VERMONT SUPREME COURT
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Case No. 21-AP-204

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

JANUARY TERM, 2022

In re N.R., N.R., N.R., Juveniles (M.R., Mother* & D.L., Father*)	}	APPEALED FROM:
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	CASE NOS. 38/39-8-19 Cajv; 74-12-19 Cajv Trial Judge: Kevin W. Griffin

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

Mother and father appeal from the termination of their rights in N.R., N.R., and Na.R. We affirm.

Na.R. was born in July 2018 and twins N.R. and N.R. were born in June 2019. The twins were born prematurely and had to remain in the Neonatal Intensive Care Unit (NICU) for several months. They were taken into the custody of the Department for Children and Families (DCF) not long after their birth. Parents stipulated that the twins were children in need of care or supervision (CHINS) and at risk of harm in mother's home because: mother spent very little time with them while they were in the NICU; mother was unable to become adequately prepared to care for the twins at home or learn how to safely care for them in addition to Na.R.; and father, who was mother's primary support person, had been recently incarcerated. The court adopted DCF's proposed disposition plan, which recommended continued DCF custody with a goal of reunification with either parent by April 2020. The case plan contained numerous action steps for both parents.

For several months, mother was positively engaged in the disposition plan. Her progress deteriorated, however, after father was released from prison and returned to the parties' home. In December 2019, father tested positive for cocaine. He then overdosed while at home with mother and Na.R. and had to be revived with Narcan. Concerns arose about mother's substance use and her possible impairment during Family Time Coaching. Mother failed to provide a urine sample as requested and she cancelled a mental health appointment.

In late December 2019, DCF filed a petition alleging that Na.R. was CHINS due to a lack of proper parental care. Na.R. was taken into temporary DCF custody and parents later stipulated that she was CHINS based on father's overdose in the home and parents' failure to sufficiently engage in services. The proposed disposition plan contained similar requirements as those already in place for the twins but added several new requirements for parents. The plan

had a goal of reunification with either parent by September 2020. In adopting the plan, the court noted that neither parent was meaningfully engaged in services required by the previously approved reunification plans for the twins. DCF also reported that both parents were actively using illicit substances and they were inconsistent with their scheduled family times.

In July 2020, DCF drafted a permanency case plan that recommended permanency through adoption given parents' failure to address the issues that led to the children coming into custody. DCF reasoned that, despite repeated attempts to engage and support parents, neither parent had progressed in addressing the case plan goals and in fact, they had deteriorated in most areas. Parents were actively using cocaine and opiates, neither were engaged in mental health or substance abuse treatment, and neither had addressed domestic violence issues in their relationship. Parents' attendance and participation in supported family time was inconsistent and mother was no longer working with Family Time Coaching. Father overdosed again in April 2020 and had to be revived with Narcan. He was reincarcerated for the fourth time in June 2020 for failing to comply with his furlough conditions.

In late July 2020, DCF moved to terminate parents' rights. Following three days of evidentiary hearings, the court granted its request in an August 2021 decision. It made numerous findings, none of which parents challenge on appeal. Essentially, as reflected above, the court found that mother took some positive steps in the first few months that the twins were in DCF custody. As of December 2019 however, mother was actively using illicit substances and she stopped engaging in her action steps. Despite repeated efforts to refer mother to various service providers and programs, mother never followed through with what she needed to do to reunify with the children. Mother was still actively using illicit substances throughout the termination hearings. As for father, the court found that he barely engaged with DCF after August 2019. After being released from prison in October 2019, father stopped taking suboxone and resumed active use of illicit substances. He then overdosed, leading to Na.R.'s removal from the home. Father never stopped using illicit substances while he was in the community. During the pendency of these cases, father was incarcerated four times for a total of six months. He did not complete any of the action steps in his reunification plans and as of December 2020, there was an outstanding warrant for father's arrest. The court found that there had been no improvement in either parent's capacity to parent the children since the beginning of these cases and that their stagnation warranted modification of the existing disposition plans.

Turning to the statutory best-interest factors, the court found no likelihood that either parent could resume parental duties within a reasonable period. It concluded that the remaining statutory best-interest factors all supported termination of parents' rights as well. On the same day that it issued its termination decision, the court denied as moot a motion to reopen that mother had filed in July 2021. This appeal followed.

Mother first argues that the court erred in finding that she stagnated in her ability to parent the children. According to mother, DCF prematurely moved to terminate her rights and it failed to acknowledge that the COVID-19 pandemic and the shutdown that accompanied it were factors beyond her control. Mother also asserts that the court failed to assess her progress with respect to each child individually. She contends that the court erred in finding that her failure to live at the Lund Home was evidence of stagnation. Father similarly faults the court for failing to make any findings about the impact of the pandemic on parents. Father also suggests that, if DCF had not moved to terminate parents' rights and if mother had been able to gain admission to

the Lund home in 2021, he would have been able to visit the children in person and play a role in their lives.

When the termination of parental rights is sought, the trial court must first determine if there has been a change in circumstances warranting modification of an existing disposition order. In re B.W., 162 Vt. 287, 291 (1994); 33 V.S.A. § 5113. A change in circumstances is most often found when a parent's ability to care for a child "has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. at 291 (quotation omitted). If the court finds a change in circumstances, it must then consider if termination of a parent's rights is in a child's best interests. Id. We will affirm the trial court's findings on appeal unless they are clearly erroneous, and we will affirm its conclusions if supported by the findings. In re B.S., 166 Vt. 345, 350 (1997). We do not reweigh the evidence on appeal. See In re S.B., 174 Vt. 427, 429 (2002) (mem.) (explaining that Supreme Court's "role is not to second-guess the [trial] court or to reweigh the evidence, but rather to determine" if trial court "abused its discretion" in reaching its decision).

The court's finding that parents stagnated is amply supported by the court's findings and the evidence here. As set forth above, parents made no progress in addressing the goals of the case plan after fall 2019. They continued to use illicit substances, father was in and out of jail, neither parent engaged in mental health or substance abuse treatment, neither addressed domestic violence issues in their relationship, and they were inconsistent in attending and participating in supported family time. Given the overwhelming evidence, any error in a finding about the Lund Home would be harmless. See In re G.F., 2007 VT 11, ¶ 15, 181 Vt. 593 (mem.) (explaining that "where a finding of fact that supports the conclusion of the court is clearly erroneous, we find harmless error if other valid findings also support the court's conclusion").

The court did not find that the COVID-19 pandemic played any role in parents' failure to engage in any action steps, aside from mother's refusal to comply with masking requirements, which impacted in-person visits, and it was not obligated to make findings on this topic. It is evident that parents are responsible for their continued use of illegal drugs, their failure to engage in visitation, their refusal to engage in services offered to them, and their failure to make any progress in addressing the goals of the case plan since fall 2019.

We also reject mother's assertion that DCF filed its termination petitions prematurely. By the time that DCF proposed changing the case plan goal to adoption, more than one year had elapsed without progress and in fact, parents' situation had deteriorated. Parents' failure to make progress on the case plan for the twins was directly relevant to determining whether they stagnated in their ability to parent Na.R.; both plans contained the same requirements. Mother's assertion that the court failed to consider her progress with respect to each child is also without merit. It is evident from the court's decision that it engaged in the appropriate analysis and considered each child's individual circumstances. We are equally unpersuaded by father's speculation about how he might have acted differently had mother been accepted into the Lund Home. The court's stagnation decision and its analysis of the best-interest factors are well-supported by its findings and by the evidence. We find no error.

Mother next argues that the court erred in its treatment of her motion to reopen. According to mother, the court violated her due process rights by terminating her rights without timely addressing or holding a hearing on her motion. She cites Mathews v. Eldridge, 424 U.S.

319, 333 (1976), in support of her assertion, and asks that we remand this case for a hearing on her motion to reopen.

The record shows that mother filed her motion to reopen on July 1, 2021, prior to the court issuing the termination order. She asserted that, in June 2021, she had recommitted herself to sobriety (although she acknowledged that her urinalysis results were positive for THC) and reengaged with DCF. Mother asked the court to reopen the evidence given the passage of time since the last hearing and the "substantial turnaround in her sobriety." Mother stated that she had a visit with the twins at the end of June 2021 and she sought to resume visitation with Na.R. as well.

As indicated, the court denied the motion as moot in light of its decision terminating mother's rights. The court presumably concluded that mother's claim to one month of sobriety (with positive THC results) did not undermine its conclusion, based on three days of evidentiary hearings, that mother had failed to meet any of the longstanding action steps in the case plan during the multiple years that the children were in custody and that termination of her rights was in the children's best interests. Mother was plainly provided with due process prior to the termination of her rights in N.R., N.R., and Na.R. See Mathews, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (quotation omitted)). Mother fails to show that the court was required to hold a hearing on her motion to reopen, which she filed prior to the issuance of a final judgment order. Cf. V.R.C.P. 60(b) (providing avenue by which party may seek relief from "a final judgment"); West v. West, 139 Vt. 334, 335 (1981) (per curiam) (addressing need for hearing in context of Rule 60 motion).

Even assuming arguendo that the court should have held a hearing on mother's pre-judgment motion to reopen, any error was harmless. We take judicial notice of the fact that mother was provided an opportunity to present evidence in support of her contention that she made progress as of June 2021. See In re Torres, 2004 VT 66, ¶¶ 7-8, 177 Vt. 507 (mem.) (recognizing that "[t]his Court is permitted to take judicial notice of facts 'not subject to reasonable dispute' when those facts are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,' including transcript of proceeding within same case, particularly where reference to transcript resolved claim of error on appeal (quoting V.R.E. 201(b)). The court held a hearing on mother's post-judgment request to stay its order terminating parental rights. It recognized mother's assertions that she was making good progress in her recovery and that she had had positive visitation with the children. At the same hearing, however, mother acknowledged that she was again living with father and that she was not engaged in any mental health or substance abuse treatment or any domestic violence programming. The court ultimately denied mother's request to stay the decision terminating parental rights. As part of its decision, the court found it unclear that reopening the evidence, as mother had requested pre-judgment, would have precipitated new and significant additional evidence. In light of the record, we reject mother's request that we remand this matter to the trial court to reconsider her motion to reopen. We find no error in the court's order terminating parents' rights.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice