

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2017-087

JULY TERM, 2017

In re A.M. and O.M., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 162-8-15 Frjv
		Trial Judge: Martin A. Maley

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

Father appeals from the termination of his parental rights in A.M. and O.M. He argues that the court erred both in concluding that he had stagnated in his ability to parent and in assessing his interactions and relationship with the children. We affirm.

O.M. was born in July 2013; A.M. was born in November 2014. Mother also has an older child, born in 2010. The Department for Children and Families (DCF) has been involved with the family for a lengthy period due to longstanding concerns about drug use, domestic violence, mother's mental health, and child endangerment. In May 2015, father was charged with domestic assault against mother; the children had been present during the assault. In August 2015, mother was involved in a rollover accident; O.M. and mother's oldest child were in the car. Mother was arrested for driving under the influence, cruelty to children, and gross negligent operation.

The children were taken into emergency DCF custody based on: findings concerning the accident described above; the fact that mother was in contact with father and allowing him to care for the children despite a restraining order prohibiting such contact; and mother's active use of nonprescribed substances that impacted her ability to care for the children. At a November 2015 merits hearing, mother stipulated that the children were in need of care or supervision (CHINS) based on the findings recited above. In February 2016, following a disposition hearing, the court approved a plan of services with a concurrent case goal plan of "[r]eunification with a (primary) parent or permanency through adoption." For purposes of the plan, father agreed to engage in domestic violence counseling. A post-disposition hearing was not held. In July 2016, DCF filed an amended case plan; it moved to terminate parents' rights. Following a hearing, which concluded in January 2017, the court terminated parents' rights.

We do not repeat all of the court's findings here. Essentially, the court found that mother continued to struggle with drug addiction at the time of the termination hearing. Father also faced substance abuse challenges. He became dependent on substances after suffering work-related injuries. DCF was concerned that father continued to abuse substances and it attempted to engage father in discussions concerning assessments and treatment. His case plan required him to demonstrate his ability to care consistently for himself on a number of issues, including the use of substances. Father was unwilling to submit to drug testing and refused to allow DCF

to communicate with his treatment providers, however, and it therefore was not possible to determine if he was substance-free. DCF also had difficulty meeting and communicating with father. After an initial meeting with DCF, father missed the following seven scheduled meetings.

Parents had an extremely volatile relationship and there was a substantial history of domestic violence involving both parents. Father minimized and denied his responsibility in perpetuating the cycle of domestic violence. He claimed to have acted only in self-defense. The court found, however, that father responded to mother's actions with extreme violence and degradation and that father had committed domestic violence against mother on multiple occasions. Mother obtained a protective order against father; father then violated the order. The court recounted various incidents in which father abused mother, including while mother was pregnant and later while the children were present. Father acknowledged that the children were impacted by violence in the home, but he minimized his behavior and blamed mother. His denial remained firmly in place even after engaging in extensive domestic violence treatment. The court recounted that father was dismissed from a domestic violence accountability program several times and found to be in violation of his probation conditions as a result. He faced possible incarceration for failing to complete domestic-violence classes.

By the time of the termination hearing, parents had not progressed beyond supervised parent-child contact. Father had weekly visitation in the children's foster home, which ceased in July 2016. These visits were chaotic. Father was not receptive to comments made by the foster mother, causing her partner to intervene. Father could not address O.M.'s behaviors. Father attended Family Time Coaching meetings in August and September 2016, and began Family Time Coaching in October 2016. He was often late and did not seem to understand O.M.'s needs. There were issues with consistency, setting boundaries, and supervision. Father switched to twice-weekly visits in the library, which he attended in a timely manner. The court found that parents clearly loved the children and wanted to be able to resume parenting. Each made strides toward this goal for periods of time.

The children were placed together in a kinship placement. The foster parents demonstrated love, affection, and commitment to the children. The children's behavior greatly improved in their care. The children's medical and dental needs, which had been neglected by parents, were also being met.

Based on these and numerous other findings, the court concluded that parents had stagnated in their ability to care for the children. The children, who were two and three at the time of the termination order, had been in DCF custody for seventeen months. During this time, father failed to adequately address the issues that led to the CHINS proceeding, including the domestic violence that he perpetrated on mother and the impact that this violence had on the children. He was inconsistent with parent-child contact. Despite being provided with a variety of services, he failed to make significant progress and show that he could meet the children's needs. The court also noted that DCF had attempted to assess if father continued to have substance abuse issues and that father refused to cooperate in that assessment. It stated that father failed to establish that substance use was not impacting his ability to parent. The court then considered the statutory best-interest factors, and concluded that they all supported termination of parents' rights. Father appealed.

Father first challenges the court's conclusion that he stagnated in his ability to parent. With respect to domestic violence, father contends that, for the most part, he participated in and was cooperative in the domestic-violence sessions that he attended. He also asserts that his

denial of striking mother except in self-defense is consistent with the court's finding that parents assaulted one another. Father also challenges the court's findings concerning substance abuse. He argues that his substance use was not a concern of the CHINS petition or the CHINS stipulation. According to father, he had no burden to show that his parenting ability was not impacted by substance abuse. Additionally, father challenges the court's findings regarding parent-child contact.

When the termination of parental rights is sought, the trial court must first find that there has been a substantial change in material circumstances, and second, that termination of parental rights is in a child's best interests. In re B.W., 162 Vt. 287, 291 (1994); see 33 V.S.A. §§ 5113, 5114. A substantial change in material circumstances is most often found when "the parent's ability to care properly for the child has either stagnated or deteriorated over the passage of time." In re B.W., 162 Vt. at 291 (citation omitted). "Stagnation may be shown by the passage of time with no improvement in parental capacity to care properly for the child" but "the mere fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances warranting modification of a previous disposition order." Id. (citations omitted). To determine the best interests of a child, the court must consider four statutory factors, the most important of which is a parent's ability to resume parental duties within a reasonable period of time. 33 V.S.A. § 5114; In re B.M., 165 Vt. 331, 336 (1996). We will not disturb the court's 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.).

We find no error here. The court's conclusion that father failed to adequately address the issue of domestic violence is supported by the court's findings, which are in turn supported by the record. The court acknowledged that each parent had assaulted the other. It rejected father's contention, however, that he acted only in self-defense, finding instead that he committed domestic violence against mother on multiple occasions. The court found that father minimized his actions and blamed mother. He violated his probation for failing to complete a domestic violence accountability program. These findings amply support the court's conclusion regarding father's lack of progress in this area, regardless of his participating in domestic-violence sessions. To the extent that father argues that the court should have drawn different conclusions from the evidence, we reject this argument. See In re S.B., 174 Vt. 427, 429 (2002) (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.").

On the issue of substance abuse, there is ample evidence in the record to establish the reasonableness of DCF's attempts to ascertain from essentially the outset of this case whether father was using substances. Father's DCF caseworker testified that she had ongoing and new concerns related to father's substance use. She explained that father had reported early in the case that he had chronic pain and was a patient at a pain management clinic. Father did not sign a release for this provider until mid-January 2016, at which time she learned that in addition to prescription medications, the treatment provider had recommended physical therapy and an MRI to assist with father's chronic pain, and father had not followed through with these recommendations. By the time of the amended case plan in July 2016, the case worker testified that she had concerns about father's substance use and whether he was taking his medications appropriately. Beginning in August 2016, she began asking father for random urine screens, which father did not provide. At one point, father told her that he had weaned off of prescription medicine by using illicit buprenorphine and that this drug might show up on the urine screen. DCF's concerns about father's substance use continued to the date of the final hearing,

including concerns voiced by a visit supervisor about father's behavior. Father himself testified that he had been on pain medication eight different times. He was prescribed opioid pain medication for a work injury, including oxycodone, morphine, and opana. Father stated that he had obtained other medicine as well to address his severe pain. According to father, he weaned himself off these drugs around November 2016 by using Suboxone that was not prescribed to him. It was reasonable under these circumstances for DCF to be concerned that the use of opiate pain medications could impact father's ability to care for and supervise two young children and to seek additional information about this issue. The court did not err in finding that father refused to cooperate in that assessment and to clarify this issue for DCF. This did not constitute a shift in the burden of proof to father as he contends, but rather required him to work with DCF to make sure substance abuse concerns were being appropriately addressed.

Father also contends that the court erred in concluding that he had not made substantial progress with respect to parent-child contact. He does not contest the court's key finding that during the nearly two years that the children were in custody, he did not progress beyond supervised visitation. Instead, father complains that the court made contradictory findings about his attendance and promptness during visitation. He cites the court's observation that "[t]he parents continue to have contact with the child[ren] during visits, however attendance and promptness continues to be a problem." He argues that this is inconsistent with the court's finding that father began Family Time Coaching in October 2016 and appeared late for the start of visits, and that at the time of the court's order, father was "now attending all visits in [a] timely manner." It is not clear that any inconsistency between these statements exists. As recently as October 2016, several months before the termination-of-parental-rights hearing, father continued his pattern of being late to visitation. Thus, lateness continued to be a problem for father until just before the termination hearing. Even if the court made an overly broad statement that failed to reflect father's most recent behavior, any error is harmless. *In re G.F.*, 2007 VT 11, ¶ 15 (stating harmless error standard in juvenile cases). Father also asserts that the court misapprehended the record with respect to his visits in the foster home. He does not challenge the court's finding that his visits at the foster home were "chaotic," and that father was not receptive to comments made by the foster mother, causing her partner to intervene. These findings are supported by testimony in the record. Instead, he questions why the court did not also find that after the foster mother felt forced to remove herself from visits, father did better under her male partner's supervision. The court had no obligation to make such a finding. The purpose of findings is to provide a clear statement as to what was decided and why. *Klein v. Klein*, 150 Vt. 466, 472 (1988). That purpose was accomplished here. Finally, the court findings with respect to father's performance at Family Time Coaching are also supported by the record. We note that even if father made some progress in his behavior during visitation, that does not defeat a finding of stagnation, particularly given that father has never progressed beyond supervised visitation.

We similarly find no error in the court's assessment of the statutory best-interest factors. Father does not argue that the court erred in concluding that he could not parent the children within a reasonable period of time, the most important statutory factor. Instead, he argues that a strong parent-child bond might override the other statutory best-interest factors, and he suggests that the court should have engaged in a deeper assessment about how the children felt about him. We reject this argument. By statute, the court must consider the children's "interaction and interrelationship" with father. 33 V.S.A. § 5114(a)(1). It did so here. It is evident that the court did not conclude that the parent-child bond outweighed the other statutory best-interest factors. Cf. *In re J.F.*, 2006 VT 45, ¶ 13, 180 Vt. 583 (recognizing that "in some cases a loving parental bond will override other factors in determining whether termination of parental rights is the appropriate remedy"). While father disagrees with the court's conclusion,

he fails to show an abuse of discretion. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (explaining that arguments which amount to nothing more than disagreement with court's reasoning and conclusion do not make out case for abuse of discretion).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice