

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. 2019-330

JANUARY TERM, 2020

In re S.R., V.R., N.R., G.R., Juveniles	}	APPEALED FROM:
(K.R., Father*)	}	
	}	Superior Court, Caledonia Unit,
	}	Family Division
	}	
	}	DOCKET NO. 30/31/32/33-5-18 Cajv

Trial Judge: Howard E. Van Benthuisen

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

Father appeals termination of his parental rights to his four children, twins S.R. and G.R., born in May 2015, and children V.R. and N.R., born in August 2017 and September 2016, respectively. On appeal, father argues that the court erred in concluding that the children were in need of care or supervision (CHINS) due to abandonment and that termination was in the children's best interests. We affirm.

The court found the following. The children have lived with their paternal grandmother and her husband (grandparents) since birth. Mother and father also lived in the home at various times. Mother and father both have struggled with substance abuse and have had lengthy periods of incarceration. The Department for Children and Families worked with the family in 2016 and provided services to father in the areas of medical management of substances, mental-health counseling, substance-abuse counseling, and probation. The case was closed in 2017 as parents made progress.

In March 2018, mother and father left grandparents' home, leaving care of the children to grandparents. Grandmother assumed sole responsibility for the children's care, including medical and other appointments. Parents did not leave any written authorizations for grandmother to act as caregiver. At some point in March 2018, grandmother learned that mother and father were in a local motel and brought the children there, but parents did not want her to leave the children there. Mother was out of touch with grandmother and the children for several months. DCF eventually learned that she was jailed in Massachusetts on drug charges. Father was incarcerated in April 2018.

In May 2018, the State filed a petition alleging that the children were CHINS due to abandonment. The court granted DCF custody of the children and DCF continued placement of the children with their grandparents. Parents contested the merits of the CHINS petition. Following a contested hearing, the court found the children were CHINS on October 17, 2018 due to abandonment. 33 V.S.A. § 5102(3)(A). The court found that parents left the children in grandmother's care without making provision for her to have legal ability to care for them. The

court further found that after parents moved into a local motel, the parents declined to have the children stay with them. Mother then disappeared and father was arrested.

In late spring of 2018, mother was arrested in Massachusetts on drug trafficking charges and held until April 2019. She did not attend the termination hearing. She had no in-person contact with the children from January 2019 to the final hearing. After mother was released from jail, DCF attempted to meet with her and to arrange visits, but mother did not appear at the meetings. At the time of the final hearing, her whereabouts were unknown.

Father has had addiction issues since age 14-15. Father used heroin from 2006 to 2014. Father has been sober since being incarcerated in spring of 2018. Father was in jail at the time of the twins' birth and was released two months later. He went back to jail in April 2018 until his release in July 2019. Father has never independently parented the children. At the time of the TPR hearing, he was in a halfway house where he was not permitted to have children. He is expected to be there until January 2020. After that, father will be under probation supervision. Father indicated that he does not intend to move the children from his mother's home and that it would take him six months to a year to obtain a job, buy a car, and find stable housing. At the time of the TPR hearing, father was not employed and had not engaged in mental-health treatment in jail. Father had had one in-person visit with the children and had been calling them regularly.

The State filed petitions to terminate parents' rights in November 2018 at initial disposition. The court found that termination was in the children's best interests. Father has a bond with the children but only two children interact with him in a way that demonstrates a solid and positive bond due to his periods of absence from their lives. The children have a strong attachment to their grandparents, who are meeting all their needs for safety, love, and affection. Grandparents provide stability and predictability for the children. The children are well adjusted to living in grandparents' home. The children need stability. Since his release from jail, father has not contacted DCF to work on elements of the case plan or to have in-person contact with the children. Because father requires time to become stable and develop a relationship with the children, he will not be able to resume parenting within a reasonable time as measured by the needs of these young children.

The family court may terminate parental rights at the initial disposition proceeding if the court finds by clear and convincing evidence that termination is in the child's best interests. In re J.T., 166 Vt. 173, 177, 179 (1997). In assessing the child's best interests, the court must consider the statutory criteria. 33 V.S.A. § 5114. The most important factor is whether the parent will be able to resume parenting duties within a reasonable period of time. In re J.B., 167 Vt. 637, 639 (1998) (mem.). The reasonableness of the time period must be measured from the child's perspective, In re B.M., 165 Vt. 331, 337 (1996), and may take account of the child's young age or special needs, In re J.S., 168 Vt. 572, 574 (1998) (mem.). On appeal, we will uphold the family court's conclusions if supported by the findings and affirm the findings unless clearly erroneous. In re A.F., 160 Vt. 175, 178 (1993).

On appeal, father challenges the court's determination that the children were CHINS due to abandonment.¹ Pursuant to statute, a child is CHINS if the child has been abandoned. 33 V.S.A. § 5102(3)(A). The statute provides four bases for abandonment:

A person is considered to have abandoned a child if the person is: unwilling to have physical custody of the child; unable, unwilling, or has failed to make appropriate arrangements for the child's care; unable to have physical custody of the child and has not arranged or cannot arrange for the safe and appropriate care of the child; or has left the child with a care provider and the care provider is unwilling or unable to provide care or support for the child, the whereabouts of the person are unknown, and reasonable efforts to locate the person have been unsuccessful.

Id. Here, the court found that parents were unwilling to have physical custody of the children because they left grandparents' home without the children and then did not want the children to stay with them at the motel. The court also found under the second clause that parents did not make proper arrangements for the children's care because neither parent arranged in writing for grandmother to have authority to act as caregiver.

Father argues that the court's decision is both unsupported by the evidence and legally incorrect. Father's evidentiary challenge relates to the court's finding concerning an incident that occurred after parents left the children with grandparents. In the findings section of the CHINS merits decision, the court found that at some point after parents left the house, they moved into a local motel but did not bring the children with them. Grandmother brought the children to the motel one time, "but the parents did not want her to leave the children there." In the court's analysis, the court described that when grandmother visited parents at the local motel "parents declined to have children move in with them" and that "the parents refused to have them stay." Father contends that the evidence does not support the court's finding that parents "refused" to have grandmother leave the children with parents. According to father, the testimony demonstrates that grandmother deemed the motel unsuitable for the children and father merely agreed with her. Grandmother testified that after mother and father left her home, they were staying at a local motel but did not take the children back with them. She explained that she brought the kids there and it was "no place I wanted to leave the kids." She further clarified that when she brought the kids there father thought it was important for the children to stay at grandparents. Father argues that this evidence demonstrates that father did not abdicate his parental responsibilities but exercised sound judgment in agreeing with grandmother that the motel was not an appropriate place for the children.

We conclude that the facts support the court's finding that parents did not want grandmother to leave the children with them. In re B.C., 2013 VT 58, ¶ 21, 194 Vt. 391 ("When findings are challenged on appeal, our role is limited to determining whether they are supported by credible evidence, leaving it to the sound discretion of the family court to determine the credibility of the witnesses and to weigh the evidence." (quotations omitted)).

¹ Mother has not appealed the termination of her parental rights.

Moreover, even if the court’s characterization of parents’ action as a “refusal” is inaccurate, the evidence does support the legally relevant part of the court’s finding—parents were unwilling to have physical custody of the children and this finding supports the conclusion that the children were CHINS due to abandonment. Under the statute, abandonment may be shown where a parent is “unwilling to have physical custody of the child.” 33 V.S.A. § 5102(3)(A). In In re B.G., 2016 VT 107, ¶ 9, 203 Vt. 317, we affirmed a determination that the mother abandoned her child where she was not taking physical care of the child, did not participate in the child’s life, and voluntarily abdicated all responsibility for the child. Here, the evidence is that parents left grandparents’ house without the children, did not want physical custody of the children after that time, and abdicated all responsibility for the children. That grandmother also thought that the motel was unsuitable for children does not change the fact that parents were unwilling to have physical custody of the children while staying at the motel. Parents’ action of leaving without the children, declining to keep them at the motel, and then disappearing and becoming incarcerated are enough to support a conclusion that parents were unwilling to have physical custody and the children were abandoned within the meaning of the statute.

Because we conclude that the facts demonstrate abandonment under the first prong—that parents were unwilling to have physical custody of the children—we need not reach the question of whether the other bases for abandonment were met in this case.

Father also argues that termination was not appropriate in this case because a guardianship to grandmother would safeguard the children’s best interests and minimize family disruption. Father contends that termination should not be considered where a guardianship to grandmother would have protected the children and minimized family disruption. We have explained that when the court is presented with a petition to terminate parental rights, the court is required to weigh the best-interests factors and is not required to evaluate other permanency options contained in 33 V.S.A. § 5531(d). In re T.T., 2005 VT 30, ¶ 7, 178 Vt. 496 (mem.) (explaining that when family court determines that termination is in child’s best interests, court does not need to “explain why it is choosing termination of parental rights over other options”). Here, father did not propose a guardianship below and consequently the court did not err in failing to address this alternative disposition on its own initiative.

Father next contends that termination of father’s rights was improperly based on father’s lack of progress with respect to an initial case plan not adopted by the court. We conclude that there was no error. Because termination in this case was sought at initial disposition, the sole question before the court was whether termination was in the children’s best interests. In re C.P., 2012 VT 100, ¶ 30, 193 Vt. 29; see 33 V.S.A. § 5114(a) (providing factors to consider in determining children’s best interests). The court considered the initial case plan, but it is evident from the court’s order that its decision on the children’s best interests was rooted in an analysis of the statutory factors. The court itself acknowledged that although parents had not made progress towards achieving the goals in the initial case plan, this stagnation did not provide a basis to terminate parents’ rights. The court properly considered each of the best-interests factors, including the most important—whether father would be able to parent within a reasonable time. See In re C.P., 2012 VT 100, ¶ 30. The court found that due to father’s incarceration, his bond with his children was diminished and father does not play a constructive role in their lives. The children had a strong bond with their grandmother and are well adjusted to their grandparents’ home and community. The children have a strong need for permanency and father will not be able to parent them in a reasonable time.

In a related argument father asserts that the court misconstrued the final factor, “whether the parent has played and continues to play a constructive role, including personal contact and demonstrated emotional support and affection, in the child’s welfare.” 33 V.S.A. § 5114(a)(4). Father argues that the court conflated this question with the third factor, whether father would be able to parent within a reasonable time and that the evidence shows that he played a constructive role in the children’s lives by frequently calling and maintaining a bond with the children. There was no error. Although similar facts related to the third and fourth factors, the family court considered each statutory factor independently. Moreover, the evidence supports the court’s findings that father’s poor choices and incarceration diminished the role he played in the children’s lives and limited his contact with the children. Father asserts that he played a constructive role, focusing solely on his past role in the children’s lives and his efforts to communicate with them while incarcerated. The court did not err in also considering father’s role in maintaining the children’s welfare, including his inability to meet their needs for food, shelter, support, medical care, and guidance.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice