

VERMONT SUPREME COURT
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Case No. 21-AP-226

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 K.B., Juvenile (C.B., Mother*)	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	CASE NO. 2-1-19 Frjv
	}	Trial Judge: Scot L. Kline

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

Mother appeals the family division's order terminating her parental rights to her child K.B., born in January 2019. Mother argues that the family division erred by: (1) failing to address the adequacy of the Department for Children and Families' (DCF) disposition case plan and (2) concluding that a violation of Title II of the Americans with Disabilities Act (ADA) is not a defense to termination of parental rights. We affirm.

Mother has four other children with K.B.'s father. In 2015, mother and father relinquished their parental rights to L.B., born August 2014. The court terminated their parental rights to twins V.B. and A.B., born June 2016, in a 2018 order, which this Court affirmed. In re V.B. & A.B., No. 2018-217, 2018 WL 5785512 (Vt. Nov. 2, 2018) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo18-217.pdf> [<https://perma.cc/UXK9-9ZNC>]. N.B., born November 2020, is currently in DCF custody.

While mother was pregnant with K.B., DCF received reports raising concerns regarding parents' ability to care for her after birth. These reports noted a continuing pattern of the parenting risks identified in the juvenile proceedings for parents' other children, including mother's mental health issues, mother's violent behavior, parental domestic violence, lack of hygiene, lack of safe and stable housing, and parents' failure to engage with services to address these concerns. Prompted by these reports, the Franklin County State's Attorney petitioned for an order that K.B. was a child in need of care or supervision (CHINS) at the time of K.B.'s birth.

Two days later, the family division held a temporary care hearing and issued a temporary care order granting custody to DCF. DCF prepared an initial case plan. It set a goal of reunification but noted the risks that mother and father posed to K.B. With respect to mother, the plan stated that K.B. would be emotionally or physically harmed if mother did not address her

mental health and was thereby unable to effectively parent, and if mother did not consistently engage with services to be able to meet K.B.'s needs. The action steps or expectations to address these risks included: engaging in individual therapy to address mother's mental health and how it impacted mother, K.B., and mother's relationship with father; signing releases to allow DCF to monitor mother's individual progress in services; identifying safe and supportive people in mother's life and working with therapeutic providers to improve her ability to make and maintain social connections; demonstrating the ability to regulate her emotions and communicate respectfully; not behaving aggressively or threateningly; and not engaging in criminal activity.

The court held a merits hearing on the CHINS petition over several days in May and July 2019 and January 2020. In the interim, in December 2019, DCF prepared a permanency case plan. The permanency case plan set a goal of adoption. It also prescribed action steps or expectations for mother and father similar to those established in the initial case plan. The court entered a CHINS finding on April 9, 2020.

On April 30, 2020, DCF filed a proposed disposition case plan with a goal of adoption. The disposition case plan contained action steps for mother and father similar to those set forth in the initial case plan and permanency case plan. On the same date, the State filed a petition to terminate parental rights.

The family division held a termination hearing over four days in July and August 2021. The witnesses included, among others, mother, father, DCF case workers, a local law enforcement officer, and a developmental-disabilities expert who had performed a family forensic evaluation ordered by the court. The expert's report and DCF's disposition case plan were among the admitted evidence. In September 2021 the court issued written findings and an order terminating parents' rights, concluding based on clear and convincing evidence that termination was in K.B.'s best interests. The court made findings on each of the four statutory best-interests factors, focusing in particular on parents' ability to resume parental duties within a reasonable period of time.

With respect to the first factor, the court found K.B. has lived most of her life with her foster parents, to whom she is bonded. K.B. has never lived with her mother and father. Although the court found mother appeared bonded with K.B. and had attended most of her weekly visits since January 2021, in May 2021 she became highly dysregulated at a scheduled visit with K.B.'s younger sibling, N.B. It took five attempts by DCF to create a safety plan with mother to allow her to successfully resume visitation with N.B. The court found that this behavior regarding visitation with N.B. was relevant to mother's relationship with K.B. As to the second factor, the court found K.B. had adjusted well to her foster home and day care.

The court found mother's inability to regulate her behavior was a central issue bearing on both the third and fourth best-interests factors. Mother had made multiple death threats, including to DCF, K.B.'s foster parent, the attorney representing the State, and one of her own former attorneys. In addition, mother's escalated behavior on numerous occasions had necessitated intervention by law enforcement. One such incident occurred during a mental health evaluation that DCF had requested to diagnose mother's mental health issues and identify any possible accommodations. That evaluation could not be completed because mother became "more emotionally dysregulated." Mother's dysregulation extended to multiple proceedings in this very case, which resulted in disrupted or postponed hearings.

The court found these behavioral issues to be exacerbated by parents' housing instability, to which DCF case workers and the developmental-disabilities expert testified. Parents did not have a permanent address, and lived in a small, very cluttered camper with significant water damage. The court found the overall condition not appropriate for children. Ultimately, the court concluded that although a bond existed between mother and K.B., mother's dysregulation and failure to engage effectively with services to address behavioral and mental health challenges undercut her ability to play a consistent and constructive role in K.B.'s life and resume parental duties within a reasonable period of time.

In its termination order, the family division did not specifically accept or reject DCF's proposed disposition case plan but summarized its contents and noted its similarities to prior case plans which had been in place over the preceding fifteen months. The court's order established adoption as the permanency goal.

On appeal, mother does not challenge the sufficiency of the evidence or correctness of the court's factual findings. Instead, she contends that the family division was required to rule on the adequacy of the disposition case plan before terminating parental rights, and suggests it committed reversible error by failing to do so. This is a question of law that we review without deference to the trial court. In re A.A., 2020 VT 48, ¶ 10, 212 Vt. 379.

The CHINS statute provides that the family division may terminate parental rights in its initial disposition order, as it did here, if it finds by clear and convincing evidence that termination is in the best interests of the child. 33 V.S.A. §§ 5114, 5318(a)(5); In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29. In evaluating whether termination is in the child's best interests, the family division must consider four statutory factors: (1) the child's relationship and interaction with family members, foster parents, and other significant persons; (2) the child's adjustment to his or her home, school, and community; (3) the likelihood that the parent will be able to resume parental duties within a reasonable period of time; and (4) whether the parent has played and continues to play a constructive role in the child's welfare. 33 V.S.A. § 5114(a); In re J.B., 167 Vt. 637, 639 (1998). Of these factors, the third is the most important. In re C.P., 2012 VT 100, ¶ 30.

If the family division orders termination of parental rights and transfers all custodial rights to DCF as it did here, the court must establish a permanency goal and adopt a case plan designed to achieve that permanency goal. 33 V.S.A. § 5318(b). But the statute is silent as to when it must adopt a case plan. Section 5318(b) provides that the court can reject DCF's proposed case plan and order DCF to prepare a new plan for court approval, indicating that the case plan need not be adopted prior to disposition. No other provision in the statute suggests that the court must adopt a case plan before terminating parental rights at an initial disposition hearing.

The court's requirement to adopt a case plan is separate and independent from any determination regarding termination of parental rights at initial disposition. See In re C.P., 2012 VT 100, ¶ 30 ("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."). Neither the statutes nor our case law suggest that the court must make findings and conclusions as to DCF's proposed case plan—i.e., review and accept or reject it—as a

precondition to terminating parental rights at initial disposition. See In re J.T., 166 Vt. 173, 179 (1997) (rejecting mother’s argument that “terminating her parental rights without an approved case plan is reversible error” where court had not adopted DCF’s case plan but mother received and participated in it).

Mother argues, however, that the court improperly declined to consider the appropriateness of DCF’s case plan on the ground that she had never objected to DCF’s approach. She points to the recommendations contained in a family forensic evaluation completed by a developmental-disabilities expert in December 2019, which suggested certain service recommendations for mother that differed from those contained in DCF’s case plans. She argues this report demonstrated DCF’s approach was inadequate and therefore the court was required to consider whether the case plan was appropriate in determining whether mother could address the issues that led to the CHINS petition being filed within a reasonable time.

The assistance that DCF provides to parents is a factor in determining whether DCF has met its burden of showing that a parent is unlikely to be able to resume parental duties within a reasonable period of time. In re C.P.; 2012 VT 100, ¶ 38; In re J.T., 166 Vt. at 180. However, DCF’s assistance to parents is not one of the best-interests factors and the court need not make specific findings regarding DCF’s efforts as a prerequisite to termination of parental rights. 33 V.S.A. § 5114(a); In re C.P., 2012 VT 100, ¶ 38. In this case, the court did consider the forensic evaluation and concluded that it held little weight because it was nearly two years old, the developmental-disabilities expert had not observed mother when she was dysregulated, and the report failed to account for how mother’s new baby, N.B., would impact the family. Furthermore, mother never requested modification of the case plan to adopt the recommendations contained in the forensic evaluation, and she failed to complete a mental health evaluation requested by DCF to determine her diagnosis and whether she needed specialized services.

The central question before the family court was whether termination was in the child’s best interests, considering the factors in 33 V.S.A. § 5114(a). The family division applied the correct standard here and its findings support its conclusions. Overwhelming evidence supported the court’s findings that mother could not regulate her behavior, which was frequently aggressive or threatening, and that she had not meaningfully engaged with services to address her mental health issues. These challenges were compounded by parents’ lack of safe, stable housing. The court also properly emphasized K.B.’s need for stability and permanence given her young age and the two and half years she had already spent in DCF’s custody. See In re J.S., 168 Vt. 572, 574 (1998). We see no error in the family division’s conclusion that termination of mother’s rights was in K.B.’s best interests.

Finally, mother argues that the court erred in determining that violation of the ADA is not a defense to a termination petition. She contends that DCF’s plan of services and assistance provided to her was deficient because it failed to accommodate her mental health conditions. A parent “may not raise violations of the ADA as a defense to [a termination-of-parental-rights] proceeding.” In re B.S., 166 Vt. 345, 354 (1997). Mother attempts to distinguish this case by pointing out that the mother in In re B.S. had agreed to DCF’s case plan, whereas mother here did not. But the availability of an ADA defense does not turn on whether a parent consents to DCF’s proposed case plan. Regardless of any actual violation, the ADA does not apply directly

to termination proceedings and denial of termination is not a remedy for an ADA violation. Id. at 353.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice