

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

SUPREME COURT DOCKET NO. 2018-145

SEPTEMBER TERM, 2018

In re M.S., Juvenile	}	APPEALED FROM:
(L.S., Mother* & T.P., Father*)	}	
	}	Superior Court, Bennington Unit,
	}	Family Division
	}	
	}	DOCKET NO. 85-8-15 Bnjv
		Trial Judge: John W. Valente

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

Mother and father separately appeal from an order of the superior court, family division, terminating their parental rights to their son, M.S. We affirm.

M.S. was born in June 2015. In late August 2015, M.S. was seriously injured in a fall while in the parents' care. The evening that M.S. was injured, both parents tested positive for substance use. As the result of the fall, M.S. suffered two skull fractures, a brain hemorrhage, and a broken clavicle. The child was hospitalized for four days.

The parents' accounts of how the injuries to M.S. occurred were not consistent, and the mechanism of the injury could not be fully determined. Mother admitted to non-prescribed drug use, and she reported that father had encouraged her not to seek help for M.S. for fear of further Department of Children and Families (DCF) involvement. The physician assessing M.S.'s injuries stated that "there is not a plausible explanation for the injuries making the possibility of a non-accidental trauma greater." The physician recommended that M.S. not be returned to the care of his parents, concluding that "[a]t the very least, there appear[ed] to be a significant contribution of negligence underlying M.S.'s injuries."

The same day of the fall, DCF filed a petition alleging that M.S. was a child in need of care or supervision (CHINS) because he was without proper care necessary for his well-being. See 33 V.S.A. § 5102(3)(B). The family court issued an emergency care order and transferred custody of M.S. to DCF based on its finding that M.S.'s safety could not be reasonably assured if the child remained in the custody of his parents. M.S. was placed in foster care and, after a brief stay with a short-term foster family, has remained with the same foster family ever since then. On August 28, 2015, the family court issued a temporary care order maintaining DCF custody.

In September 2015, mother was incarcerated for a violation of probation in connection with a DUI-drug conviction. She remained incarcerated for five months and was released in late February 2016. In October 2015, father was charged with DUI-drug. On February 4, 2016, the parties stipulated to a CHINS adjudication based on the allegations in the petition.

In early April 2016, at which time M.S. had already been in DCF custody for nearly eight months, the parents stipulated to, and the family court approved, a disposition case plan. The disposition case plan stated that “[d]ue to the seriousness of this case a concurrent goal has been developed to either discharge custody to [mother] and/or [father] or develop alternate permanency plan if parents are unable to resume parenting in a time frame reasonable for the child.” The concurrent goals of adoption or reunification with the parents were to occur within six months. The plan indicated that it was in M.S.’s best interests to be raised by one or both of his parents if the resumption of parental duties could be done safely and within a reasonable period of time. The plan also noted, however, that M.S. was very young and needed to have permanence as soon as possible. The plan included measures addressing issues of substance abuse and mental health to help the parents provide a safe environment for M.S. The recommendations contained therein were similar to those DCF presented at the temporary care hearing in August 2015. Pursuant to the recommendations, mother was to, among other things, engage in scheduled visitations, not abuse drugs or alcohol while caring for M.S., continue to remain compliant with substance abuse treatment and therapy, participate in a parenting class, provide a safe and nurturing environment for M.S., maintain safe and stable housing, follow all conditions imposed by the Department of Corrections (DOC), continue to engage with DCF and to work with service providers, and sign releases to allow service providers to communicate with DCF. Father was to, among other things, engage in scheduled visitations, not abuse alcohol or drugs while caring for M.S., obtain a substance abuse assessment and follow through with recommendations, participate in a parenting class, sign releases to allow DCF to access service providers, maintain safe and secure housing, maintain communication with DCF and work cooperatively with service providers, and follow through with all treatment plans and recommendations from his neurologist.

In the next few months following the disposition order, both parents made progress toward case plan goals. Mother was attending visits, had taken parenting classes, was compliant with DOC conditions, had signed releases, and was communicating with DCF. DCF still had concerns, however, that she was not getting the appropriate level of substance abuse therapy to help her maintain her sobriety and that she was struggling to stay with a therapist long enough to develop a relationship that would serve her needs. Father was also attending visits regularly, was enrolled in a parenting class, was working with a neurologist to address his own medical concerns, had had a substance abuse assessment and a psychological evaluation, had signed releases, had maintained stable housing, and was communicating with DCF and all service providers. Father had still not resolved his criminal charges, however, and DCF had ongoing concerns about how father’s physical problems were impacting his ability to care for M.S. safely. There was an incident during a visit in which father, who had balance problems, nearly fell while holding M.S. in his arms. This was of particular concern to DCF because of the family’s history.

In November 2016, the parents were evicted from their apartment. Father became homeless, while mother was incarcerated as the result of a furlough violation. In February 2017, DCF requested a change in the case plan goal to only adoption. The stated reasons for the change was that M.S. had been in custody for eighteen months and that the parents had not been able to resume their parenting duties within a time frame that was in M.S.’s best interests. DCF noted that mother had not followed through with any substance abuse treatment recommendations, had not recently been compliant with DOC or DCF expectations, and had been incarcerated as a result of a furlough violation. DCF further noted that father was homeless and had not demonstrated an ability to safely parent M.S. In late April 2017, after completing her sentence, mother reengaged in supervised visits. She did not enroll in a substance abuse treatment program or obtain a therapist, however. By July 2017, she had obtained a job and was living with her mother. Father remained homeless at the time and was attempting to address his own medical needs while

continuing with supervised visits. Meanwhile, M.S. remained with the same foster family with whom he had been since September 2015.

In late June 2017, DCF filed a petition to terminate mother's and father's parental rights. A hearing was held on March 2, 2018. Following the hearing, the family court concluded, by clear and convincing evidence, that DCF had demonstrated that there was a substantial change of circumstances because both mother's and father's abilities to resume parental duties had stagnated and that M.S.'s best interests warranted terminating the parental rights of both parents. Both mother and father separately appeal the superior court's termination order.

Father argues that the court's stagnation and reasonable-period-of-time conclusions are not supported by its findings, which, in turn, are not supported by the evidence. Mother argues that the evidence presented at the termination hearing did not support the family court's findings underlying its conclusions either that her parental rights had stagnated or that the parents would be unable to resume their parental duties within a reasonable period of time.

In post-disposition termination cases, the family court undertakes a two-step inquiry, "first determining whether there has been a substantial change in material circumstances from the initial disposition order, and, if there has, whether the best interests of the child require termination of parental rights." In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44. "A substantial change of 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." Id. (quotation omitted). "Stagnation may be found when the parent has not made the progress expected in the plan of services . . . despite the passage of time." Id. (quotation omitted). "We will affirm the [family] court's findings in support of changed circumstances unless they are clearly erroneous, and its conclusions if reasonably supported by the findings." Id.

"[T]o determine a child's best interests, the court must consider four statutory factors." In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325; see 33 V.S.A. § 5114(a) (setting forth criteria for determining best interests of child). "The most important factor in the court's analysis is the likelihood that the natural parent can resume his or her parental duties within a reasonable period of time." In re D.S., 2014 VT 38, ¶ 22. "The reasonableness of the time period is measured from the perspective of the child's needs, and may take account of the child's young age or special needs." In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29 (citation omitted). "The court's inquiry must be forward-looking, that is, the court must consider a parent's prospective ability to parent the child," but "past events are relevant in this analysis." In re D.S., 2014 VT 38, ¶ 22 (quotation omitted). "As long as the court applied the proper standard, we will not disturb its findings unless they are clearly erroneous, and we will affirm its conclusions if they are supported by the findings." Id. (quotation omitted). "We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." Id. (quotation omitted).

Regarding stagnation and his ability to resume his parental duties within a reasonable period of time, father argues that neither the evidence nor the family court's findings support the court's conclusions that his ability to parent M.S. had stagnated as the result of his physical infirmities and his reluctance in one instance in the past to obtain medical assistance for M.S.'s injuries. Regarding his past reluctance to seek help for M.S. injuries, father contends that he cannot be faulted for not addressing an issue that was not addressed in the case plan. Along these lines, he cites the absence of any evidence that he failed to complete a recommended service or that he made any statements or engaged in any conduct suggesting that he would still be reluctant to obtain medical assistance for M.S. if the child were to be placed in his care. Regarding his physical infirmities, he argues that DCF failed to meet its burden of submitting evidence of a prognosis or

prescribed medications that would prevent him from parenting M.S. The parties disagree as to who was at fault for the lack of information regarding father's medical problems. Father contends that DCF, and not him, is responsible for failing to obtain records from his neurologist.*

In discussing changed circumstances due to stagnation, the family court found that, although father had consistently attended scheduled visits with M.S., some of those visits were cut short because father had fallen asleep and reported feeling exhausted. During one visit, he had placed M.S. at risk by losing his balance while carrying the child on stairs. The court expressed doubts about whether father was capable of caring for an active child, given his physical limitations. The court stated that concerns over father's ability to keep M.S. safe had prevented father from having visits with M.S. in an outside environment. The court also cited father's reluctance to obtain medical assistance when M.S. was injured in August 2015 and DCF's ongoing uncertainty as to whether those injuries were the result of physical abuse or an accident caused by negligence. As for the best-interests analysis, the court cited the same issues to demonstrate that father would not be able to resume his parental duties within a reasonable period of time from the perspective of M.S., who had been in state custody for over two and one-half years, essentially his entire life, at the time of the termination hearing.

We conclude that the evidence and the family court's findings were sufficient to support the court's determination that father's ability to parent M.S. had stagnated and that father would not be able to resume his parental duties within a reasonable period of time from M.S.'s perspective. As the court indicated, due to the fact the M.S. had been severely injured and was an infant when he was taken into state custody, it was critical for the parents to demonstrate their ability to parent M.S. safely within a reasonable time frame. M.S. was taken into state custody in August 2015, when M.S. was only two months old. The adopted disposition case plan set a goal of achieving reunification by October 2016. In November 2016, father and mother were evicted from their apartment, resulting in father becoming homeless and moving to a shelter, where he remained for over a year until mother and father moved into an apartment together in December 2017. At the time of the termination hearing, neither the extent of father's observed physical infirmities nor any necessary medical treatment was completely understood. Because of these circumstances, father had not been able to move from supervised to unsupervised visitation. Meanwhile, M.S. was well adjusted in the foster family with whom he had lived for most of his life. These facts were sufficient to support by clear and convincing evidence the superior court's finding of stagnation and its conclusion that father would not be able to resume his parental duties within a reasonable period of time from M.S.'s perspective.

The evidence is even stronger as to mother, with respect to the family court's finding of stagnation and its conclusion that she would be unable to resume her parental duties within a reasonable period of time from M.S.'s perspective. As the family court stated, in the two-and-one-half years since M.S. came into state custody, mother had been incarcerated for two separate

* The DCF caseworker testified that father reported being diagnosed with Parkinson's disease. Before and after that diagnosis, the case worker unsuccessfully attempted to obtain medical records from father's neurologist. Apparently, father signed a DCF release form that was sent to the neurologist's office, but the case worker was still not able to obtain father's medical records from the office. The case worker did not seek to obtain a release form from the office, and father never obtained the records himself to give to DCF, despite the case worker's request that he do so. In July 2016, the family court denied father's motion for unsupervised visits, noting that M.S. had been severely injured in an unexplained fall, that father had been observed having difficulty safely carrying the child, and that DCF had not been able to obtain more information about father's neurological condition.

periods of time totaling nearly a year, which significantly affected her ability to attain the necessary improvement in parenting ability contemplated by the case plan goal of reunification in a timely manner. Further, the evidence supports the court's findings that mother did not always consistently engage in supervised visitation; that she had not engaged with a therapist long enough to establish a relationship to serve her mental health needs that were evidenced by her angry outbursts and threatening comments to DCF personnel; that she did not follow through with substance abuse treatment, which continued to be a concern; and that she was without her own residence from November 2016 until December 2017, nearly two and one-half years since M.S. had been taken into state custody.

Finally, we reject mother's argument that the family court failed to analyze the parents' ability, as a couple, to parent M.S. Even assuming that the court should have explicitly considered how the parents could have complemented each other in caring for M.S., for the reasons stated above, the record does not support mother's claims that the parents, either apart or together, could resume their parental duties within a reasonable period of time from M.S.'s perspective.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice