

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. 2019-170

OCTOBER TERM, 2019

In re A.M., A.M., J.M., P.M., Juveniles	}	APPEALED FROM:
(J.M., Father* & J.M., Mother*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 24/25/26/27-3-16 Wmjv
		Trial Judge: Katherine A. Hayes

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

Mother and father separately appeal the termination of their parental rights with respect to their four children. We affirm.

The four children who are the subject of these proceedings were born during mother's and father's marriage before they divorced in 2013, at which point mother became the custodial parent. The four children—An.M., Al.M., J.M., and P.M.—were born, respectively, in May 2005, May 2006, December 2007, and January 2010. The family division terminated mother's and father's parental rights following an adjudication on a second set of petitions alleging that the children were in need of care or supervision (CHINS). The State filed the first set of CHINS petitions in April 2014. The children were adjudicated CHINS based upon mother's stipulation that she had allowed the children to have frequent and continuing contact with their maternal grandfather, an untreated convicted sex offender, and that the children were living in unsanitary conditions. In July 2004, the family division issued a disposition order, based on the parties' stipulation, that kept the children with mother under a conditional custody order (CCO). The conditions were that mother not allow the children to have any contact with their maternal grandfather, not permit her then-current boyfriend to physically discipline the children, maintain stable housing, ensure that the children's medical needs were met, and cooperate with the Department for Children and Families (DCF). In July 2015, the family division vacated the CCO and returned custody to mother without any conditions.

In early March 2016, the children's father, who was living in Florida at the time, reported to DCF that mother was allowing the children to have contact with the maternal grandfather. The State filed new CHINS petitions that same month. Following a temporary care hearing, the court issued a CCO leaving the children in mother's care but ordering her to not allow contact between the children and the maternal grandfather, to take part in a family evaluation and follow all recommendations, and to participate in intensive family-based services. The CCO also barred mother and her then-current partner from physically disciplining the children. The CCO was later amended to require mother to arrange individual therapy for the children. In August 2016, mother stipulated to a CHINS adjudication, acknowledging that she had again placed the children at risk

of harm by allowing them to have contact with their maternal grandfather. During this time period, father had little or no contact with the children.

In September 2016, the family division issued a disposition order based on the parties' stipulation. The order called for continuation of the CCO with mother and added a requirement that mother obtain prior approval from DCF before moving to a new residence. The CCO was to remain in place for six months, with the expectation that unconditional custody would be returned to mother at that point.

In November 2016, the State sought custody of the children under an emergency care order after discovering that mother had moved to New Hampshire without notifying DCF and that she was again allowing contact between the children and the maternal grandfather. The family division transferred custody of the children to DCF.

In December 2016, the family division held a post-disposition review hearing, after which the court issued an order, based on the parties' stipulation, that continued DCF custody and provided parent-child contact with both parents in accordance with an amended disposition case plan. At this time father had recently moved from Florida to Palmer, Massachusetts to live with his mother and resume contact with the children. The plan called for concurrent goals of reunification with one of the parents or adoption. The expectation was that reunification would occur on or before April 2017. The case plan goal was extended twice, until November 2017. At a permanency planning hearing in October 2017, the family division approved modified concurrent goals, based on the parties' stipulation, that called for either the children's return to mother's care under a CCO by January 2018 or adoption. At that point, mother was actively engaged in therapy and a parenting class, and her visits with the children had increased from one and one-half to three hours per week. It was expected that a gradual increase in unsupervised parent-child contact would begin later that month. The case plan required, among other things, that mother: (1) demonstrate an ability to consistently meet the children's physical, emotional, and developmental needs; (2) engage in and benefit from family time coaching during visits; (3) participate in and benefit from individual therapy, with a focus on understating the importance of keeping the children safe and not exposing them to individuals who had been convicted of sexual crimes or substantiated for sexual abuse; (4) have safe and stable relationships without interpersonal violence; (5) not allow the children to go to the maternal grandparents' house or have contact with the maternal grandfather, (6) participate in a DCF-approved parenting class; (7) arrange for the children to have individual therapy; (7) obtain gainful employment and stable housing; and (8) not use physical discipline with the children. The goals for father were similar, apart from the conditions concerning mother's parents.

In December 2017, J.M.'s foster parents reported that they found sexually graphic and unencrypted pictures on a tablet that his parents had given him. A couple of months earlier, DCF had received a report about mother's boyfriend posting sexually suggestive images and comments by the children concerning one of the images.

In January 2018, the State sought the termination of both mother's and father's parental rights with respect to all four children. A two-day contested termination hearing was held in October 2018. In April 2019, the family division issued its order terminating mother's and father's parental rights. Both mother and father appeal that decision.

Mother argues that the family division failed to adequately assess the quality of her bond with the children, which she asserts should take precedence over any parenting deficiencies she may have. According to mother, the evidence and the court's findings support the conclusion that

continuing her relationship with the children would benefit them. She also joins father’s arguments challenging the family division’s conclusions that the parents’ ability to care for the children had stagnated and that neither parent would be able to resume parental responsibilities within a reasonable period of time.

In post-disposition termination cases, the family division is required to undertake 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 progress expected in the plan of services . . . despite the passage of time.” Id. (quotation omitted). “We will affirm the trial court’s findings in support of changed circumstances unless they are clearly erroneous, and its conclusions if reasonably supported by the findings.” Id. To determine a child’s best interests, the family division must consider the four factors set forth in 33 V.S.A. § 5114(a). The most important factor in the court’s analysis is the likelihood that the legal parent can resume parental duties within a reasonable period of time. In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325. “The reasonableness of the time period is measured from the perspective of the child’s needs” In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29. That inquiry is “forward-looking”—“the court must consider a parent’s prospective ability to parent the child,” although “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 witnesses and to weigh the evidence.” Id. (quotation omitted).

At the outset, we reject father’s argument that the family division applied an impermissibly low standard—whether the parents had made “progress toward significant and necessary case plan goals”—in determining whether the parents’ ability to care for the children had stagnated. As indicated above, “[s]tagnation may be found if the parent has not made the progress expected in the plan of services for the family despite the passage of time.” In re D.M., 2004 VT 41, ¶ 5. Because the “main concern” is whether the “parent had demonstrated the improvement contemplated at the time the children were removed from the parent’s care,” the “key question for the court when considering whether stagnation has occurred is whether the parent has made progress in ameliorating the conditions that led to state intervention.” Id. ¶ 7. That is precisely what the family division did here. The court considered the extent to which the mother and father had progressed to put themselves in a position to be able provide for the children’s physical, emotional, and developmental needs, as required by the case plan.

Father argues, however, that even assuming the family division applied the correct standard, the evidence does not support its conclusion that the parents’ progress towards reunification had stagnated. He contends that the record does not support the court’s conclusion that the parents failed to make significant progress towards meeting the children’s needs, especially their need for emotional support. We disagree.

As for himself, father points out that he relocated to Massachusetts from Florida to be closer to the children after they were taken into state custody and that he initiated positive visits with them. The family division acknowledged these facts, but the record also supports the court’s findings that: (1) father upset the children by missing a number of visits and then failed to comply with DCF’s requirement that he confirm the visits ahead of time; (2) father told DCF in the early fall of 2017 that he did not intend to reunify with the children; (3) around the same time, family

time coaching for father was canceled because father was not taking advantage of the program; (4) father did not work with DCF to arrange alternative plans for parent-child contact and never resumed visits with the children; and (5) his last visit with the children was on September 27, 2017. These facts, in turn, support the family court's conclusion that father never truly connected with the children and did not take actions to put himself in a position to parent the children. Thus, the record supports the court's conclusion that father's ability to care for the children had stagnated.

As for mother, she joins in father's argument challenging the family division's findings that she had failed to take an active role in meeting the children's emotional and mental-health needs, that she did not understand the nature and complexity of the children's needs, and that she failed to seek an increase in parent-child contact. We conclude that the record supports the court's conclusion that mother's ability to parent the children had stagnated. The court acknowledged mother's progress in consistently visiting the children, in engaging in individual and group counseling and obtaining counseling for the children, and in accepting that she could not allow the children to have contact with the maternal grandfather. But despite indications that the children had experienced physical and/or sexual abuse while under her care, mother's reaction to incidents in late 2017 involving the children's potential exposure to inappropriate sexual images supported the court's finding that mother had not fully comprehended the harm to the children while under her care and the need to protect them from further harm. The record also supports the court's recognition that mother had not progressed beyond minimal weekly visits over a significant period of time, despite the children's needs for permanency.

As for the parents' challenge to the family division's best-interest analysis, we first reject father's argument that the court failed to recognize that its termination of his and mother's parental rights would result in the children being separated, contrary to state policy. See 33 V.S.A. § 5106(4) ("To the extent that it is appropriate and possible, siblings in the Commissioner's custody shall be placed together."). There was evidence of bullying behaviors among the children when they were living together under mother's care. In addressing the best-interest factors, the court concluded that each of the children had made significant progress overcoming serious emotional, behavioral, and mental-health problems after being removed from mother's care and being placed in separate foster care situations. The court found that P.M.'s evaluation made it clear that he had to be placed in a home with no other children. The court also found that overall the children's relationships with each other had improved and that the foster parents had provided the children the opportunity to see each other on holidays and birthdays. In short, the court considered the children's relationships with each other in assessing whether to terminate mother's and father's parental rights.

Father also challenges the court's conclusion that he would not be able to resume his parental duties within a reasonable period of time, arguing that the only evidence to support that conclusion was his lack of contact with the children and his inability to secure appropriate housing. He also argues that DCF did not make reasonable efforts to support him in his effort to assume parental responsibilities. We conclude that the record amply supports the family division's determination that father would be unable to resume his parental duties within a reasonable period of time from the children's perspective. As the court found, the children had significant behavioral and mental-health issues when they came into state custody. Father had had minimal contact with the children in the years since the parents' divorce, and therefore it was critical for him to make significant progress in demonstrating that he would be able to assume parental responsibilities. As the court found, father initially engaged in visits through family time coaching, but did not do so consistently and eventually stopped visiting the children in October 2017 following his termination from the family-time-coaching program and his failure to work with DCF to set up a different arrangement. He also informed DCF that he did not plan on reunifying with the children. The

record is clear that father was not close to being in a position to care for the children at the time of the termination hearing as the result of his own actions or inactions. As the family division found, none of the children had an active relationship with father due to his limited visits and his expressed lack of interest in assuming parental responsibilities.

Mother joins father's argument that the record does not support the bases the family division relied upon in concluding that she would not be able to resume her parental duties within a reasonable period of time. Father argues that mother's visitation time was minimal because of the children's dysregulation before and after the visits rather than because of her actions, that any failure on her part to connect with the children's therapists did not reflect upon her ability to meet the children's medical needs, that her work with her therapist and her willingness to take parenting classes demonstrated that she was willing to make amends for her prior parenting weaknesses, and that she made substantial changes to improve the hygiene and cleanliness of the family home. We find these arguments unavailing. As the family division detailed, the children developed serious behavioral and mental-health problems while under mother's care and improved "by leaps and bounds" after being removed from her care. Despite years of intervention and services, mother still had not progressed beyond limited weekly contact with the children, who were in dire need of stability and permanency in their lives. The record supports the court's conclusion that mother would not be able to resume her parental duties within a reasonable period of time from the children's perspective.

Finally, mother argues that the family division did not accurately assess the value of her bond with the children. Again, we disagree. The family division considered the bond between mother and the children, finding that the children love their mother and generally enjoy their visits with her. The court also found, however, referring to mother's relationships with partners, that the children had not been her top priority and that she had not been able to provide them with the emotional support that they need. The record supports these findings, as well as its findings the children rely primarily on their foster families for support and that mother does not play a significant positive role in their lives.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice