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

Case No. 21-AP-260

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

MARCH TERM, 2022

In re A.H., Juvenile	}	APPEALED FROM:
(S.S., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	CASE NO. 157-11-19 Wmjv
		Trial Judge: Michael R. Kainen (merits);
		Elizabeth D. Mann (disposition)

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

Mother appeals the court's decision adjudicating her son A.H., born in January 2005, as a child in need of care or supervision (CHINS). On appeal, mother argues that the decision should have been vacated as unsupported by the evidence and that the court failed to properly address mother's claim of ineffective assistance of counsel. We affirm.

In 2019, the Department for Children and Families (DCF) had an open family case with mother and a crisis worker was engaged with the family. One area of concern was housing because the family was living in a shed without insulation, running water, or a septic system. In the fall of 2019, mother moved into a hotel room with her two children. On November 25, 2019, the State filed a petition alleging that A.H. and his sibling were CHINS. As to A.H., the petition alleged that mother was unable to parent A.H., who has special needs and is on the autism spectrum.

The merits hearing took place over two days in December 2020 and January 2021. The court found the following facts. A.H. was taken to the emergency room at a local hospital several times in late November 2019. Three reports were made to DCF regarding A.H. from those visits, and some of the concerns were that A.H. exhibited aggressive and angry behavior and mother's behavior escalated A.H.'s agitation. On November 23, 2019, a nurse, who had seen A.H. the night before at the hospital, was working as an emergency responder and went to

the hotel room in response to a 911 call from mother. Upon arrival, the nurse observed five people living in the hotel room and that the room smelled of urine and mildew. There was rotten food on the counter. The nurse noticed that A.H. was wearing the same shirt as the night before and that the shirt had food or vomit on it. A.H. had strong body odor, was unclean, and had unwashed hair. A.H. was yelling random thoughts. Mother explained that she had not been able to get A.H. to take his medication and stated that he was "possessed, and that there were demons inside of him." Emergency personnel had to physically restrain A.H. A.H. had dilated pupils.[1] On a different evening in the same time period, mother brought A.H. to the emergency room. Mother was behaving in a way that escalated AH.'s behavior. The medial team wanted a psychological evaluation, but mother left with A.H. against medical advice. A DCF investigator visited the hotel room on November 25, 2019. Although the room was overcrowded, at that time, the room was clean, and the smells were no longer presented. A.H. was quiet and reserved on that day.

Based on the evidence, the court found that mother was unable to meet A.H.'s special needs. Although the court found that there was only one night when the hotel room was an unhealthy environment for the children, the court explained that mother could not ensure that A.H. bathed properly or took his medication. In addition, the court found that mother was unable to understand what escalated or calmed A.H. and did not work productively with A.H.'s medical and mental-health providers to get positive results for A.H. The court also found that mother did not have a realistic view of A.H.'s behavior. The court concluded that this situation put A.H. at risk of harm and therefore that he was CHINS for lack of proper parental care.[2] The court subsequently entered a disposition order continuing custody with DCF and with a goal of reunification. Mother filed a notice of appeal from the merits decision. See 33 V.S.A. § 5315(g) (providing that merits decision is not final appealable order separate from disposition order).

"A child may be adjudicated CHINS if at the time the petition is filed [the child] is 'without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being.' " In re B.C., 2018 VT 126, ¶ 12, 209 Vt. 48 (quoting 33 V.S.A. § 5102(3)(B)). A CHINS proceeding focuses on the child's welfare and the State has the burden of proving a lack of proper parental care "by a preponderance of the evidence." Id. On appeal, this Court will affirm if the findings are not clearly erroneous and will uphold the legal conclusions if supported by the findings. Id.

Mother first argues that the evidence presented at the disposition hearing contradicted the evidence provided at merits, and that the trial court therefore erred in not vacating the CHINS order based on this evidence. Mother points to testimony offered at the disposition hearing that indicated mother was able to manage A.H. and attend to his hygiene needs, that she understood A.H.'s medical and behavioral needs, and that she worked appropriately with A.H.'s pediatrician

[1] These symptoms prompted health-care providers to take a urine screen, but A.H.'s urine sample was lost and not tested.

[2] The court found there was insufficient evidence to support a CHINS adjudication as to A.H.'s sibling.

to support A.H. Mother also asserts that the evidence at disposition demonstrated that A.H. had aggressive and violent behavior that was unrelated to mother's parenting skills. Mother claims that this evidence contradicts the findings the court made in the CHINS order that mother was unable to work with A.H.'s medical providers or to manage A.H.'s behavior or his special needs.

Mother has not preserved this claim for appellate review. See In re A.M., 2015 VT 109, ¶ 28, 200 Vt. 189 (explaining that party must present argument to trial court "with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it" (quotation omitted)). At no time during the disposition hearing did mother seek to vacate the merits decision or move to dismiss the CHINS petition.

Mother concedes that this argument was not raised before the family court, but asserts that the family court erred in not exercising its discretion to vacate the CHINS order sua sponte to correct "a fundamental miscarriage of justice." Varnum v. Varnum, 155 Vt. 376, 383 (1990). Mother has failed to demonstrate that there was an error so obvious and grave that it would meet this high standard because mother's assertion is that there was evidence that may have contradicted the evidence relied on by the family court in its merits determination. In general, we uphold the family court's findings at the CHINS stage unless they are clearly erroneous. See In re B.C., 2018 VT 126, ¶ 12. Moreover, it is exclusively within the family court's province "to weigh the evidence and assess the credibility of witnesses." In re M.L., 2010 VT 5, ¶ 29, 187 Vt. 291.

Even accepting mother's allegation that some evidence at the disposition hearing contradicted evidence presented at merits and concerned the relevant events that precipitated filing the petition, mother has not demonstrated that the evidence relied on by the family division was infirm or invalid in some manner. The family court's findings in the merits order were supported by evidence in the record and the court was not required to sua sponte reconsider its assessment of the evidence after the fact.

Mother also contends that the trial court failed to properly address her claim of ineffective assistance of counsel. The facts related to this claim are as follows. After the merits order issued, on March 29, 2021, mother filed a handwritten motion with the court asking to have her counsel withdrawn because she had not received adequate or effective legal counsel. She asserted that she provided her attorney with witnesses to refute the assertions made in the CHINS petition, but the attorney did not present testimony from these witnesses. Counsel subsequently moved to withdraw and there were several filings from mother and her counsel on the topic of counsel's ongoing representation. In response, the court granted the motion to withdraw, concluding that the attorney-client relationship had broken down. A new attorney subsequently entered an appearance on mother's behalf and represented her in the disposition proceedings. No further claim of ineffective assistance was raised in the family court.

On appeal, mother contends that the trial court "should have addressed the ineffective assistance claim rather than ignoring it." This Court has not recognized that there is a right to effective assistance of counsel in a CHINS proceeding or what the appropriate remedy would be for a deprivation of that right. In re C.L.S., 2021 VT 25, ¶¶ 20, 21 (recognizing that Court has

addressed ineffective-assistance claims on appeal without deciding whether right to it exists). Here, the family court did not ignore mother's motion. The court responded to mother's concerns about her attorney by granting the attorney's motion to withdraw—exactly the relief that mother sought in her filing. Once mother had new counsel, she did not seek any additional relief for the alleged failures of her prior counsel. Having failed to seek any further relief from the family court in the first instance, mother has not preserved the argument for review on appeal. In re A.M., 2015 VT 109, ¶ 28.

Affirmed.

BY THE COURT:

____
Paul L. Reiber, Chief Justice

____
Harold E. Eaton, Jr., Associate Justice

____
Karen R. Carroll, Associate Justice