No._____

IN THE
SUPREME COURT OF THE UNITED STATES

C.B.
Petitioner

v.

STATE OF VERMONT,
Respondent

On Petition for Writ of Certiorari
To the Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

MATTHEW F. VALERIO
DEFENDER GENERAL
MARSHALL PAHL
Counsel of Record
OFFICE OF THE DEFENDER GENERAL
6 Baldwin St., 4th Floor
Montpelier, Vermont 05633
(802) 828-3168
marshall.pahl@vermont.gov

June 10, 2024

QUESTION PRESENTED

In Vermont and a minority of other states, hearsay may be admitted and relied upon in a proceeding to permanently terminate a person's parental rights. Given the gravity of the interests at stake, may states engage in imprecise "balancing of interests" tests to determine what due process rights parents are entitled to when the government seeks to permanently take their children? Or does the historically-established fundamental right to conceive and raise children without interference require a more objective, bright-line protection similar to the tests used to govern the deprivation of other historically-established and traditional rights?

RULE 14(B) STATEMENT

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *S.C. v. State of Vermont*, No. 23-7314, Petition for Writ of Certiorari (2024) (petition of a different party in the same case; no judgement yet entered).

LIST OF PARTIES

The parties to the decision from which review is sought are:

C.B., father – Petitioner

S.C., mother – Respondent

State of Vermont – Respondent

J.B., juvenile – Respondent

S.B., juvenile – Respondent

W.B., juvenile – Respondent

L.B., juvenile – Respondent

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PETITION FOR A WIRT OF CERTIORARI

Petitioner, C.B., respectfully petitions for a writ of certiorari to review the judgement of the Vermont Supreme Court.

OPINION BELOW

The opinion of the Vermont Supreme Court (App. 1a) is not published. It is reported electronically as *In re W.B., L.B., S.B., J.B.*, No. 23-AP-227, 2024 WL 166964 (Vt. 2024) (unpub.) (mem.)

JURISDICTION

The Vermont Supreme Court entered judgement on January 12, 2024. App. 1a. On April 8, 2024, Justice Sotomayor extended the time to file a petition for a writ of certiorari to and including June 10, 2024. *See* Application No. 23A879. The Court has jurisdiction under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall... deprive any person of life, liberty or property without due process of law.

U.S. Const. Amend. XIV

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. Amend. IX

STATEMENT OF THE CASE

In early 2020, one of C.B.'s children, his thirteen-year-old step daughter, S.B., ingested an unknown medication and was brought to the emergency room by C.B. The trip to the hospital was reported to the Vermont Department for Children and Families, which filed a petition seeking an order giving C.B.'s former partner, S.C., the mother of the children, temporary custody under conditions intended to protect the children from harm.

At the merits hearing, although the allegation was that one child had ingested medicine while with her *father*, the children's *mother*, S.C., stipulated that the children had been neglected. The children's father, C.B., did not stipulate that the children had been neglected and requested a contested hearing. Under Vermont law, though, the stipulation of a single parent who is the custodial parent is sufficient to waive all other parties' rights to contest the allegations. Vt. Stat. Ann. Tit. 33 § 5102(22). In practice, and in this case, that means that even if the allegations of neglect do not involve the custodial parent, the custodial parent may nonetheless prevent the non-custodial parent from challenging the allegations against them. *But see*, *In re Sanders*, 852 N.W.2d 524, 536 (Mich. 2014) (denying an accused parent an adjudicatory hearing is unconstitutional).

Father, C.B., filed a motion objecting to the "one-party stipulation" on constitutional grounds and also argued that the court's procedure denied him the constitutionally protected right to parent his biological children absent a court finding of "unfitness." *See Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (holding it

unconstitutional for the government to take a parent's children without proving that that parent is "unfit"). Both motions were denied.

Following the merits stipulation, the children were initially kept with their mother, but eventually were placed in state custody after allegations that the parents drank and argued in front of the children. The state moved the children back and forth from state custody to their mother's home until the government filed a petition to permanently terminate the parental rights of both parents.

The termination hearing lasted five days. On the first day, the parents' attorneys brought to the attention of the court that one of the children had written a letter objecting to termination of her parents' parental rights and asking for contact with her parents and siblings on her own behalf and on behalf of one of her siblings. On the basis of the letter, the parents' attorneys asked to depose the children in lieu of calling them as witnesses at the termination hearing – particularly because the children's attachment to their parents is a critical factor in determining whether to terminate parental rights. The motion to depose the children was denied.

Though the children were not deposed, numerous witnesses were permitted to testify to statements the children had made, speculate as to the children's desires, and testified that the children had made accusations of misconduct by C.B.'s father – the children's paternal grandfather. Hearsay objections to that testimony were overruled because hearsay is admissible without restriction in termination of parental rights cases in Vermont. *See* Vt. Stat. Ann. Tit. 33 § 5317(b)

("Hearsay may be admitted and may be relied on to the extent of its probative value.").

Given the need to respond to the hearsay accusations and statements provided by other witnesses, father's attorney subpoenaed the children as witnesses. Though there was no dispute that the children were competent witnesses and there is no law in Vermont allowing the court to prohibit a party from calling a witness to put on relevant evidence, the court quashed the subpoenas and refused to allow the children to testify.

In the end, the court issued a lengthy decision granting the government's petition to permanently terminate C.B.'s parental rights and allow the government to adopt the children to other families. In its decision, the court relied heavily on the hearsay accusations and statements to conclude that it was in the children's "best interest" to terminate their parental rights. *See* Vt. Stat. Ann. Tit. 33 § 5317(d) (the court will terminate parental rights if it is in the best interest of the children). Both parents appealed the termination decision to the Vermont Supreme Court.

The Vermont Supreme Court addressed the case through its "rocket docket," where almost all appeals of termination of parental rights cases are heard. Because it was on the "rocket docket," the appellate attorneys for the parents had a mere five minutes to argue before a reduced panel of three justices and the unpublished memorandum decision was written before argument even occurred.

In its decision, the Vermont Supreme Court simply stated, citing no law, that the trial court had the discretion to refuse to allow the children to testify on the

basis that "the negative impact on the children outweighed the probative value of their testimony." App. 4a. It relied on prior caselaw to explain that parents in termination of parental rights cases had no right to confront the witnesses against them or even to be present at the proceedings:

> Father argues that some of the court's findings [...] were based solely on the children's hearsay statements and the court refused to allow father to introduce the children's testimony in rebuttal. Father claims this amounts to a denial of due process. *There was no denial of due process here because father was provided with notice and an opportunity to be heard.* See In re C.L.S., 2021 VT 25, ¶ 19 214 Vt. 379 (explaining that fundamental requirement of due process is opportunity to be heard in meaning [sic] time and meaningful manner). Due process does not compel the testimony of children in juvenile proceedings or confer a right of confrontation to father. See In re R.W., 2011 VT 124, ¶ 64, 191 Vt. 108 (Dooley, J. concurring) (explaining that due process is satisfied by providing notice and opportunity to be heard, but *a parent is not conferred a right to be present or to confront witnesses*).

App. 4a-5a (emphasis added).

REASONS FOR GRANTING THE WRIT

1. **Because the right to parent one's children free from government intervention is a fundamental right, it should be protected the way that other fundamental rights are protected. The right to parent is not a simple interest that can be balanced in a *Mathews* process test, it is a long-established natural right and must be subject to great deference.**

    a. *This Court is highly protective of historically-established, long-protected rights that are essential to the orderly function of our nation, whether or not they are enumerated in the Constitution. That protection takes the form of bright-line rules and prohibitions, not tests that weigh the "value" of a long established traditional right against the interests of the government.*

This Court has established various tests and exceptions to fundamental

rights, both enumerated and unenumerated. Those rights have been identified as natural, fundamental rights which have historically and traditionally been protected by our common law and our early legislatures and are given an elevated status by courts today. Specifically, rather than balancing the individual's interest in the historically and traditionally protected right against the government's interest in regulating it, those rights that have been identified as occupying a position of historical protection are protected by bright-line rules and significant limitations on government intrusion.

Statements in dicta notwithstanding, there is no reason that the few natural and unenumerated rights protected by the Constitution should be treated any differently. United States Const. Amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Because Constitutional rights are guarded so jealously, this Court has been very conservative in finding unenumerated rights. This Court has held the recognition of unenumerated rights to a high standard: "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (*quoting Washington v. Gluksberg*, 521 U.S. 702, 721 (1997).

To that end, this Court has identified only a small number of unenumerated rights. In *Dobbs*, this court rejected the notion that there was an unenumerated right to abortion, noting that far from a "history and tradition" of protection of abortion rights, abortion had been the subject of prohibition and regulation since

the early days of the republic. *Dobbs*, 597 U.S. at 241. On the other end of the spectrum, this court has found that the right to keep and bear arms is protected by the Second Amendment, but would also be protected as an unenumerated right because of a lengthy tradition of protecting the right to bear arms, that makes up one of the "fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

Because of its status as a fundamental right, protected by historical legal tradition, the right to own a firearm for self protection may only be curtailed in a manner that is "consistent with the Nation's historical tradition." *New York State Rifle& Pistol Assn. Inc. v. Bruen*, 597 U.S. 1, 17 (2022). In *Bruen*, this court drew a bright line rule – that the government must affirmatively prove that its regulation of the right to own and possess firearms is "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. What this Court has specifically *rejected*, time after time, are the proposed "balancing tests" which would condition any regulation of firearms to a comparative analysis of the needs of the government and the interests of individuals. "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

Similarly, when considering First Amendment cases, this Court again eschews any "interest balancing" tests in favor of bright line rules. Even the some of the most odious speech – falsified child pornography – is not subject to a balancing

test because it does not fall within the historically accepted areas of "unprotected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Where speech is protected, even substantial government interests in regulation are insufficient to allow intrusion into such a fundamental right. *Id.*

b. The right to conceive, raise, and parent one's children is one of the oldest and longest-recognized fundamental rights in the world – predating governmental and political power.

One of the only other unenumerated rights that is not subject to controversy or constitutional doubt is the right to family integrity and parental autonomy free from government intervention. Since the founding of our nation, the right of parents to the custody and control of their own children has been identified as a natural right. *See Wright v. Wright*, 2 Mass. 109, 110-11 (Mass. 1806) (holding that, though the children of unmarried women lack certain legal rights, "the mother has a righ to the custody and control of him, and is bound to maintain him, *as his natural guardian.*) (emphasis in original). This Court has identified the right to conceive and raise one's child as "essential to the orderly pursuit of happiness by free men" *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Specifically, this Court has held that the right to conceive and raise children is "one of the basic civil rights of man" and "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Significantly for the analysis in this case, this Court has held that the right to parent is a right "far more precious [...] than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). Further, this Court has acknowledged that the state *cannot* act as a parent to effectively provide the kind of care and

upbringing that parents provide. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("care and nurture of the child reside first in the parents, whose primary function and freedom to *include preparations for obligations the state can neither supply nor hinder.*") (emphasis added). Though not mentioned specifically in the Constitution, this court has found the right to family integrity to be protected by the due process clause of the Fourteenth Amendment (*Meyer v. Nebraska*, supra, 262 U.S. at 399), the Equal Protection clause of the Fourteenth Amendment (*Skinner v. Oklahoma*, supra, 316 U.S. at 541); and the Ninth Amendment (*Griswold v. Connecticut*, 381 U.S. 479, 496 (1965). No natural or unenumerated right has enjoyed the stable and lengthy recognition by this Honorable Court as the right to parent without government intervention.

In fact, the right to parental custody, autonomy, and control are pre-political – parents' rights to raise their children independently do not flow from the power of the state, but from the natural relationship between parent and child. Unlike most fundamental rights, parents have had the right and expectation to raise their children independently since pre-historical times. *See* Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 Am. J. Juris. 197, 202 (2014) (identifying the moral and biological imperatives of parenthood absent political power). Saint Thomas Aquinas made the same observations more than 800 years ago, writing in the *Summa Theologiae* that just as a child is "enfolded within its mother's womb" before it is born, it is "enfolded in the care of its parents, which is like a spiritual womb [...] according to natural law, a son, before coming to the use

of reason, is under his father's care. Hence it would be contrary to natural justice, if a child, before coming to the use of reason, were to be taken away from its parents' custody, or anything done against its parents' wish." St. Tomas Aquinas, *Summa Theologiae,* II-II, q.10, a.12.

> c. *Though the rights of parents are well-established and historically protected, they have been eroded in the modern era by "balancing tests" which equate the government's interest in permanently terminating parents' relationships with their children with the natural and fundamental right to parent.*

Despite the well-established and deeply historical tradition of parental rights, states have treated the relationship between children and parents as little more than a property interest. Indeed Vermont has repeatedly invoked this Honorable Court's decision in *Mathews v. Eldridge* to define the boundaries of process to which parents are entitled before being permanently deprived of their children. 424 U.S. 319 (1976). *Mathews* provides a "balancing" test that defines the scope of process due to any person being deprived of an interest, usually a property interest, by the government. *Id.* at 342-347. Since *Mathews* was decided, this Court has generally limited its applicability to cases involving the deprivation of a government benefit or to define the scope of rights available to those who are incompetent or committed to state custody for mental health reasons. *See, e.g., Heller v. Doe*, 509 U.S. 312 (1993) (applying *Mathews* test to Kentucky's procedures for involuntary mental health commitment); *City of Los Angeles v. David*, 538 U.S. 715 (2003) (applying *Mathews* test to a city towing ordinance).

Twice, this court has invoked the *Mathews* test to address child protection

cases, and both of those cases have demonstrated the infirmity of the test in the child welfare context. In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court, applying *Mathews*, held that to permanently terminate parents' rights, a court must do so by clear and convincing evidence rather than by a preponderance of the evidence. *Id.* at 769. This Court never said *what* the state must prove by clear and convincing evidence, only that whatever criteria a state decided could justify a termination of parental rights must be proven by clear and convincing evidence. *Id.* In so deciding, the Court acknowledged that its decision on the standard of proof did nothing to address the substantive problems at the heart of the child welfare system:

> At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families*, 431 U.S., at 835, n. 36, 97 S.Ct., at 2105, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833–835, such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in

> family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

Santosky v. Kramer, supra, 455 U.S. at 762-63 (internal footnotes omitted).

The *Mathews* analysis in *Santosky* may have provided a standard of proof to be applied by state courts, but it accomplished nothing. Because states were left with unfettered authority to define the conditions that permit a termination of parental rights, it does not matter what the standard of proof actually is. For example, in Vermont, it is only necessary that the government prove that termination of parental rights is in the best interest of the child by clear and convincing evidence. *See, e.g., In re H.G.*, No. 23-AP-304, 2024 WL 557602, *2 (Vt. 2024) (unpub.) (mem.) ("If it finds a change in circumstances, the court must then consider wither termination is in the child's best interests"). While in other states, the government must prove much more. In New Jersey, the standard for termination of parental rights is that the government must prove "by clear and convincing evidence that risk of 'serious and lasting [future] harm to the child' is sufficiently great as to require severance of the parental ties." *New Jersey Division of Child Protection and Permanency v. K.S.*, No. A-0016-16T1, 2017 WL 2666362, *6 (2024) (unpub.) (mem.) (*quoting In re Adoption of a Child by W.P. & M.P.*, 706 A.2d 198, 201 (N.J. App. 1998) (*quoting In re Guardianship of J.C.*, 608 A.2d 1312, 1316 (N.J. 1992)). A similar standard in North Dakota requires that "[t]o terminate a

person's parental rights, the petitioner must prove the child is deprived; the conditions and causes of the deprivation are likely to continue or will not be remedied; and, that by reason thereof the child is suffering or will probably suffer serious physical, ,mental, moral, or emotional harm." *In re J.S.*, 743 N.W.2d 808, 812 (N.D. 2008). There is no consistency in the grounds for termination of parental rights across the states which renders consistency in the standard of proof irrelevant. *Mathews* was an inappropriate tool for deciding *Santosky* because it limited the Court's holding to the applicable standard of review.

A year before, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), this Court applied *Mathews* to hold that parents subject to a termination of parental rights proceeding were not entitled to counsel. *Id.* at 33-34. In doing so, the Court acknowledged the weakness of the *Mathews* analysis, holding that its decision was contrary to public policy, conflicted with the overwhelming recommendations of governmental and non-governmental organizations in the field of child welfare law, and was inconsistent with the laws of the majority of states. *Lassiter v. Department of Social Services*, supra, 452 at 34. In that case, the *Mathews* analysis provided a result that was already repudiated by the legal world and now represents a dead letter of law as every state now provides counsel for parents in termination of parental rights cases, despite this Court's holding in *Lassiter*.

Mathews' failure to create useful law regarding the right to counsel in termination proceedings was presaged by Justice Stevens, who wrote in dissent that

Mathews was an appropriate test to determine due process requirements in property cases, but that the right to counsel in a case with such significant consequences should not be determined by weighing the burdens on the respective parties, but rather should be guaranteed as a measure of fundamental fairness like the right to counsel in criminal cases. *Lassiter v. Department of Social Services*, supra, 452 U.S. at 59-60 (Stevens, J. dissenting).

d. There is a deep split of authority among states as to what due process rights are available to parents who are subject to attempts by the government to permanently terminate their parental rights because of the vague and subjective nature of tests which balance governmental interests against personal rights.

Due to the vague and subjective nature of the *Mathews* balancing test, states have applied it to termination of parental rights proceedings with completely disparate results. While Vermont has reduced *Mathews* to its core and promises parents only "the right to be heard at a reasonable time in a reasonable manner" *In re C.L.S.*, 253 A.3d 443, 451 (Vt. 2021) (internal quotation omitted). The Vermont Supreme Court has used that minimalist interpretation of *Mathews* to deny parents the right to challenge hearsay presented at a termination hearing. App. 4a-5a (explaining that there is no right to challenge hearsay, merely "to be heard in a meaning [sic.] time and meaningful manner.). Vermont is among a small minority of states that permits the use of hearsay in termination proceedings. *See also, In re J.R.B.*, 715 P.2d 1170-1173-74 (Alaska 1986) (holding that the admission of hearsay in a termination proceeding does not violate due process).

Other states have applied the same test and reached opposite conclusions. In

New Jersey Div. of Youth & Fam. Servs. v. B.M., 993 A.2d 258, 267-68 (N.J. App. 2010), a New Jersey court held that the admission of doctor's records without the doctor present for cross-examination was a violation of due process. In *Ark. Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 886 (Ark. 2002), the Arkansas Supreme Court held that a caseworker's "home study" documents were properly excluded from a termination proceeding because the fundamental liberty interest in parental rights weighed so heavily against the government's interest in admitting the document. And in *Lewis v. Dep't of Health & Rehabilitative Servs*, 670 So.2d 1191, 1193-94 (Fla. App. 1996), a Florida court held that due process would be violated if social services investigation reports were admitted without the opportunity to cross-examine the authors.

The split of authorities on the simple issue of the admissibility of hearsay in a termination of parental rights proceeding demonstrates the weakness of *Mathews* as a tool for defining due process rights in the most grave proceedings held in state courts. "The termination of parental rights has been characterized as tantamount to a 'civil death penalty'." *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. Banc. 2004). That characterization reflects the natural, instinctive, and moral bond between parents and children. Most parents would choose a lengthy jail sentence, even a life sentence, over the permanent severance of the relationship with their children. Just as *Mathews* has been rejected in the world of criminal law because of the fundamental rights at stake (*see Medina v. California*, 505 U.S. 437, 443 (1992) ("[T]he *Mathews* balancing test does not provide the appropriate framework for

assessing the validity of state procedural rules which [...] are part of the criminal process."), it should not be applied in termination of parental rights cases where it produces inconsistent and arbitrary results that do not reflect the incredibly fundamental, long-established, and historically-protected rights of parents to raise their own children.

CONCLUSION

The petition for a writ of certiorari should be granted

Dated this June 10, 2024 at Montpelier, Vermont,

Marshall Pahl
Counsel of Record
Office of the Defender General
6 Baldwin St., 4th Floor
Montpelier, VT 05633
marshall.pahl@vermont.gov

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Vermont Supreme Court Decision affirming the decision terminating C.B.'s parental rights, *In re W.B.*, No. 23-AP-227, 2024 WL 166964 (Vt. 2024) (unpub.) (mem.) ..... ia

Vermont Supreme Court
Filed: January 12, 2024

VERMONT SUPREME COURT

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

Case Nos. 23-AP-227 &
23-AP-240

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, 2024

In re W.B., L.B., S.B., J.B., Juveniles (C.B., Father* & S.C., Mother*)	}	APPEALED FROM: Family Division Superior Court, Franklin Unit CASE NOS. 252-10-19, 253-10-19, 254-10-19 & 255-10-19 Frjv
In re G.C., Juveniles (S.C., Mother*)	}	CASE NO. 256-10-19 Frjv

Trial Judge: Howard E. Van Benthuysen

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

Mother and father appeal termination of their parental rights to L.B., W.B., S.B., and J.B., born in March 2017, May 2015, April 2010, and October 2007, respectively. Mother also appeals termination of her parental rights to G.C., born in March 2014.[1] On appeal, parents both argue that the children's attorney had a conflict of interest that prevented the attorney from adequately representing all the children at the same time and the court erred in denying their requests to depose the children and to have them testify. Father argues that some findings were not supported because they rely solely on hearsay statements by the children. Mother argues that not all findings are supported by the evidence, and it was not in the children's best interests to have mother's rights terminated where they have a loving relationship with her. We affirm.

The Department for Children and Families (DCF) became involved with the family due to concerns about drug use. In October 2019, the State filed a petition alleging the children were in need of care or supervision (CHINS) because they were without proper parental care due to

[1] G.C.'s father did not seek custody, advocating for mother to have custody of the children. He did not attend the termination hearing and did not appeal termination of his parental rights.

parents' substance abuse, the exposure to substances, domestic violence, and lack of adequate supervision for the children. Mother and father were in a relationship but were not regularly living together. Mother, who had primary custody of the children, stipulated to the merits of the petition. The goal was reunification and the children were initially placed with mother under a conditional custody order (CCO), but were subsequently removed due to her failure to supervise the children, her positive drug screening, and father's use of alcohol and behavioral problems. There were subsequent attempts to place the children with mother, but these were unsuccessful for similar reasons. The reunification attempts with mother negatively impacted the children.

The court found that father engaged in abuse and domestic violence against mother, some of which was witnessed by the children and that father lacked insight into how this negatively affected the children. Father did not complete the goals of the case plan. He did not complete recommended domestic-violence programming, did not regularly attend treatment, continued to struggle with alcohol abuse, did not engage in mental-health treatment, and did not provide releases for DCF. Father lacked stable housing. During the case, he stayed at mother's house in violation of the case plan. He did not believe an allegation that his father sexually assaulted G.C. and brought the children to his father's house despite DCF's prohibition against it.

Mother struggled with alcohol and drug addiction and admitted to using crack cocaine during the pendency of the case. Mother completed some of the case-plan goals, including completing a domestic-violence assessment and engaging at times in medically assisted treatment. However, she did not meet other key goals. Mother did not consistently engage in mental-health treatment, had numerous drug relapses, tested positive for unprescribed substances, and was unable to maintain sobriety. Mother had stable housing until the time of the final hearing, but subsequently lost her housing. She was unemployed. Although mother attended parent-child contact, she was impaired at times and did not move beyond supervised contact due to concerns about her relapses. Mother was often late to visits and this upset the children.

By the time of the final hearing, all children were in pre-adoptive placements. J.B. W.B., and S.B. were placed with their maternal grandmother. They were doing well in grandmother's care. They had a routine and regularly attended school and medical and counseling appointments. L.B. was placed with a foster family where she has lived since May 2020, except for periods totaling less than six months when there was attempted reunifications with mother. L.B. developed a loving relationship with her foster parents and improved in her development and social skills. G.C. had several foster placements and exhibited sexualized behaviors. By the time of the final hearing, she had settled into a foster family that intended to adopt her and she was receiving counseling.

In September 2022, the State filed petitions to terminate parental rights. Parents moved several times to have the children testify. The court denied the requests, finding that the evidence parents sought could be presented through other witnesses and the negative impact on the children outweighed the probative value of the children's testimony.

Following an evidentiary hearing over several days, the court found that there was a change of circumstances due to parents' stagnation. Mother did not address the key issues of substance abuse, domestic violence, lack of proper supervision, and control of inappropriate partners around the children. Mother continued to struggle with substance abuse and did not maintain consistent medically assisted treatment or substance-abuse counseling. Mother was involved with partners who were violent and exposed the children to domestic violence. Mother

did not consistently or satisfactorily engage in mental-health counseling. Mother did not keep her releases current and did not consistently cooperate with drug testing. Mother was unemployed and lost her housing. Father also struggled to maintain sobriety. He continued to use alcohol and tested positive for nonprescribed substances. He allowed releases to lapse and did not provide all required drug tests. He lacked stable housing.

The court further found that termination was in the children's best interests. The children were well adjusted to their foster homes and had positive relationships with their foster families and communities. Parents would not be able to resume parenting in a reasonable time as measured from the needs of the children. Father indicated he did not want custody of the children and sought to have the children returned to mother so he could visit in her home. In any event, he had not fulfilled the most important parts of the case plan reunification goals and was not able to resume parental duties in a reasonable time. In the three years the children were in custody, there were multiple unsuccessful attempts at reunification with mother. Mother did not progress on key case-plan goals. She did not maintain sobriety and did not participate mental-health counseling. Parents lacked suitable and stable housing. The children were in custody for over two years and further delays were not in their best interests. Therefore, the court granted termination of parental rights. Mother and father appeal.

When termination is sought after initial disposition, as in this case, the family court must conduct a two-step analysis. It must first consider if there was a change of circumstances and second whether termination is in the child's best interests. In re K.F., 2004 VT 40, ¶ 8, 176 Vt. 636 (mem.); see 33 V.S.A. § 5113(b) (requiring change of circumstances to modify existing disposition order); 33 V.S.A. § 5114(a) (listing factors to determine best interests of child). As long as the court applied the proper standard, we will not disturb its findings on appeal unless they are clearly erroneous; we will affirm its conclusions if they are supported by the findings. In re G.S., 153 Vt. 651, 652 (1990) (mem.). "Our role is not to second-guess the family court or to reweigh the evidence, but rather to determine whether the court abused its discretion in terminating . . . parental rights." In re S.B., 174 Vt. 427, 429 (2002) (mem.).

We first address parents' joint argument alleging that the children's attorney had a conflict of interest. On the first day of the termination hearing, the court was discussing the status of exhibits with the parties and mother's attorney indicated that there was a letter from S.B. indicating that she did not want to be adopted and wished to return home to her mother. Mother's attorney also stated that G.C. was not in a pre-adoptive home. Mother's attorney stated that the children's different placements and desires called into question "the ability of one attorney to represent five juveniles." There followed a discussion between the court and the attorneys regarding admission of the letter and parents' request for the children to testify regarding their wishes. During the discussion, the children's attorney stated that she had spoken to each child and noted that although the children wanted contact, they did not wish to live permanently with mother and father. At no time did either parent move to disqualify children's attorney or ask for appointment of new counsel.

On appeal, parents argue that the children's attorney had an obvious and unresolved conflict of interest that prevented the attorney from adequately representing all the children at the same time. Father alleges that some children wanted contact with parents and that the attorney erred in advocating for an outcome contrary to those children's wishes.

"[O]ne attorney may represent more than one child in a juvenile proceeding and will not be disqualified unless an actual conflict arises." In re L.H., 2018 VT 4, ¶ 35 n.9, 206 Vt. 596.

An actual conflict occurs when "an attorney's professional judgment for one client necessarily will be affected adversely because of the interests of another client." In re Jasmine S., 63 Cal. Rptr. 3d 593, 601 n.6 (Cal. Ct. App. 2007) (quotation omitted).

Parents did not properly preserve the argument they now raise on appeal. See In re C.H., 170 Vt. 603, 604 (2000) (mem.) (explaining that parent must raise issue in family court to preserve it for appeal). Because neither parent alleged an actual conflict or moved to disqualify counsel, there was no opportunity for the other parties to respond or for the court to evaluate the merits of parents' argument. Mother's vague statement at the hearing was not sufficient to preserve this issue, especially because it came before the children's attorney explained the attorney's interactions with each child and the children's responses. See In re A.M., 2015 VT 109, ¶ 28, 200 Vt. 189 (explaining that preservation requires presenting argument with "specificity and clarity" so that trial court has "fair opportunity to rule on it" (quotation omitted)). Moreover, on appeal, parents' argument is built on the assumption that some children wanted reunification with parents, which is contrary to the family court's findings. The family court found that the sentiment expressed in the letter was due to S.B.'s brief anger over her grandmother's enforcement of a rule and not a reflection of her true desire, which was to continue living with her grandmother.

Parents next raise arguments regarding the court's denial of their requests to have the children be deposed and to testify. Prior to the termination hearing, parents moved to depose the children or to subpoena them to testify. The children's attorney opposed the request. The court denied the request, finding that the negative impact on the children outweighed the probative value of their testimony. Mother and father renewed their motions during trial and the court again denied the requests.

On appeal, mother contends that the trial court abused its discretion in declining to allow the children to testify because, mother asserts, their testimony was the sole means for mother to demonstrate their love and attachment to her, which was critical to the court's best-interests analysis. In a juvenile proceeding, the court may allow deposition of a minor if it would further the purposes of the juvenile proceeding. See V.R.F.P. 2(d)(5). These purposes include providing for the "care, protection, education, and healthy mental, physical, and social development of children," preserving family and separating children only when necessary, and ensuring "safety and timely permanency for children." 33 V.S.A. § 5101. The family court acted well within its discretion here in assessing the need for the children to testify against the damage that this might cause to these young children. The court found that information regarding the children's adjustment to their foster homes, relationships with mother, and connections to the community could be assessed through the testimony of other witnesses and that the potential harm to the children outweighed any probative value of their testimony. See In re C.B., 2020 VT 80, ¶ 27, 213 Vt. 215 (noting that best interests of child should drive exercise of discretion in juvenile proceedings).

Father argues that some of the court's findings regarding domestic violence and father's substance abuse were unsupported by the record because they were based solely on the children's hearsay statements and the court refused to allow father to introduce the children's testimony in rebuttal.[2] Father claims this amounts to a denial of due process. There was no

[2] The court found that during one of the attempts at reunification parents left the children with their paternal grandfather even though the children were not supposed to be around him or at his house because G.C. alleged that she was sexually assaulted by her paternal grandfather.

denial of due process here because father was provided with notice and an opportunity to be heard. See In re C.L.S., 2021 VT 25, ¶ 19, 214 Vt. 379 (explaining that fundamental requirement of due process is opportunity to be heard in meaning time and meaningful manner). Due process does not compel the testimony of children in juvenile proceedings or confer a right of confrontation to father. See In re R.W., 2011 VT 124, ¶ 64, 191 Vt. 108 (Dooley, J., concurring) (explaining that due process is satisfied by providing notice and opportunity to be heard but parent is not conferred right to be present or to confront witnesses).

In addition, the court did not err in relying on hearsay statements. "Hearsay evidence is admissible in termination proceedings as long as it is not the sole basis for termination of parental rights." In re A.F., 160 Vt. 175, 181 (1993). The children's hearsay statements did not form the sole basis for termination of father's parental rights. The court held hearings over several days and heard from multiple witnesses. The court made extensive findings regarding father's lack of compliance with the case plan and the children's best interests. The court's decision to terminate father's parental rights was based on extensive nonhearsay evidence, including father's own testimony.

Contrary to father's assertion, the record supports the court's findings challenged by father. Evidence beyond the children's hearsay statements supported the court's findings that father was physically aggressive in front of the children and that he physically abused mother. Father himself testified that he "went at" a man with a knife and punched him in the face and two children observed this and were hurt and crying. Court records indicate that father was convicted of assaulting mother in 2012. Mother also testified concerning father's violent behavior and her past requests for abuse-prevention orders. Father also claims that the evidence does not support the court's findings that he only completed half of his urine tests and that he did not seek custody of the children. As to the urine tests, the DCF worker testified that as of the time of the final hearing father had not appeared for a urine test since September 2022. As to father's desire to have custody of the children, the court's findings accurately reflected father's position during the pendency of the case in which at no time did he seek full custody of the children. Critically, nonhearsay evidence supported the court's findings that father's progress had stagnated, and that termination was in the children's best interests, particularly that father would not be able to parent within a reasonable time. Father struggled to maintain sobriety and acknowledges that alcohol remained a problem for him. He has tested positive for nonprescribed substances. He

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The court found that paternal grandfather exposed his penis to L.B. inappropriately. Although mother was aware of these allegations and mother knew the children were not allowed to be around him, mother left the children at grandfather's house. On appeal, father argues that the evidence does not support the court's findings that grandfather exposed himself to L.B. or that parents left the children with grandfather over the weekend because he claims these findings were based solely on L.B.'s hearsay statements. In addition to L.B.'s hearsay statements, these findings were supported by the testimony of the DCF caseworker and mother. Mother testified that she knew there were pending sexual abuse charges against grandfather and that she believed both L.B. and G.C. regarding their allegations about grandfather. The DCF case worker testified that when parents were first interviewed regarding the children being at grandfather's home, neither suggested that grandfather was not there. Weeks later, parents asserted that grandfather was not at home. The court could reasonably infer from this testimony and the hearsay statements of the children that grandfather was present during that time. In any event, this finding was not critical to the court's assessment of father's stagnation or its determination of the children's best interests.

lacked stable housing. The children need stability, and father will not be able to parent in a reasonable time.

Finally, father also contends that his rights should not be terminated where he was not proven unfit. He asserts that without a finding of unfitness, it was improper for the court to require him to complete action steps in the case plan. By not raising his objection to the case-plan requirements or action steps at disposition, father has not properly preserved this argument for appeal and therefore we do not reach it on appeal. In any event, this Court has previously rejected the argument that the State must demonstrate a parent is unfit at the time of termination. Under the statutory scheme, "the determination of parental unfitness, which triggers the transfer of custody away from the parents, must be made at the disposition hearing." In re R.L., 148 Vt. 223, 227 (1987).

We turn to mother's arguments. Mother contends that the record does not support the court's finding that she used crack cocaine two weeks before the May hearing. At the termination hearing, the court had the following exchange with mother:

> THE COURT: Okay. All right. And I think you said that recently, within the last couple of weeks, you used some crack cocaine with some of your friends? So is that what you would call a slip?
>
> THE WITNESS: I don't know.
>
> THE COURT: When you talked about slips earlier, was that a slip?
>
> THE WITNESS: It's a—a slip would be, like, one time.
>
> THE COURT: Okay. So that was a slip?
>
> THE WITNESS: And then you go right back to getting clean.
>
> THE COURT: Is that what happened a couple weeks ago?
>
> THE WITNESS: I'm definitely struggling.
>
> THE COURT: I'm sorry?
>
> THE WITNESS: I'm struggling.
>
> THE COURT: Okay. Are you struggling with alcohol more than the coke?
>
> THE WITNESS: Yes.

Mother contends that this testimony demonstrates that she did not confirm that she used cocaine two weeks prior to the hearing and therefore the court's finding is erroneous. The court's finding that mother used crack cocaine was a reasonable inference from mother's testimony. In any event, even if erroneous, there was ample other evidence to support the court's findings regarding mother's ongoing struggle to maintain sobriety. See In re B.M., 165 Vt. 331, 340 (1996) (explaining that reversal of termination order not required if some findings are erroneous as long as sufficient findings exist to support court's decision). The unchallenged evidence

indicates that mother continued to struggle with substance abuse and had not maintained sobriety for any significant period of time.

Mother also argues that it is not in the children's best interests to have mother's rights terminated where they have a loving relationship with her. Mother argues that the court's balancing of the statutory factors was incorrect and that she has a strong bond with the children and can resume parenting through a slow transition back to her home. Mother is essentially asking this Court to reassess the statutory factors. That is not the role of this Court. The family court has discretion to determine the credibility of witnesses and weigh the evidence. In re D.S., 2014 VT 38, ¶ 22. Here the court properly assessed the statutory factors. As to the most important factor—whether mother would be able to parent within a reasonable time—the court found that mother was not prepared to parent and that the children required stability. The court therefore properly concluded that termination was in the children's best interests.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice