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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-052

AUGUST TERM, 2007

In re N.B. & A.B., Juveniles	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Family Court
	}	
	}	
	}	DOCKET NOS. F33-1-03 CnJv & F115-2-04 CnJv
		Trial Judge: Geoffrey W. Crawford

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

Father appeals the family court's orders terminating his parental rights with respect to his two children, N.B. and A.B., and denying his petition to have his parents appointed permanent guardians over the children. We affirm.

N.B., who was born in September 1993, first came into state custody in January 2003 based on allegations that father had subjected his older half-sister to inappropriate corporal punishment. The ensuing protective order required, among other things, that father engage in anger management counseling, that the family participate in family services, and that the parents submit to random drug testing and substance abuse assessments. Subsequently, both parents consistently tested positive for cocaine use. In May 2003, N.B. was returned to state custody based on continuing concerns regarding the parents' substance abuse, and father moved out of the home. The family court noted that father had a long, serious history of drug abuse. As the result of further drug screening, father tested positive for cocaine and opiates. The parents admitted that N.B. was a child in need of care or supervision (CHINS), and while the CHINS proceeding was pending in February 2004, A.B. was born. A CHINS petition was filed on behalf of A.B. shortly after her birth because of the mother's continuing drug abuse. The disposition report called for continued state custody with services, counseling, and drug treatment for the parents. The report unequivocally warned that a petition for termination of parental rights would be filed within three months if the parents failed to make significant progress in addressing their drug problems and providing a safe home for their children.

In June 2004, the children were placed with the paternal grandparents, but were returned to the parents in the fall of 2004. In April 2005, father was charged with domestic assault based on an altercation with his sixteen-year-old stepdaughter. After being cited for the offense, but prior to his

arraignment, father left the state. Since that time, father has not appeared personally in any family court proceeding and has remained out of contact with his children except for occasional visits and telephone calls. On September 21, 2005, the family court returned custody of the children to the mother based on her assurances that she would move to Florida to be near the paternal grandparents. Six days later, after learning that the mother was secretly planning to move to Utah, the Department for Children and Families (DCF) sought and obtained an emergency pick-up order. At a September 29, 2005 emergency hearing, the court returned custody of the children to DCF and changed the case plan to place the children with the paternal grandparents in Florida. Shortly thereafter, mother took A.B. to Georgia, where father was staying with one of his brothers, and left N.B. behind with a neighbor. DCF obtained an emergency pick-up order and returned A.B. to Vermont. Both children were placed with the paternal grandparents, with whom they have remained since the fall of 2005.

In April 2006, DCF filed a petition to terminate parental rights. During this period, father was living in Georgia and Florida. In January 2006, he admitted to DCF that he was using drugs, and in August 2006 he was arrested in Florida and charged with retail theft and possession of drug paraphernalia. At the time of the first day of the termination hearing in October 2006, father was unemployed and had no fixed address. He was separated from the mother, who was living in California. By the time of the second day of the termination hearing, father was back in jail in Florida on new charges. He was still in jail on the last day of the termination hearing in January 2007, waiting for resolution of the Florida charges. Domestic assault charges remained pending in Vermont. The mother voluntarily relinquished her parental rights during the proceedings. Following the termination hearing, during which father was represented by counsel and testified by telephone, the family court terminated father's residual parental rights, concluding that father (1) had failed to lead a stable, drug-free life which could provide a safe environment for his children, and (2) had no ability to care for his children because he was incarcerated in Florida awaiting trial and had charges pending in Vermont. After finding changed circumstances, the court concluded that all four of the criteria set forth in 33 V.S.A. § 5540 strongly weighed in favor of termination of father's parental rights. The court also rejected father's request to establish a permanent guardianship with the paternal grandparents, stating that the statutory criteria had not been met because those same grandparents were very likely to adopt the children.

On appeal, father first argues that because the family court transferred custody of the children back to the mother in its September 21, 2005 order, the children were no longer CHINS and thus the court lacked subject matter jurisdiction to reopen the CHINS proceeding one week later and eventually terminate his parental rights. We conclude that father waived this argument by failing to raise it until the instant appeal. As we stated in In re B.C., 169 Vt. 1, 8 (1999), "[u]nless a court has usurped power not accorded to it, its exercise of subject matter jurisdiction is binding in subsequent proceedings as long as the jurisdictional question was litigated and decided or the parties had an opportunity to contest subject-matter jurisdiction but failed to do so." (Emphasis added). "This approach is consistent with the modern trend 'to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.' " Id. (quoting Restatement (Second) of Judgments § 11, cmt. e (1982)). Here, as in B.C., 169 Vt. at 7, the family court unquestionably possessed subject matter jurisdiction over the general type of controversy before it. The children had been adjudicated CHINS, and although custody had been transferred

back to the mother based on her false assurances that she would be taking them to Florida to be near the paternal grandparents, DCF was essentially claiming in its request six days later for an emergency pick-up and hearing that the children were once again CHINS. See 33 V.S.A. § 5503(a) (providing that the family court has "exclusive jurisdiction over all proceedings concerning any child who is or who is alleged to be . . . a child in need of care or supervision" (emphasis added)). Father did not contest the family court's subject matter jurisdiction with respect to its detention and custody orders issued in the fall of 2005, and thus he is precluded from doing so here. We reject father's belated jurisdictional challenge, which exalts form over substance.

Father also argues that the family court's termination order and denial of his request for a permanent guardianship is based on its misunderstanding of the permanent guardianship statute and its unsupported findings concerning his relationship with his children. According to father, the court mistakenly assumed that granting a permanent guardianship would undermine the authority of the paternal grandparents, and further, that the court failed to acknowledge his decision to be near his children in Florida. We conclude that the record fully supports the court's orders terminating father's parental rights and rejecting his request for a permanent guardianship. The evidence overwhelmingly supports the family court's findings that father will be unable to resume a parental role within a reasonable period of time, that he has not played a constructive role in the children's lives because of his own volitional conduct, and that his conduct has significantly weakened his relationship with the children. Thus, even if we were to accept father's argument that the provision in 14 V.S.A. § 2664(a)(2) precluding a permanent guardianship if adoption is "reasonably likely" should be construed as meaning only when adoption is in the children's best interests, but see In re A.S., 171 Vt. 369, 373-74 (2000) (noting Legislature's intent that a permanent guardianship be a last resort when adoption or return to the parents has been ruled out), we would still uphold the court's rejection of a permanent guardianship in this case because the record fully supports its order terminating father's rights and freeing the children for adoption.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice