation in Nevada has no direct evidentiary significance concerning changed circumstances and the best-interests factors in this TPR proceeding. It does not have collateral estoppel effect because, among other things, the standard of proof in the substantiation proceeding was less rigorous than the standard of proof in a termination of parental rights proceeding. See In re J.R., 164 Vt. 267, 270-71 (1995) (holding that finding of abuse based on preponderance of evidence did not have preclusive effect on issue of abuse in termination of parental rights proceeding). And it does not have any evidentiary value because it merely reflects the conclusion of the Nevada child-protection agency as to the strength of the evidence supporting the allegations. Chase v. Bowen, 2008 VT 12, ¶ 14, 183 Vt. 187; see also id. ¶ 9 (“DCF's belief that stepdaughter had been abused was not evidence of the abuse . . .”). We do not, however, read the trial court's termination decision as ascribing independent weight to the Nevada substantiation as a basis for finding stagnation or determining best interests. We understand the Nevada substantiation to be a significant factor that led to the

suspension of parent-child contact and father's submission to a psychosexual evaluation, and we understand that the court considered the testimony offered regarding the Nevada allegations independent of the actual substantiation determination.

Father's failure to follow the recommendations from the psychosexual evaluation was a significant factor in the trial court's analysis of changed circumstances and the children's best interests. In particular, one of the factors the trial court considered in concluding that father had failed to meaningfully engage with the case plan's action steps was that he had not made any effort to address the concerns raised in the psychosexual evaluation. Likewise, with respect to the children's best interests, one of a number of factors cited by the trial court in support of its conclusion that father was not likely to be able to resume parental responsibilities in a reasonable time was the fact that he had not engaged in treatment for his mental health challenges, including sex-offense-specific treatment. The court made findings on these matters by clear and convincing evidence. The court's consideration of father's failure to follow up on the treatment recommendations from the psychosexual evaluation as one of a number of factors supporting its changed-circumstances and best-interests determination was not error.

Father contends that he could not be required to get a psychosexual evaluation or to participate in sex-offender treatment absent an affirmative finding of sexual abuse, citing In re D.C., 160 Vt. 608 (1993) (mem.). Given that father voluntarily submitted to the psychosexual evaluation and did not object on this basis in the trial court, he has not preserved this argument for appeal.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice