

VERMONT SUPREME COURT
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Case No. 21-AP-215

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

FEBRUARY TERM, 2022

In re M.H., Juvenile	}	APPEALED FROM:
(L.H., Mother*)	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	CASE NO. 2-1-20 Frjv
	}	Trial Judge: Scot L. Kline

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

Mother appeals termination of her parental rights to her son M.H., born in December 2019. On appeal, mother argues that the court violated her right to due process by denying her motion to continue the termination hearing to conduct a competency evaluation and allow for presentation of an additional witness. Mother also contends that termination was not in M.H.'s best interests. We affirm.

The family court made the following findings. M.H. was born prematurely and admitted to the neonatal intensive care unit (NICU). Mother has lower cognitive abilities and admits she is an alcoholic and has depression and anxiety. She has been involved in violent relationships. She consumed alcohol during her pregnancy. M.H. was treated for withdrawal from nicotine and alcohol and was diagnosed with fetal alcohol spectrum disorder. While M.H. was in the hospital, the State filed a petition to adjudicate M.H. as a child in need of care or supervision (CHINS). In January 2020, the court transferred custody of M.H. to the Department for Children and Families (DCF), and DCF placed M.H. with mother's sister.

In June 2020, the court adjudicated M.H. as CHINS based on mother's stipulation that she consumed excessive amounts of alcohol during her pregnancy and was in a volatile relationship that put M.H. at risk of harm. The initial case plan had a goal of reunification with mother by July 2020. The goals for mother included abstaining from alcohol and other substances, engaging in substance-abuse and mental-health counseling, engaging in Family Time, attending visits, attending medical appointments, maintaining relationships free from violence, and completing a parenting course. Mother continued to struggle with her alcohol

addiction. She was charged with driving while under the influence in April 2020 and reported that she was drinking in October 2020.¹ Mother went to a residential rehabilitation facility, Valley Vista, in December 2020, left against medical advice, and then returned and completed the program in February 2021. Mother did not provide required urinalyses and tested positive for alcohol in March 2021. She relapsed in April 2021 and June 2021.

Mother did not visit with M.H. from the end of February until April 2020. From April to June 2020, visits were virtual due to the COVID pandemic. After that, mother had in-person and virtual visits. Mother gave birth to another child, N.H., in 2021. At one point, she had both children together for visits, but after the Family Time coach expressed concern, visits were scheduled separately. As of April 2021, mother was having one in-person visit and three virtual visits per week with M.H. Mother worked with a Family Time coach on parenting skills but made only elemental progress. Although mother was permitted to attend M.H.'s medical appointments virtually, she did not.

In October 2020, the State filed a petition to terminate parental rights at initial disposition and a permanency plan with a goal of termination and adoption. The court held five days of hearings from April to August 2021.²

After the termination proceedings were underway, and at mother's request, the court granted a continuance for mother to participate in a parenting assessment with Dr. Yuan, a psychologist who specializes in working with people with developmental disabilities. She completed a competence-based parenting assessment of mother and provided a report in June 2021. Dr. Yuan expressed that mother has cognitive disabilities but that she believed mother could resume parental duties with reasonable time. The court did not credit the conclusions made in Dr. Yuan's report because it was based on mother's inaccurate statements regarding her sobriety and her partner. Mother reported to Dr. Yuan that she had maintained sobriety, when she instead had several relapses and had failed to follow through on her after-care plan, including by avoiding people who regularly used alcohol. Further, mother informed Dr. Yuan that her current partner was a support for her but failed to disclose that he drank to the point of passing out and had children removed from his custody by DCF. Mother also failed to inform Dr. Yuan that she attended under half of the scheduled visits with her counselor and was not regularly participating in mental-health counseling.

At the close of the hearing, the court made the following findings by clear and convincing evidence. M.H. has never lived with mother and has a limited relationship with her. He has a close bond with his foster mother and her partner and is adjusted to his community. Mother will not be able to assume parental duties within a reasonable period of time. Mother was unable to maintain sobriety and continued to be involved with a partner who drinks heavily. Mother is still working on basic parental skills and has not engaged in mental-health counseling. DCF provided mother with a number of supports and mother's inability to assume parental duties was a result

¹ At the time, mother was pregnant with another child, N.H.

² Father voluntarily relinquished his rights in May 2021.

of her own actions and not of DCF's. The court concluded that termination was in M.H.'s best interests. Mother appeals.

The family court may terminate parental rights at the initial disposition proceeding if the court finds by clear and convincing evidence that termination is in the child's best interests. In re J.T., 166 Vt. 173, 177, 179 (1997). In assessing the child's best interests, the court must consider the statutory criteria. 33 V.S.A. § 5114. On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993).

Mother's first argument relates to her request to continue the termination hearing. The facts related to this argument are as follows. On the first day of the termination proceedings in April 2021, mother's counsel requested a continuance.³ Mother's attorney explained that two family support workers had expressed concerns that mother did not fully understand the process and purpose of the termination hearing. Mother's attorney noted that mother had a court-appointed guardian, had a low I.Q., and received developmental services. Mother's counsel represented that she thought mother was competent to proceed, noting that mother had participated in a criminal case, but asked for a continuance to complete an independent evaluation of mother's competence. Mother identified an individual to complete the evaluation. The State objected that the request was untimely, noting that the case had been pending for over a year, that the information about mother's existing voluntary guardianship had been known throughout the proceedings, and that mother had competently participated in criminal and family cases. The State also indicated that the person mother had identified to do the evaluation did parenting assessments and not competency evaluations. Counsel for M.H. also opposed a continuance given the length of time the case had already been pending and argued that a competency evaluation would not be useful because the sole outcome would be to appoint a guardian ad litem for mother and mother already had a guardian.

The court engaged in a colloquy with mother, confirming that mother understood the purpose of the hearing, explaining the State's burden in the case, and providing mother with an opportunity to ask questions. The court provided mother's attorney with an opportunity to consult with mother. At counsel's request, the court further questioned mother using more open-ended inquiries and allowed counsel to question mother. The court also questioned the family support worker, who clarified that she was not concerned that mother did not have the ability to understand the proceedings; rather, she was concerned that she had not adequately explained the process to mother.

Ultimately, the court denied the motion to continue the hearing for a competency evaluation. The court recognized that accommodations would be necessary during the process to ensure mother had time to understand the proceedings. The court emphasized that the request for an evaluation had come late in the juvenile proceedings and that the child had been in custody for a long period of time and had a high need for permanency. The court found that mother had a sufficient understanding of the process and concluded that a competency evaluation was not

³ Although counsel represented that the motion had been filed in advance of the hearing, the court and the other parties had not received the motion, so counsel made an oral motion.

necessary. To assist mother in understanding, the court appointed mother's father, who is also her guardian, as her guardian ad litem.

On appeal, mother argues that the court violated mother's right to due process by denying mother's attorney's request for a competency evaluation. The State contends that the due process argument was not properly preserved for appeal, that there was no error in denying the continuance and that, in any event, any error was not prejudicial to mother.

We decline to reach mother's due process argument because she did not raise it in the trial court. As recounted in detail above, in the trial court, mother asked for a continuance to conduct an evaluation of mother to determine her understanding of the proceedings. The trial court adequately responded to these arguments, acting well within its discretion in denying the motion for a continuance. See In re D.H., 2017 VT 71, ¶ 11, 205 Vt. 281 ("Whether to grant a motion to continue is a decision that falls within the trial court's discretion."). Given that mother waited until the morning of the first day of termination proceedings to ask for a continuance and the juvenile's need for permanency, the court was well within its discretion to deny the motion to continue. Moreover, the court concluded that an evaluation was not necessary based on its finding that mother could understand the proceedings. The court appointed a guardian ad litem to ensure that mother had assistance in understanding what was happening.

At no time in the trial court did mother protest to the court's procedure on the basis that it violated mother's right to due process. Having failed to present this ground to the family court, mother cannot now raise the issue on appeal.⁴ See In re G.F., 2007 VT 11, ¶ 23, 181 Vt. 593 (mem.) (declining to address constitutional due process and equal protection arguments not raised in trial court).

Mother also contends that the court denied her due process by declining to hear from one of mother's proffered witnesses. During the termination proceedings, mother sought to present testimony from an alcohol counselor at Valley Vista. Mother proffered that the counselor would testify that mother completed the Valley Vista program, was engaged in her rehabilitation, and the counselor had concerns about mother's ability to process information. The State objected because the individual was not on the witness list and that the State did not have mother's records from the program. The court agreed that if the court permitted the counselor to testify, mother first had to provide the State with mother's records from Valley Vista. At a subsequent hearing date, mother again sought to have the counselor testify. The State again objected to mother presenting testimony from the counselor because the State had received the records only the night before. The court declined to rule on the State's objection, and at the end of the day, the court indicated it would schedule additional hearing time to hear the counselor's testimony. Mother's counsel requested at least a week's notice for her witness, but the court indicated the hearing would be scheduled when there was time available. On the rescheduled and final

⁴ Because the argument was not preserved for appeal, we do not reach the question of whether federal due process might require a competency hearing of a parent in a termination proceeding and under what circumstances. See In re Alexander V., 613 A.2d 780, 785 (Conn. 1992) (concluding that "under certain circumstances, due process requires that a hearing be held to determine the legal competency of a parent in a termination case").

hearing day, mother asked for another continuance because the counselor was not available on that day. The court denied the motion to continue, finding that the proffered testimony was duplicative of other testimony and not really disputed.

On appeal, mother contends that the court abused its discretion in precluding mother from presenting the counselor's testimony on a hearing day when the witness was available and not continuing the hearing to allow for more time. The court acted well within its discretion in conducting the hearing and ultimately declining to further extend the termination proceedings. See In re D.H., 2017 VT 71, ¶ 11 (explaining that decision of whether to continue hearing is within family court's discretion). The court's decision was reasonable given that the witness request came late in the process, the court attempted to make time for the witness, the proceedings had already been extended, and M.H. needed permanence. Moreover, the proffered evidence from mother's counselor was largely duplicative of other testimony already presented regarding mother's attendance at Valley Vista, her completion of the program, her engagement, and her challenges processing information.⁵ Mother's contention that the court's decision amount to a denial of due process was not raised below and therefore we do not address it on appeal.

Finally, mother argues that the State failed to prove by clear and convincing evidence that termination was in M.H.'s best interests. In evaluating the best-interests factors, the most important factor is whether the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.). The reasonableness of the time period must be measured from the child's perspective, In re B.M., 165 Vt. 331, 337 (1996), and may take account of the child's young age or special needs, In re J.S., 168 Vt. 572, 574 (1998) (mem.).

Mother contends that matters beyond her control precluded her from progressing towards being able to parent M.H. within a reasonable period of time. Mother asserts that remote visits, which were necessitated by the pandemic, prevented her from forming a bond with M.H. She also argues that DCF did not provide her with enough time or services in light of her intellectual disabilities.

The court's assessment of the best-interests factors is supported by the evidence. The court specifically found that mother's inability to assume parental duties within a reasonable time was caused by her own actions and not DCF's failures. Mother made some progress on her parenting skills, but her progress was very limited over a considerable period of time. The court found that DCF had communicated with mother about what supports she needed and implemented strategies to assist mother. These included strategies identified by Dr. Yuan such as speaking in simple terms, taking extra time to explain concepts, having mother repeat information, and using visual aids. The court found that mother showed love and affection for M.H. and had engaged in visits in a modest way, but that she had failed to maintain sobriety, significantly improve her parenting skills, or consistently engage in mental-health counseling.

⁵ Most relevant, the DCF caseworker testified that mother attended Valley Vista in January 2021 and successfully completed the program. She also testified about mother's need for additional support.

The court emphasized M.H.'s young age and immediate need for permanence and stability. These findings support the court's conclusion that termination was in M.H.'s best interests.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice