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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-060

AUGUST TERM, 2004

In re S.L.-P., Juvenile	}	APPEALED FROM:
	}	Chittenden Family Court
	}	DOCKET NO. 240-5-02 Cnjv
	}	Trial Judge: David Jenkins

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

Father appeals from a family court judgment terminating his parental rights to the minor S.L.-P. He contends: (1) the evidence was insufficient to support the judgment; (2) the Department of Social and Rehabilitation Services violated his constitutional right to equal protection of the law by offering mother services while disregarding father; and (3) SRS infringed his right to due process by seeking termination of parental rights in violation of its own policy manual. We affirm.

The facts may be summarized as follows. S.L.-P. was born in January 2002. SRS became involved in the case in March, when mother was arrested for retail theft, and filed a CHINS petition in May, after reports of mother' s drug use, failure to supervise S.L.-P or her three-year old brother, and missed medical appointments. At a hearing in May, the court ordered both children into SRS custody. Father was not present at the hearing, but was represented by counsel because of uncertainty as to whether he or M.L. was the father. The court ordered paternity testing on June 11, and found the children to be CHINS at a hearing on June 18. Father failed to appear for the CHINS hearing, but arrived later that day and was directed to arrange for genetic testing with the Office of Child Support. He failed to do so.

In September, SRS filed a disposition report recommending termination of parental rights. At a hearing in October, where father was again represented by counsel but was not present, the court again ordered paternity testing. M.L. appeared for the scheduled test in November, and was determined not to be the father. Father failed to appear for the test. Father' s whereabouts remained unknown until December, when was arrested and incarcerated for probation violations. He was later found to be in violation of probation, and has since remained incarcerated on sentences for heroin distribution, domestic assault, lewd and lascivious conduct with a child, and furnishing alcohol to a minor. He was tested while incarcerated and determined to be S.L.-P' s biological father.

SRS filed a TPR petition in January 2003. At a hearing in February, father requested prison visitation with the minor. The court denied the request, noting that it was reluctant to subject the child, who was one year old, to prison visits with father, who had never previously seen the child and had made virtually no prior effort to contact the child. Following a two day hearing in September and October, the court granted the petition and terminated the parental rights of both mother and father. Only father has appealed the judgment.

Father contends the evidence was insufficient to support the order of termination for two reasons. First, he contends that SRS failed to prove by clear and convincing evidence that stagnation had occurred resulting in a substantial change of circumstances. However, where " as here " termination is raised at the initial disposition hearing, the relevant issue is not whether a change of circumstances has occurred, but whether termination is in the bests interests of the child. In re J.T., 166 Vt. 173, 177 (1997). Father also asserts that SRS failed to meet its burden of showing that termination was in

the best interests of the child because he was never afforded an opportunity to demonstrate his parenting skills, claiming that mother initially hid the fact of his paternity and that he was later unfairly denied visitation with the child while incarcerated. The court found, and the evidence shows, that father was aware of the possibility of his paternity at least as early as October 2001, when mother " then pregnant with S.L.-P " told him that he could be the father and asked him to be tested. Father' s reaction was to smash her face into a wall, resulting in a conviction for domestic assault. As the court further found, and as the evidence shows, during the period between the minor' s birth in January 2002 and father' s request for prison visitation in February 2003 (following his arrest in December 2002), father made virtually no effort to contact the child, failed to respond to SRS attempts to contact him throughout the summer of 2002, appeared at none of the hearings involving the child until September, and ignored two court orders to undergo genetic testing in June and October.

The trial court thus reasonably concluded that having literally " disappeared from the scene" and having ignored repeated efforts by SRS to involve him in the minor' s first fourteen months of life, father' s claim that he was not afforded a reasonable opportunity to parent or visit with the child was without merit. See In re K.F., 2004 VT 40, & 12, 852 A.2d 584 (rejecting father' s claim that termination of parental rights was based on factors " beyond his control" where record showed pattern of unavailability due to incarceration, criminal behavior, and nonparticipation in programming). Additionally, the court' s conclusion that termination was in the best interests of the child was amply supported by the evidence and findings (1) that father' s attitude toward children in general, in light of his several incidents of domestic assault and sex offender status, was A alarming," (2) that he had failed to complete sex offender and substance abuse counseling, (3) that he had an extensive history of criminal convictions and probation violations, and (4) that he had established no contact or relationship with the child and no likelihood of assuming parental responsibilities within a reasonable time. See In re S.W., 2003 VT 90, & 7, 833 A.2d 879 (upholding termination of father' s parental rights in light of extended incarceration, likelihood of reincarceration, history of violent offenses, and failure to complete programming); In re A.D.T., 174 Vt. 369, 377 (2002) (parent who has refused to have any relationship with, or responsibility for, child is per se unable to resume parental duties).[1]

Father next asserts that SRS' s provision of services to mother, but not father, violated his constitutional right to equal protection of the law. The claim was not asserted below, and therefore was not preserved for review on appeal. In re White, 172 Vt. 335, 343 (2001). Although father claims in his reply brief that the issue nevertheless warrants review as a " fundamental miscarriage of justice," Varnum v. Varnum, 155 Vt. 376, 383 (1990), the record of father' s near total disregard for the minor' s interests, history of violent crime, pattern of incarceration, and failure to complete sex offender and substance abuse counseling show that this is not " one of those rare and extraordinary cases which is so grave and serious that it strikes at the very heart of" father' s constitutional rights. Id. at 382-83 (quoting In re Maher, 132 Vt. 560, 562 (1974)). Accordingly, we decline to consider the claim.

Finally, father contends that SRS violated his constitutional due process rights and its own policy manual by seeking termination of his parental rights before he was postively identified as the biological father and offered adequate parenting services. The claim was not raised below and therefore was not preserved for review on appeal. White, 172 Vt. at 343. Furthermore, as previously discussed, father' s claim that he was not afforded an adequate opportunity to acquire or demonstrate parenting skills is entirely lacking in merit.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

Footnote

1. Father also summarily asserts that 33 V.S.A. § 5540 is "overly vague" and "void" as applied to the circumstances here because the criterion relating to a parent's ability to "resume" parental responsibilities assumes that a child has had contact with the parent. The argument was not raised below and therefore was not preserved for review on appeal. In re White, 172 Vt. 335, 343 (2001). Furthermore, we rejected a similar claim in In re A.D.T., 174 Vt. 369, 377 (2002) ("We reject father's assertion that in cases like this where a parent has never met his child, refused to participate in the case planning process for the child, and failed to demonstrate the slightest interest in the child's well being or circumstances, the juvenile court must have some evidence about the parent's parenting abilities before severing the legal parent-child relationship.").