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. 2020-142

SEPTEMBER TERM, 2020

In re M.K., Juvenile (M.K., Father*)	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 405-12-16 Cnjv
		Trial Judge: Thomas Carlson

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

Father appeals the termination of his parental rights to eleven-year-old son M.K. We affirm.

This case began in December 2016 when the Department for Children and Families (DCF) filed petitions alleging that M.K., who was born in April 2009, and his younger sister N.K. were children in need of care or supervision (CHINS) due to concerns about mother's substance abuse. Following a temporary care hearing, the children were placed in the custody of their maternal step-grandmother under a conditional custody order.

At the time of the petitions, father was incarcerated, and the children were in mother's care. Father has never been M.K.'s primary caregiver or resided with him for any significant length of time. Both parents have struggled with substance abuse for many years. The children were previously in DCF custody in 2013 and 2015. On each of those occasions, father was incarcerated on charges related to possession of controlled substances.

In March 2017, the parties stipulated that the children were CHINS based on mother's conduct. By that time, father had been released from jail into the Chittenden Adult Drug Treatment court program. He was living in Burlington and had been visiting M.K. in the home of mother's stepmother. In August 2017, the court adopted a disposition plan with concurrent goals of reunification with father or adoption or other permanent placement within three to six months. Since disposition, father has had periodic supervised contact with M.K., interrupted by periods of incarceration and lack of transportation.

M.K. lived with his step-grandmother under a conditional custody order from December 2016 until April 2018, when DCF learned that conditions in her home had deteriorated and M.K. had suffered a burn to his collarbone. The court transferred custody of M.K. to DCF. M.K. has not seen his mother since that time. He was subsequently placed in several different foster homes. At the time of the termination hearing, he was living with a foster family in New Haven, Vermont.

In April 2018, M.K.'s attorney moved to terminate the parental rights of both parents. The petition to terminate father's parental rights was subsequently withdrawn. In February 2019, the court held a hearing on the petition to terminate mother's parental rights, which mother did not attend. At that hearing, father agreed to relinquish his residual rights with regard to daughter N.K. In April 2019, the court issued a written decision granting the petition to terminate mother's parental rights to M.K. and N.K.

In May 2019, the court adopted an amended permanency plan with concurrent goals of reunification with father or adoption within three to six months. The case plan cautioned that weekly visits would not prepare father and M.K. for reunification. It expected father to continue to engage in drug treatment, drug court, and parenting classes, participate in team meetings and school and medical appointments, and visit consistently with M.K.

Father left the Chittenden Adult Drug Treatment court program and moved to Weybridge in the fall of 2018. In October 2019, father was incarcerated for violating furlough for a drug possession conviction. In December 2019, DCF moved to terminate father's parental rights.

The termination hearing was held on March 5, 2020. At the time of the hearing, father was still incarcerated and had pending charges of disorderly conduct and assault on a police officer. He was hoping to be released on home detention to reside with his nineteen-year-old girlfriend, their five-month-old child, and his girlfriend's mother in their home in Weybridge. He had been living there for several months before he was reincarcerated in October 2019.

The court found that father attended about one-third of M.K.'s team meetings after the May 2019 permanency order. He eventually stopped attending any team meetings or communicating with M.K.'s foster family or therapist. His visits with M.K. were consistent into June 2019, but then his attendance fell off. Both the foster mother and the DCF case worker reported that father and son had a loving relationship. However, the foster mother described M.K. as "getting used to disappointment" as father became increasingly inconsistent in attending visits. He had no contact with M.K. for several months after he was reincarcerated in October 2019. Eventually, M.K.'s case worker began bringing M.K. to visit father once a week in jail.

M.K. suffered from complex childhood trauma as a result of having witnessed substance abuse and domestic violence and experienced many relocations, poverty, and neglect. He was often aggressive and would growl and strike out. He had trouble getting to sleep because he was afraid of the dark and being alone. M.K. had great difficulty making friends and interacting with peers. He struggled in school; although he was in fifth grade, he was at a first-grade level in all subjects. He engaged in aggressive and sexualized behavior with his younger sister when they lived together. He spent time at the Brattleboro Retreat and Jarrett House following escalations with previous foster families.

With his New Haven foster family and support team, M.K. made significant progress. He was taking medication for depression, post-traumatic stress disorder and attention deficit hyperactivity disorder. He had a consistent routine. He had learned to settle down when triggered and to sleep with soft light and noise. He had made a good friend. However, the foster family was not willing to adopt M.K. and his next placement was unknown at the time of the termination hearing.

Based on the above findings, the court concluded that father had stagnated in his ability to care for M.K. It found that although father was important to M.K. and played a limited constructive role in his life, father was not likely to be able to assume parental duties within a reasonable time due to his incarceration, uncertain living situation, unemployment, and substance

abuse issues, and the fact that he had never been a primary caregiver for M.K. or any other child. The court therefore concluded that it was in M.K.'s best interests to terminate father's parental rights.

On appeal, father first argues that the court erred in finding that there had been a substantial change in circumstances that warranted modification of the disposition order. He argues that from M.K.'s perspective, nothing changed between the May 2019 order and the termination hearing because he was still in the same foster placement, he was having regular contact with father, who had never been a custodial parent, and there was no threat of him being moved. Father asserts that DCF filed the second termination petition only to facilitate working with an adoption agency to find a suitable home for M.K. when his placement with his current foster family ended.

When termination is sought after initial disposition, the family court must conduct a two-step analysis. In re D.S., 2016 VT 130, ¶ 6, 204 Vt. 44. First, it must determine that there has been a substantial change in material circumstances warranting modification of the previous order; then, it must determine whether termination is in the best interests of the child. Id.; 33 V.S.A. §§ 5113, 5114. The requisite change in 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." In re S.W., 2003 VT 90, ¶ 4, 176 Vt. 517 (mem.) (quotation omitted). "Stagnation 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, 176 Vt. 639 (mem.). We will uphold the trial court's findings regarding changed circumstances "unless they are clearly erroneous, and will affirm its conclusion if supported by the findings." In re S.W., 2003 VT 90, ¶ 4.

The trial court's determination that father's ability to care for M.K. had stagnated is supported by its findings, which are in turn supported by the record. As the trial court found, after the May 2019 disposition order father's initial attendance at team meetings and communication with other caregivers decreased and eventually stopped altogether. He also stopped participating in drug court and substance abuse treatment. He visited M.K. inconsistently, and visits stopped altogether for several months after he was incarcerated. Father failed to progress beyond supervised visitation once a week, as expected by the case plan. Under these circumstances, the trial court did not err in concluding that father's progress had stagnated such that changed circumstances existed. See In re S.W., 2003 VT 90, ¶¶ 6-7 (affirming finding of stagnation where father failed to substantially comply with case plan). While M.K. may have become accustomed to father's inconsistent visits and periodic incarceration, and his foster placement appeared to be stable until the end of the school year, the question before the court was whether father made progress toward being able to assume a parental role for M.K. He did not, and from M.K.'s perspective, that constituted changed circumstances. See id.

Father also argues that the court erred in determining that termination was in M.K.'s best interests where M.K. did not yet have an adoptive home and the evidence showed that father was a positive relationship in his life. The court must consider four statutory factors when determining whether termination is in a child's best interests, the most important of which is the likelihood that the parent will be able to resume or assume parental duties within a reasonable time. In re D.S., 2014 VT 38, ¶ 22, 196 Vt. 325. "We leave it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." In re A.F., 160 Vt. 175, 178 (1993).

Here again, the family court's findings are supported by the evidence and support its conclusions. The family court found that father's relationship with M.K. was important, but found that his relationships with other members of his support team were more important because father

had never been able to provide stability and support for himself or M.K. The court found that M.K. was well-adjusted to his current foster home and community, although this would likely change. It determined that father had never been a primary caregiver for M.K. or any other child, and that he was unlikely to be able to assume parental duties within a reasonable time due to his repeated and continuing incarceration, uncertain housing and unemployment, and struggles with substance abuse. Finally, it found that father had played a constructive role in M.K.'s life, but that role had been limited by his history of substance abuse and incarceration. Father does not appear to challenge these findings, which are supported by the record.

Rather, father argues that the family court should have given greater weight to the bond between him and M.K. because there was no available adoptive placement for the child. We have recognized that "in some cases a loving parental bond will override other factors in determining whether termination of parental rights is the appropriate remedy." In re J.F., 2006 VT 45, ¶ 13, 180 Vt. 583 (mem.). "Public policy, however, does not dictate that the parent-child bond be maintained regardless of the cost to the child; [the CHINS statute] recognizes that severance of that bond may be in the child's best interest." In re M.B., 162 Vt. 229, 238 (1994). The court considered the strength of the parental bond but found that it was outweighed by other factors that favored termination. We see no abuse of discretion in the court's assessment.

We reject father's argument that because DCF had not identified an adoptive home for M.K. at the time of the hearing, the court should have denied termination and instead attempted a trial reunification with father. "[W]e have repeatedly stated that a valid termination of parental rights does not depend on the availability of permanent foster care or adoption." In re S.B., 174 Vt. 427, 430 (2002) (mem.) (quotation omitted). We therefore have "rejected the claim . . . that the court must consider less drastic alternatives to termination once it has determined the parent to be unfit and unable to resume his or her parental responsibilities." In re G.F., 2007 VT 11, ¶ 20, 181 Vt. 593 (mem.). As discussed above, the court concluded in accordance with the statutory factors that termination was in M.K.'s best interests, and its conclusion is supported by the findings and the record. The court was not required to consider alternative placement options or the lack thereof.

To the extent that father is attacking the court's determination that he would not be able to assume parental duties within a reasonable time, his argument fails. The reasonableness of the time period needed for a parent to assume or resume parental duties is measured from the perspective of the child. In re D.S., 2014 VT 38, ¶ 22. It was unknown when father would be released from incarceration, or whether he would have suitable housing for M.K. when he was released. Father had been receiving services from the state for over three years. Reunification with father had been a goal for most of that time, yet he demonstrated little to no progress toward obtaining the stability and skills necessary to assume a parental role. The court's finding was not clearly erroneous.

Father contends that the family court effectively abandoned its oversight role by terminating father's parental rights and transferring custody to DCF. We disagree. As father himself acknowledges, the court's jurisdiction over M.K. will not terminate unless the court acts to terminate jurisdiction or the child is adopted. 33 V.S.A. § 5103(d). Until then, the court must continue to hold regularly scheduled permanency hearings and may conduct other proceedings as appropriate. 33 V.S.A. § 5321. M.K. will also continue to have a court-appointed attorney and guardian ad litem to represent his interests. 33 V.S.A. § 5112.

Finally, we find no support for father's assertion that the family court's decision was improperly based on the DCF caseworker's testimony that termination of father's parental rights

would allow DCF to expand placement options for M.K. The court did not reference this testimony in its decision. The court considered the appropriate factors, and its findings and conclusions were supported by the evidence. Accordingly, we find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice