

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. 2018-073

AUGUST TERM, 2018

In re T.M. & A.M., Juveniles	}	APPEALED FROM:
(R.M., Father*)	}	
	}	Superior Court, Windsor Unit,
	}	Family Division
	}	
	}	DOCKET NO. 35/36-2-14 Wrjv
		Trial Judge: Thomas J. Devine

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

Father appeals the termination of his parental rights to seven-year-old A.M. and five-year-old T.M. We affirm.

A.M. was born in January 2011 and T.M. was born in September 2012. Both children have special needs. A.M. has been diagnosed with attention deficit hyperactivity disorder and reactive attachment disorder. T.M. was born with spina bifida, a permanent birth defect that causes nerve damage and other disabilities. He requires extensive medical and personal care including daily catheterization. He has also been diagnosed with reactive attachment disorder. Both boys are on individualized education plans at school.

In 2012, the Department for Children and Families (DCF) filed a petition alleging A.M. and T.M. were children in need of care or supervision (CHINS) due to concerns over the parents' drug use, particularly mother's while she was pregnant with T.M. While the case was pending, the children remained with their parents under a conditional custody order. The parents successfully engaged in services, and the case was closed in May 2013.

During the summer and fall of 2013, DCF received new reports about the family. DCF sought a court hearing to address its concerns over missed medical appointments for T.M., inconsistent daycare, mother's depression, and father's admission to using alcohol and marijuana. In response, father threatened to remove the children to Florida. DCF filed new CHINS petitions and was granted emergency custody of the children. The parents stipulated to the merits of the petitions in April 2014, agreeing that their substance abuse interfered with parenting A.M. and T.M. The children were eventually placed with a foster family with whom they continue to reside.

In May 2014, the court issued a disposition order that continued custody with DCF and established concurrent goals of reunification with the parents or adoption. In October 2014, DCF filed petitions to terminate parental rights. Mother voluntarily relinquished her rights in January 2015. At the conclusion of a contested hearing in August 2015, the court terminated father's rights on the grounds that he had continued to use illicit drugs and had not made substantial progress in addressing his substance abuse.

This Court reversed in a decision issued in February 2016, holding that the State had not proven by clear and convincing evidence that there existed a change in circumstances warranting modification of the disposition order. *In re T.M.*, 2016 VT 23, ¶ 23, 201 Vt. 358. The State's primary evidence that father continued to engage in illicit substance abuse was found in records of his opioid replacement program, which showed some positive test results for marijuana. The Court noted that there was no evidence connecting the test findings to father's progress in substance-abuse treatment or to his parenting. *Id.* ¶ 19. Given the facts that father had met most of the goals of the case plan and had a loving and appropriate relationship with the children when he was permitted to see them, it was "not obvious, without more evidence, that his use of an undetermined amount of marijuana throughout part of the period preceding the termination hearing reflects such a substantial departure from the case plan goals" that it amounted to stagnation. *Id.* ¶ 23.

Following the reversal, in March 2016 the family court approved a new case plan with concurrent goals of reunification with father or adoption by August 2016. The plan required father to, among other things, maintain suitable housing, establish financial stability, engage in mental health counseling and substance abuse treatment, undergo drug screens upon request, engage in parent education including family time coaching, demonstrate an ability to supervise and monitor the children, get his license reinstated, and engage in law-abiding behavior.

In October 2016, DCF filed renewed petitions to terminate father's parental rights. A hearing was held over four days in June and July 2017. In February 2018, the family court granted the petitions in a written decision that included the following findings.

Father was provided no contact with the children between the issuance of the family court's termination decision in August 2015 and this Court's February 2016 decision. Visitation was reinstated immediately after the latter decision was issued. The children were initially reserved with father during visits. Although father's attendance at visits was strong, he struggled to accept feedback from the family time coach or to set boundaries for the children. Father also ignored suggestions that he help T.M. with stretching exercises necessary for T.M.'s recovery from surgery.

After the initial termination decision, father was removed from the list of persons authorized to see information about T.M.'s medical care and appointment schedule. He never requested that his access be restored. DCF encouraged father to contact T.M.'s spina bifida nurse to receive information and instruction about T.M.'s medical needs, but he did not do so until April 2017. The nurse spoke with father and his girlfriend for about a half hour, outlining T.M.'s condition and his needs, and offered to send additional materials. Father told her he was "all set for now." He did not contact the nurse again. The nurse testified that father needed much more education regarding T.M.'s needs to safely care for him.

By the spring of 2017, father demonstrated progress in family time coaching. He began to help T.M. with his stretching exercises, showed gains in setting limits for the children, and brought books and educational toys for them. However, the children continued to exhibit concerning behaviors following visits, including aggression and anxiety, and T.M. regressed in toileting.

Father stopped participating in substance abuse counseling immediately after the family court's August 2015 termination decision. He stated that this was because he lost his insurance and had an argument with one of the service providers. He began using black market Suboxone and his alcohol consumption increased to a twelve-pack of beer each night. In September 2015 father was charged with leaving the scene of an accident and his driver's license was suspended. In February 2016—two weeks after this Court reversed the termination decision—father was

charged by New Hampshire police with criminal threatening, driving with a suspended license, resisting arrest, misuse of plates, and open container. Father failed to appear in court and an arrest warrant issued that remained outstanding until January 2017, when father resolved the case by paying an \$800 fine. The New Hampshire arrest warrant precluded father from attending appointments for T.M. at Dartmouth-Hitchcock Medical Center.

A forensic psychologist who examined father in May 2016 reported that father denied responsibility for DCF involvement and blamed the children's mother. Father also felt family time coaching was unnecessary. Father had been in DCF custody himself as a child and had a negative view of the department. He felt that DCF, his own mother, and the foster parents were aligned against him. The psychologist opined that father would need a year or longer of support, treatment, ongoing abstinence, and parent education before reunification with the children would be viable. Father began mental health therapy in July 2016. His therapist testified at the hearing that father had made progress but needed further counseling.

In September 2016, father began substance abuse treatment with a specialist in addiction medicine. Father was prescribed buprenorphine to assist him in withdrawing from opioid use. His physician warned father that any alcohol use was dangerous due to the interaction with buprenorphine. Despite this, father continued to drink heavily during the first eight months of his therapy, causing the doctor to reduce his buprenorphine dosage. In April 2017, the physician informed father that he would no longer prescribe buprenorphine if father continued to drink. Father agreed to take Antabuse to assist him in not using alcohol. Father has not had any positive tests for alcohol since then. However, he tested positive for morphine on two occasions in February and May 2017; father denied using morphine. The court found that these tests were accurate based on the testimony of a toxicologist. Father's physician testified that father had made some progress in his substance abuse treatment in the months leading up to the hearing but stated that a two-and-a-half-month period of recovery did not represent sustained recovery.

In July 2017, an off-duty DCF worker who was dining at the brewery where father works observed father apparently drinking a beer. The DCF worker reported the incident to father's therapist, who asked father to take a urine test. Father refused to do so until two days later, at which point he tested negative for alcohol. The court found that father delayed the urinalysis to avoid a positive alcohol test result.

Father was unemployed for a period of time in the spring of 2016. He has since obtained steady employment as a cook at a local brewery. He is in a relationship with a new partner who has a five-year-old son. She and father also have a child together, who was born a few weeks before the termination hearing in this case commenced. Father lives with his partner and the two children in a two-bedroom condominium.

Based on the evidence presented at the hearing, the court found that father had stagnated in his progress toward reunification with A.M. and T.M. It acknowledged that father had made progress toward many of the case plan goals and had worked hard since September 2016 to overcome his heroin addiction by participating in substance abuse treatment. However, the court found that father had not demonstrated the sustained period of recovery necessary to make reunification viable, as evidenced by the positive morphine tests and his continued heavy use of alcohol until two months prior to the hearing. The court found that the need for absolute sobriety was paramount because of T.M.'s extensive medical needs, which required constant attention and monitoring. Moreover, father had failed to learn about or demonstrate competency in meeting either child's special needs. Father had expressed skepticism regarding A.M.'s diagnoses and had not been involved in A.M.'s education plan or attended special education meetings. He also failed

to participate in T.M.'s medical care despite prompting from DCF and the family time coach to reach out to T.M.'s providers. Although he had finally contacted T.M.'s nurse in April 2016, he needed much more education before he could safely care for T.M.

The court then analyzed the statutory factors as required by 33 V.S.A. § 5114. It found that A.M. and T.M. loved father but displayed regressive behaviors following visits with him. The children had a strong loving bond with their foster parents, who were both registered nurses capable of meeting their complex needs, and were well adjusted to the foster home. The court found that father would not be able to resume parenting A.M. and T.M. within a reasonable amount of time given both children's special needs, father's slow progress toward recovery and mental health following the reversal of the initial termination decision, father's denial of responsibility for the children's situation and deep distrust of DCF, and the fact that he now had another baby with his new partner. Although father attended visits, demonstrated love and affection, and had made some progress in parenting, he had not been a constructive force in the children's early lives. Based on these findings, the court concluded that termination was in the children's best interests.

On appeal, father challenges the court's determination that there existed sufficient changed circumstances to warrant modification of the previous disposition order. When termination of parental rights is sought, the court must engage in a two-step analysis: first, it must find that there has been a substantial change in circumstances, and second, it must find that the best interests of the child require termination of parental rights. See In re R.W., 2011 VT 124, ¶ 14, 191 Vt. 108; 33 V.S.A. §§ 5113, 5114. The requisite change in 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 R.W., 2011 VT 124, ¶ 14 (quotation omitted). The "fact that a parent has shown some progress in some aspects of his or her life does not preclude a finding of changed circumstances." In re A.F., 160 Vt. 175, 181 (1993). The trial court's findings in support of changed circumstances will stand absent clear error, and we will affirm its conclusions if supported by the findings. In re D.S., 2016 VT 130, ¶ 6.

Father argues that the court improperly based its stagnation finding on "isolated incidents" of drug use and his disengagement from services following the earlier termination order. He claims that he has otherwise successfully engaged in treatment and there was no evidence that the drug use interfered with his ability to parent the children. We see no error. The court did not base its stagnation finding on father's relapse into alcohol and drug use during the period between the earlier termination decision and our reversal of that decision. Instead, the court focused on father's subsequent continued heavy alcohol use for the first eight months of his medication-assisted treatment despite repeated warnings from his physician, his two recent positive morphine tests, and his unwillingness to undergo a urinalysis test after he was observed apparently to be drinking a beer when he claimed to be abstaining from alcohol. These findings were supported by the record. Further, father's treating addiction physician testified that father had not demonstrated sustained recovery as of the time of the hearing. This testimony was consistent with the opinion of the forensic psychologist that due to his history, father needed to demonstrate a year or more of ongoing abstinence before reunification was viable. Thus, unlike the first termination hearing, the current record contains ample evidence of father's ongoing substance abuse issues. Cf. In re T.M., 2016 VT 23, ¶ 21. This evidence supports the court's conclusion that father had not made sufficient progress towards the sobriety necessary to care for the children, and T.M. in particular.

Father also argues that the court violated his right to due process by finding stagnation based on his failure to learn about the special needs of the children and demonstrate competency in meeting those needs because that was not a specific expectation of the case plan. This argument is without merit. The trial court found that although this expectation was not expressly stated in

the case plan, the DCF case worker had periodically discussed the importance of gaining proficiency in meeting the boys' special needs, including the treatment and management of T.M.'s spina bifida. This finding was supported by substantial evidence. The CHINS petition was based in part on concerns that the parents were not meeting T.M.'s medical needs. The DCF case worker periodically discussed the importance of learning about T.M.'s spina bifida with father and encouraged him to contact T.M.'s spina bifida nurse to learn about T.M.'s condition and ask for his records. The family time coach testified that she also encouraged father to learn about the boys' medical and emotional needs, including their individualized education plans and T.M.'s medical information. The March 2016 case plan approved by the court required that father demonstrate an ability to supervise and monitor the children appropriately based on their development and emotional and physical needs and to undergo parent education to understand what the children needed for healthy development. Further, the case plan submitted in October 2016 with the termination petition contained an express provision requiring father to "stay updated on [T.M.]'s medical needs, this includes contacting [T.M.'s spina bifida nurse] for regular updates." This evidence is sufficient to support the trial court's conclusion that father was on notice of the need to inform himself of his children's significant needs. See In re D.S., 2016 VT 130, ¶ 7 (rejecting mother's argument that she lacked notice of changes needed to correct problems that led to DCF intervention, where required changes were apparent from factors leading to DCF custody, parents' identified areas of risk, and case plan objectives requiring mother to learn how to safely parent through family time coaching and psychotherapy). The trial court did not err in finding stagnation based on father's failure to do so.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice