

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. 2018-077

JULY TERM, 2018

| | | |
|----------------------|---|------------------------------------|
| In re D.M., Juvenile | } | APPEALED FROM: |
| (A.B., Father*) | } | |
| | } | Superior Court, Chittenden Unit, |
| | } | Family Division |
| | } | |
| | } | DOCKET NO. 120-4-16 Cnjv |
| | | |
| | | Trial Judge: Kirstin K. Schoonover |

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

Father appeals an order of the superior court, family division, terminating his parental rights with respect to his son, D.M. We affirm.

D.M. was born seven weeks premature in March 2016. Shortly after his birth, the State filed a petition alleging that he was a child in need of care or supervision (CHINS) because he was without proper parental care necessary for his well-being. See 33 V.S.A. § 5102(3)(B). On April 8, 2016, the family court issued an emergency temporary care order placing D.M. in the custody of the Department for Children and Families (DCF). At that time, the identity of D.M.'s father was unknown, and mother's mental health prevented her from being able to safely parent the child. Mother, who has a schizoaffective disorder, identified three or four possible fathers, and the court issued genetic testing orders for three of them. On April 11, 2016, nineteen days after D.M.'s birth, DCF placed the child with foster parents with whom he has remained ever since.

At an August 2016 merits hearing, the family court accepted mother's admission and adjudicated D.M. CHINS based on mother's inability to parent D.M. Four days before the September 13, 2016, scheduled disposition hearing, DCF filed a disposition case plan with the sole goal of adoption. Mother did not appear for the September 13 hearing, which the court continued to allow DCF to file a petition to terminate mother's parental rights. DCF filed its petition later that month.

Father missed his first court-ordered genetic testing appointment, but he made the second appointment. In November 2016, the results of the testing identified him as D.M.'s biological father. In February 2017, the court ordered father to have two hours of parent-child contact every other week. The court also ordered DCF to update the case plan to include a plan of services for father. The ensuing case plan called for father, among other things, to provide a safe and stable home free from illegal substances, to engage in parent education and follow through with recommendations, to work with service providers and physicians and follow through with all recommendations regarding D.M.'s medical needs, to participate in shared parenting meetings, to not engage in further criminal activity, to maintain contact with DCF, to actively engage in achieving case plan objectives, to demonstrate skills that would enable him to safely parent D.M.,

and to engage in a home study. Later that month, the State filed a petition to terminate father's parental rights.

At all relevant times, father was living in Massachusetts with his mother. He took the bus and stayed in a hotel to visit D.M. in Vermont, with some financial assistance from DCF. His visits with D.M. were sporadic from the beginning. After his initial visit in early February 2017, father missed three of the next four scheduled visits. In April 2017, the family court increased visits to six hours every Monday, with four of those hours unsupervised in the community. Father made only six out of the next twenty Monday visits. He often called late Sunday evening to cancel the scheduled visit. Father's pattern of missed visits continued through to the end of the termination hearing in January 2018. Once the visits began in February 2017, father and the foster mother communicated through a notebook. Father never indicated to the foster mother why he missed appointments and he never inquired about D.M.'s medical appointments or the child's progress at daycare.

In June 2017, father filed a motion seeking transfer of custody of D.M. to him. A hearing on father's motion commenced in August 2017, but it was continued until the following month to be joined with a hearing on DCF's motion to terminate father's parental rights. The combined hearing was held over four days in September and October of 2017 and January 2018.

Because father sought custody of D.M. as a Massachusetts resident, the court requested that Massachusetts child welfare services conduct a home study of father's residence in Massachusetts pursuant to the Interstate Compact on the Placement of Children. A Massachusetts social worker visited father's home on one occasion but was unable to schedule follow-up visits because of father's unavailability. The social worker also learned that father was co-parenting an infant daughter from another relationship, that his then-current girlfriend was not the mother of the child, and that father had a juvenile and adult criminal history. The Massachusetts social services agency ultimately declined to approve father's home for D.M.'s placement because of father's overall lack of cooperation, his inconsistency in communicating with the agency, his failure to provide proof of parenting classes, and his failure to demonstrate that he had purchased the necessary safety items to protect a toddler from harm in his home.

In September 2017, DCF learned that father had been arrested in Massachusetts on a fugitive-from-justice warrant. Father told DCF that he had been arrested for unpaid traffic tickets in New York, but DCF later discovered that father had been arrested in Miami, Florida in July 2017 on drug charges involving possession and distribution of cocaine.

Following the completion of the termination/custody hearing, the family court denied father's motion to transfer custody of D.M. to him and, after examining the statutory best-interest factors, granted DCF's motion to terminate father's parental rights. On appeal, father argues that the court withheld its discretion by limiting its consideration of potential disposition options to the only two requested by the parties—termination of parental rights or transfer of custody to father—rather than considering other statutory options available at initial disposition. According to father, in doing so, the court overlooked its responsibility to focus on the best interests of the child, which in this case could have included maintaining DCF custody and giving him more time to demonstrate that he was capable of caring for D.M. Father contends that the court failed to consider what was a reasonable period of time, from D.M.'s perspective, for him to reach the point where he could care for D.M.

For the following reasons, we find these arguments unavailing. Following a CHINS disposition hearing, the family court is required to make such orders "as the court determines are

in the best interest of the child, including”: (1) continuing or returning custody to the custodial parent or guardian; (2) granting parent-child contact to a noncustodial parent or other person having a significant relationship with the child when the goal is reunification with the custodial parent; (3) transferring custody to a noncustodial parent; (4) transferring custody to DCF; (5) terminating parental rights; (6) establishing a permanent guardianship; or (7) transferring custody to a relative or other person having a significant relationship with the child. 33 V.S.A. § 5318(a)(1)-(7). If the court orders options (2), (4), or (5), it must establish a permanency goal and adopt a case plan designed by DCF to achieve that goal. *Id.* § 5318(b).*

In this case, DCF filed a petition requesting only option (5)—termination of father’s parental rights—and father filed a motion requesting only option (3)—transfer of custody of D.M. to him, the noncustodial parent. As the family court indicated in its decision, notwithstanding the fact that father’s limited visits with D.M. during the past year had been sporadic, father took the position at the termination hearing that he was ready to parent D.M. Father cites nothing in the record to challenge this finding or to show that he requested or even raised the possibility of continuing DCF custody to give him additional time to bond with D.M. and demonstrate that he could care for the child. Moreover, the record does not indicate, as father argues, that the family court withheld its discretion to consider other options at initial disposition by assuming that it was restricted to considering only the options requested by the parties. Indeed, the court expressly acknowledged that § 5318(a) required it to make such orders as it determined were in D.M.’s best interests and that it had the authority to issue orders related to the legal custody of D.M., including those requested by the parties. The fact that the court noted what options the parties were requesting and that it was required to weigh those options does not demonstrate that the court believed it was without authority to order other statutory options if the facts warranted it.

Notably, father makes no proffer on appeal that this was such a case, and the record would not support such a proffer. Father does not challenge the court’s findings and conclusions that: (1) his visits with D.M. were sporadic from the beginning right through the termination hearing, even though father had been warned that consistent and increased visitation was critical in this case for him to develop a bond with a child who had been in foster care virtually his entire life; (2) because of his minimal contact with D.M., father had not developed a strong relationship with D.M.; (3) father failed to cooperate with the Massachusetts social services agency to demonstrate that he had a suitable home to safely parent D.M.; (4) father had not shown any interest in D.M.’s medical, educational or emotional needs or development; and (5) father had made little meaningful progress towards being able to care for D.M. during the previous year in which the young child had spent his entire life with a foster couple with whom the child had bonded and who had fully supported his medical, educational, and emotional needs. In short, nothing in the record suggests that this was a case in which D.M.’s best interests would be furthered by maintaining DCF custody to see if father would make further progress towards demonstrating that he could care for the child. Cf. *In re C.L.*, 2005 VT 34, ¶ 17, 178 Vt. 558 (mem.) (affirming termination based upon family court’s findings that father would not be able to assume parenting responsibilities within a reasonable period of time because he had not established any personal or emotional connection to young child who would suffer emotional damage if removed from foster family with whom she had spent her entire life).

* We note that it is DCF’s, not the family court’s, responsibility to create a disposition case plan following a CHINS adjudication, 33 V.S.A. § 5316(a), and that the court may only either adopt DCF’s case plan or reject it and order the Department to prepare and submit a revised plan for the court’s approval. *Id.* § 5318(b).

We further note that in the context of a post-disposition termination case, this Court has rejected similar arguments to those raised by father here, stating that once the family court determines that termination of parental rights is in the child's best interests, it need not explain why it is choosing termination over other statutorily available permanency options. In re T.T., 2005 VT 30, ¶ 7, 178 Vt. 496 (mem.). In any event, as discussed above, this is not a case where the record demonstrates that a further delay in permanency was in the child's best interests.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice