

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-247

NOVEMBER TERM, 2017

In re X.B. and A.B., Juveniles	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	
	}	DOCKET NO. 293/294-10-14 Cnjv

Trial Judge: Kirstin K. Schoonover

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

Father appeals the termination of his parental rights to X.B., born in April 2001, and A.B., born in August 2011. We affirm.

The Department for Children and Families (DCF) filed a petition in October 2014 alleging that X.B. and A.B., who were then thirteen and three years old respectively, were children in need of services (CHINS). The petition alleged that mother, the custodial parent, had significant untreated substance abuse issues that negatively impacted her ability to care for the children. The precipitating event was mother's report to the police that X.B. was missing from the home. When police arrived, mother appeared to have been using drugs and did not know what day it was. The police became concerned when they realized X.B. had been gone for more than a day and mother had waited to contact police. Police contacted DCF, which scheduled mother for a substance abuse assessment. Mother admitted to using cocaine, alcohol, and three to four bags of heroin a day, as well as taking daily medication to help her seizure disorder.

A temporary care hearing was held at which the parties agreed to place the children in the custody of their maternal grandmother. Mother was permitted to have supervised contact with the children. DCF could not locate father, whose last known address in the Department of Corrections database was no longer accurate. DCF attempted to contact father through his parents and through an email address provided by mother, to no avail.

In November 2014, mother admitted to the merits of the CHINS petition. A disposition hearing was held in March 2015. The court adopted a case plan calling for conditional custody with grandmother for six months while mother engaged in services. The case plan did not call for reunification with father or establish any goals for father. Father's attorney indicated at the hearing that father did not object to the case plan.

DCF contacted father around the time of the disposition hearing. He was living in New York and did not want to return to Vermont because he had an outstanding arrest warrant for possession of stolen property. He indicated to DCF that he wanted custody of his children, but not

until he resolved the Vermont warrant. He refused to provide his address to DCF. DCF did not have any further contact with father until he contacted DCF in January 2017 seeking custody of the children. By that point, DCF had filed a petition to terminate both parents' rights, and DCF advised father to consult his attorney.

Mother failed to engage in substance abuse treatment as required by the case plan. She did not attend any of the children's medical or dental appointments, and failed to appear at most of the court proceedings, including the termination hearing. Her contact with the children was terminated after she assaulted her adult son and spit in X.B.'s face while the family was watching the Super Bowl together in February 2016, causing grandmother to obtain a relief-from-abuse order. At the time of the termination hearing, she faced multiple criminal charges.

Although father was never the primary caregiver, he helped care for the children before he moved to New York in October 2014. After he moved, he called the children five to six times and visited them approximately four times. In 2016, A.B. asked her grandmother if she could invite father for her birthday, because A.B. could not remember what he looked like. Father attended the birthday. Father did not provide any financial assistance to the children after he moved.

DCF filed a termination petition in September 2016. The termination hearing was held in April 2017. Mother did not attend, but was represented by counsel. Father attended and testified at the hearing.

Father stated that he did not want to remove X.B. from his high school, but did want custody of A.B. He believed that there were too many people in grandmother's household, and alluded to a fight that allegedly occurred there at Christmas. He currently lived in a one-person cottage in New York, but said that he was looking for a two- or three-bedroom apartment. He stated that he was currently working two jobs. He admitted that he never provided any child support, that he was a registered sex offender, and that he had used heroin in the past with mother. He stated that he had not used heroin since October 2014.

Father admitted that he had not seen the children very often since he moved to New York due to the arrest warrant. He said that he spoke to the prosecutor regarding his warrant, and the prosecutor told him that if he pleaded guilty he might have to spend some time in jail and pay a fine of up to \$700. He claimed that the prosecutor was supposed to send him a plea waiver form, but never did. He did not contact DCF or attempt to set up visitation because he was worried about returning to Vermont due to the warrant.

In a written decision issued in May 2017, the court granted the petition and terminated the parental rights of both mother and father. The court determined that both parents had stagnated in their ability to parent the children. The court next considered the factors set forth in 33 V.S.A. § 5114. The court found that the children were strongly bonded with their grandmother and older brother, who lived with grandmother. They were well-adjusted to their foster home, school, and community. Although they enjoyed being with father when they saw him, they did not have a deep personal connection with him. The court found that neither mother nor father would be able to resume parenting the children within a reasonable time. Father had not lived with the children since October 2014. He had been virtually absent from their lives while the case was pending. The court noted that father had chosen to remain outside the state for three years to avoid a warrant, when he could have turned himself in with relatively minimal consequences and thereby resolved

the warrant. He still had not turned himself in at the time of the hearing. As a result, he had missed opportunities to play a meaningful role in the children's lives. He had not provided any financial or emotional support to grandmother, who had cared for the children and tended to their significant medical and dental needs. The court concluded that although father may love the children, he did not play a constructive role in their lives. It determined that termination of parental rights was in the best interests of the children. Father appealed; mother did not.

On appeal, father argues that the court erred by terminating his parental rights without a showing of "parental unfitness." This Court has made clear that "parental unfitness" is not one of the criteria the family court is required to find before it may terminate parental rights. In re D.C., 2012 VT 108, ¶ 26, 193 Vt. 101. Rather, the court is required to find "by clear and convincing evidence that changed circumstances exist and termination of parental rights serves the best interests of the child, 33 V.S.A. § 5113(b), as viewed through the specific criteria contained in § 5114(a)." Id. ¶ 25. As we have often repeated, the most important criterion is whether the parent will be able to resume parental duties within a reasonable amount of time. Id. ¶ 22. The court found that father would not be able to resume parenting within a reasonable amount of time, and furthermore that he played no constructive role in the children's lives. The court's findings are supported by the record, and in turn support its conclusion that termination was in the children's best interests.

Father argues that he was not an unfit parent merely because he lived out of state and chose a noncustodial role, and that the parent-child relationship should be maintained absent a showing that he is unfit to care for the children. "Public policy, however, does not dictate that the parent-child bond be maintained regardless of the cost to the child; 33 V.S.A. § 5540 recognizes that severance of that bond may be in the child's best interest." In re M.B., 162 Vt. 229, 238 (1994). As the court found, father voluntarily absented himself from the children's lives for nearly three years because he was avoiding an arrest warrant. Had he turned himself in, he would have been able to return to Vermont and be involved in his children's lives. Instead, he chose to remain in New York and let grandmother take care of the children. He made no attempts to work with DCF on a case plan to regain custody; in fact, he avoided DCF for an extended period of time. At the time of the hearing, he still had not resolved the warrant. The court found that the children needed permanency and could wait no longer for father to take the steps necessary to resume a parental role. These findings were supported by the record.

Father further claims that the court improperly faulted him for not paying child support because it had not ordered him to do so. We find no error. Section 5114 requires the court to consider whether the parent has played a constructive role in the child's welfare; this includes emotional, but also financial, support. 33 V.S.A. § 5114(a); see also In re J.B., 157 Vt. 668, 669 (1991) ("Parents have a duty to provide support, when they are able, for their minor children."). It was not improper for the court to consider whether father provided, or attempted to provide, financial support for his children, even if he had not been specifically ordered to do so. Such information is relevant to the best-interests determination.

Father also claims that the court "faulted" him for being on the sex offender registry. Although the court mentioned father's prior conviction and sex offender status in its findings, there is no evidence that its decision was based upon these facts. In re M.W., 2016 VT 28, ¶ 13, 201 Vt. 622 (affirming termination decision despite challenged findings of alleged criminal behavior by

father where court did not base termination decision on those findings). We therefore see no basis to reverse the court's decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Karen R. Carroll, Associate Justice