VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 21-AP-188

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

DECEMBER TERM, 2021

In re A.M., Juvenile	}	APPEALED FROM:
(B.M., Father*)	}	
	}	Superior Court, Franklin Unit
In re A.M. & A.C., Juveniles	}	Family Division
(J.C., Mother*)	}	CASE NOS. 178-7-19 Frjv; 179-7-19 Frjv
	}	Trial Judge: Scot L. Kline

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

Mother appeals the termination of her parental rights to five-year-old A.C. and two-year-old A.M. A.M.'s father (hereinafter referred to as "father") also appeals the termination of his rights to A.M.[1] We affirm.

A.C. was born in July 2016 and A.M. was born in June 2019. In July 2019, the Department for Children and Families (DCF) filed petitions alleging that A.C. and A.M. were children in need of care or supervision (CHINS) due to lack of parental supervision, the unsanitary condition of the family's home, and reports that father was emotionally and physically abusive to A.C. Following a temporary care hearing, the court transferred custody of the children to DCF.

A contested merits hearing was held in September 2019. The court issued a written order concluding that the children were CHINS. The court made several findings by clear and convincing evidence. Specifically, the court credited the testimony of the maternal grandmother that mother and father's home was in filthy condition, with dog feces and cat urine everywhere. A.C.'s room smelled particularly strongly of urine. Her windows had been covered so that the room was dark, and she had no toys. Her bed had no sheets, and the floor was littered with crushed food. For a time, parents periodically locked A.C. in her bedroom. Maternal

[1] The court also terminated A.C.'s father's parental rights. A.C.'s father did not appeal.

grandmother had called DCF several times to report the conditions in the home and testified that the family's apartment was "always like that." Maternal grandmother provided food for the family and baby supplies. It was not clear whether either parent worked outside the home or had any source of income.

The parents frequently argued in front of maternal grandmother. Their arguments often revolved around A.C. Maternal grandmother had witnessed father yelling at A.C., cursing at her and calling her names, and had seen him push her to the floor. On one occasion, after A.M. was born, father used his knee to push A.C. to the floor and away from the baby, yelling at her, "No, this is my baby." Another time, father became angry while A.C. was present and threw a diaper box against a window, breaking the window.

A home health worker and a Head Start worker had both reported rough and inappropriate treatment of A.C. to DCF during the winter of 2019. DCF made a safety plan that required father to be supervised in A.C.'s presence. A meeting was held between the parents and a domestic violence specialist. Father was combative during the meeting, stated he would not follow DCF's recommendations, and said, "no wonder that [DCF] worker got shot," apparently referring to the murder of DCF worker Lara Sobel.

A DCF worker made several home visits and observed the home to be filthy. Once, she watched as father ate a cupcake in front of A.C., taunting her with it and not allowing her to have one. This upset A.C. and caused her to cry. Father was often playing videogames and would not engage with the DCF worker. During one visit, he screamed obscenities at the family dog for two minutes in front of her and A.C. On another visit, father became angry, threw a child's chair into a corner, and called the DCF worker a derogatory name. Mother told the DCF worker that she deferred to father in disciplining A.C. In June 2019, the parents texted the DCF worker and told her they would no longer be cooperating with DCF. All the above findings were made by clear and convincing evidence.

In the CHINS merits decision, the court also found by a preponderance of the evidence that mother interacted appropriately with A.C. and showed her love and affection. During a previous DCF case, mother had successfully worked with service providers to obtain physical therapy for A.C. However, the court concluded that mother was unable to maintain a safe, clean, and appropriate living environment for the children, and deferred to father, who was angry and volatile, in matters of discipline. Based on these findings, the court concluded that A.C. and A.M. were CHINS.

In October 2019, the court approved a case plan for A.C. that called for reunification with mother by January 2020, and a case plan for A.M. that called for reunification with mother or father by the end of April 2020. The case plans required mother to fully engage with service providers, attend all visits with the children, attend parental education and follow recommendations, engage in mental health treatment, take responsibility for and acknowledge the reasons the children were in custody, provide a safe environment for the children, and meet with a domestic violence specialist. The case plan for A.M. contained similar action steps for father. Father was also specifically required to engage in mental health treatment to address his

anger management and domestic violence issues and to not threaten DCF workers or service providers.

In May 2020, DCF filed petitions to terminate parents' rights to A.C. and A.M. The court held a hearing over three days in January, April, and June 2021.

In the termination decision, the court adopted the findings that it had previously made by clear and convincing evidence in the CHINS merits decision about the circumstances that led to the children entering DCF custody. The court further found that both parents had stagnated in their progress since disposition. Mother's last visit with A.C. was in June 2020. Her visits with A.M. had been virtual since March 2020. She attended approximately 75% of them. Mother initially engaged with the children's service providers but became less consistent after January 2020, and she was ultimately discharged from programs for lack of involvement. Mother participated in mental health treatment for approximately six months, but was then discharged by her counselor for lack of engagement. Although mother testified that she had found a new counselor, she did not provide DCF with a release for that counselor. Mother refused to acknowledge the reasons for the CHINS proceeding and denied that father had been abusive. She viewed him as a positive support for her and believed he had a close fatherly bond with A.C. The court found that the evidence from the termination and CHINS merits hearings contradicted this belief. Mother blamed maternal grandmother and others for making up the allegations about father's behavior and denied that she had experienced any domestic violence.

Father attended few of his supervised visits with A.M. His last in-person visit with A.M. was in February 2020. In March 2020, visits began being conducted remotely, and father participated for a time. His last virtual visit with A.M. was in July or August 2020. He did not request further visits. Father refused to engage in mental health treatment. He denied any responsibility for the children being in custody and claimed that it was all due to lies by maternal grandmother. He stated during a meeting with DCF workers that "they should take all DCF workers and line them up and shoot them all." At the termination hearing, he stated that he thought it was "hilarious" that a DCF worker was shot. Although he denied that he had threatened DCF or service providers, the court found that father's statements contained express or implied threats of violence and that service providers appropriately declined to work or limited their work with him in response.

Based on these findings, the court concluded that both parents had failed to make progress in their capacity to parent the children. The court then assessed the best-interests factors set forth in 33 V.S.A. § 5114(a) and concluded that they weighed in favor of terminating parental rights. This appeal followed.

On appeal, mother argues that the termination decision must be reversed because her counsel at the CHINS merits stage was ineffective in failing to appeal the merits and disposition order. She argues that the attorney should have appealed the CHINS decision because the court made selective findings by clear and convincing evidence, precluding re-litigation of these issues at the termination stage, and the record at the merits hearing was insufficient to support the

findings. She argues that the attorney's failure to appeal prejudiced her and led to her parental rights being terminated based on factors beyond her control.

This Court has not yet addressed whether parents have the right to effective assistance of counsel in CHINS or termination proceedings. See In re C.L.S., 2021 VT 25, ¶ 20. We need not reach this issue here because we conclude that even if such a right exists, mother has failed to demonstrate that she was prejudiced by her counsel's allegedly ineffective performance. In the context of a criminal proceeding, a successful ineffective-assistance claim requires proof "by a preponderance of the evidence that (1) counsel's conduct fell short of the prevailing standard of a reasonably competent attorney, and (2) this incompetence was sufficiently prejudicial to create 'a reasonable probability' of a different result." In re M.B., 162 Vt. 229, 234 (1994) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). Assuming without deciding that counsel's failure to file a notice of appeal on behalf of mother from the CHINS merits decision was ineffective assistance, mother has not shown that such an appeal was likely to succeed.

The family court has discretion under 33 V.S.A. § 5315(a) to make CHINS merits findings by clear and convincing evidence, and this Court has held that the family court may rely on such findings at the termination stage. See In re A.M., 2015 VT 109, ¶ 38, 200 Vt. 189 ("We consistently have held that a finding of fact made in a merits decision may be adopted by the court in a disposition determination unless the standard of proof required for disposition is higher than that actually employed in making the finding."). Contrary to mother's claim, the court's decision to make certain findings by clear and convincing evidence did not prevent her from mounting a defense to the termination petitions or introducing additional evidence on these points. As we explained in A.M., the court's ability to take judicial notice of merits findings in later disposition proceeding "does not mean that these facts will dictate the outcome of later proceedings within the same case, as different legal questions are presented at different stages of litigation. Nor does it preclude additional consideration of those issues." Id. ¶ 32.

Mother claims that the testimony presented at the merits hearing was not sufficient to support findings by clear and convincing evidence. Mother does not challenge any findings in particular; rather, she argues generally that the hearing was only two hours long and that father's testimony conflicted with some of the testimony of maternal grandmother and the DCF worker. We are unpersuaded by mother's argument. "When findings are attacked on appeal, our role is limited to determining whether they are supported by credible evidence. 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 A.F., 160 Vt. 175, 177-78 (1993) (citations omitted). The court's findings in the merits decision are supported by the testimony of the maternal grandmother and the DCF worker, both of whom testified to events that they personally observed. The court concluded that this testimony met the clear-and-convincing standard, and we defer to its assessment of the evidence. The fact that there was some conflicting evidence does not render the court's findings erroneous. Although father denied that he had ever been physically abusive to anyone or verbally abusive to children, the court was free to believe the more detailed and specific testimony of the State's witnesses over father's general denials. And while father offered a slightly different version of the incident when he broke a window with a diaper box and

contended that he had put a lock on the outside of A.C.'s bedroom door to prevent her from locking herself in, the court was not required to believe these explanations. See id.

Mother further argues that the court erred by making its positive findings about mother by a preponderance of the evidence only, leaving them open to relitigation by DCF. The positive testimony about mother's conduct with the children, while uncontradicted, was sparse and vague, and it was up to the court to decide how much weight to accord to it. See In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325 (stating that weighing of evidence is role of family court); In re M.E., 2019 VT 90, ¶ 20, 211 Vt. 320 ("[A] court or jury is not bound in all circumstances to believe testimony not directly contradicted." (quotation omitted)). We cannot say that the court clearly erred in making these findings by a lower standard.

In sum, the record supports the court's findings in its CHINS merits decision and we view it as highly unlikely that mother would have succeeded in overturning those findings if she had appealed. Accordingly, mother has failed to demonstrate that her attorney's alleged error was sufficiently prejudicial to create a reasonable probability that the outcome of the proceeding would have been different.[2]

We turn to father's appeal. Father argues that the court's decision terminating his parental rights to A.M. must be reversed because the court erred in finding that he made threats to service providers and that service providers appropriately limited or refused services to father in response. Father argues that the service providers withheld or withdrew services arbitrarily and that this was a factor beyond his control that could not support termination.

The record supports the court's findings. Father testified that he told multiple DCF workers that he thought it was "hilarious . . . about the DCF worker getting shot." He stated that he made these statements because he had "a lot of hatred for them." A.M.'s case plan, which was admitted into evidence without objection, indicates that father made similar statements during an intake interview with Family Time coordinators. The case plan states that during the same interview, father refused to sign releases or share information, became escalated and stated that everyone was out to get him, and hit the wall and door. A DCF worker testified that due to safety concerns, father was referred to supervised visitation. DCF arranged for transportation for father to his intake interview at the visitation center through Good News Garage. Father made multiple threatening statements about DCF staff on the ride to and from his intake interview. As a result, Good News Garage declined to transport father to visits.

Although father testified that he never intended to inflict violence, the court reasonably viewed father's statements as threatening, given his admitted animosity toward and history with DCF and the other evidence of his unpredictable and sometimes violent behavior. See In re D.S., 2014 VT 38, ¶ 22 (explaining that family court's role is to assess credibility of witnesses). Furthermore, the court did not err in concluding that the non-DCF service providers were justified in limiting or refusing service to father based on his behavior. The record shows that

[2] To the extent that father is claiming that his attorney at the CHINS merits phase of the proceeding was also ineffective, that claim is inadequately briefed, and we do not address it.

father's statements, while nominally about DCF, were coupled with other violent behavior or alarming statements that could cause a reasonable person to fear for their safety. Father's behavior toward service providers was a matter within his control. We accordingly see no reason to disturb the court's decision below.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice