

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

In re Carter A.

111 A.D.3d 1181, 977 N.Y.S.2d 415 (3d Dep't 2013) · Decided November 27, 2013

SUMMARY

The New York Appellate Division, Third Department, affirmed an order terminating the father's parental rights after finding that he had abandoned his child under Social Services Law § 384-b. The court held that the father's sporadic visits and failure to communicate did not preclude abandonment, and that he failed to show that he was unable to maintain contact or was discouraged from doing so. The court also rejected arguments concerning a suspended judgment, the petition's allegations, and ineffective assistance of counsel.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Garry, J.; Rose, J.E.; Stein, J.; McCarthy, J.
JURISDICTION	New York
DECIDED	November 27, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent appealed from an order of Family Court that adjudicated the child abandoned under Social Services Law § 384-b and terminated respondent's parental rights.
STANDARD OF REVIEW	The Appellate Division reviewed Family Court's abandonment determination based on whether petitioner established abandonment by clear and convincing evidence and deferred to Family Court's credibility determinations.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Respondent father v. Petitioner

TOPICS

- termination of parental rights
- parental rights
- family law procedure
- appellate procedure
- preservation of error

PRACTICE AREAS

family law

termination of parental rights

appellate procedure

QUESTIONS PRESENTED

1. Whether petitioner established by clear and convincing evidence that respondent abandoned the child under Social Services Law § 384-b.
2. Whether respondent's two visits in December 2011 precluded a finding of abandonment or required recalculation of the statutory six-month period.
3. Whether respondent's incarceration, orders of protection, or the written-visitation-request requirement prevented or discouraged contact with the child.
4. Whether Family Court could impose a suspended judgment after finding abandonment.
5. Whether respondent's unpreserved challenges to the petition and his ineffective-assistance claim warranted reversal.

HOLDINGS

1. Petitioner established by clear and convincing evidence that respondent abandoned the child because, during the six-month period before the petition, he failed to visit or communicate with the child or petitioner despite being able to do so and not being prevented or discouraged from doing so.
2. Respondent's two visits did not preclude a finding of abandonment because they constituted sporadic, infrequent, and insubstantial contacts and were initiated by petitioner.
3. Respondent failed to meet his burden of proving that he was unable to maintain contact or was prevented or discouraged from doing so.
4. A suspended judgment is not an authorized disposition after a finding of abandonment.
5. Respondent's challenges to the petition's specificity and the timing of the proceeding were unpreserved, and counsel was not ineffective for failing to make dismissal motions that were unlikely to succeed.

KEY QUOTATIONS

“They amount to nothing more than “sporadic and infrequent, insubstantial contacts,”” (111 A.D.3d at 1183)

“a suspended judgment is not an authorized disposition after a finding of abandonment” (111 A.D.3d at 1183)

“Counsel cannot be deemed ineffective for failing to make a motion . . . that is unlikely to be successful” (111 A.D.3d at 1184)

FACTUAL BACKGROUND

Respondent's child was removed from the custody of respondent and the child's mother in October 2011 and was later placed in petitioner's custody and foster care. During the six-month period preceding the abandonment petition, respondent attended only two visits in December 2011, initiated by petitioner, and thereafter failed to visit, communicate with the child or petitioner, respond to caseworker communications, or provide letters, gifts,

or cards. Although respondent was incarcerated during part of the period, the record showed that he was able to maintain contact and was not prevented or discouraged from doing so.

PROCEDURAL HISTORY

The child was removed from respondent's custody after neglect proceedings were commenced. Family Court found respondent had neglected the child, later conducted a combined fact-finding and dispositional hearing in the abandonment proceeding, found abandonment, and terminated respondent's parental rights. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Maria E. [Jermaine D.], 94 A.D.3d 1357, 1357-1358 (3d Dep't 2012)
- Matter of Ryan Q. [Eric Q.], 90 A.D.3d 1263, 1264 (3d Dep't 2011), lv. denied, 18 N.Y.3d 809 (2012)
- Matter of Jamaica M. [Hakeem N.], 90 A.D.3d 1105, 1106 (3d Dep't 2011), lv. denied, 18 N.Y.3d 806 (2012)
- Matter of Jamal B. [Johnny B.], 95 A.D.3d 1614, 1615-1616 (3d Dep't 2012), lv. denied, 19 N.Y.3d 812 (2012)
- Matter of Jacob WW., 56 A.D.3d 995, 997 (3d Dep't 2008)
- Matter of Leon CC. [Larry CC.], 86 A.D.3d 764, 766 (3d Dep't 2011), lv. denied, 17 N.Y.3d 714 (2011)
- Matter of Jackie B. [Dennis B.], 75 A.D.3d 692, 693 (3d Dep't 2010)
- Matter of Alec B., 34 A.D.3d 1110, 1111 (3d Dep't 2006)
- Matter of Jennie EE., 187 A.D.2d 877, 877-878 (3d Dep't 1992), lv. denied, 81 N.Y.2d 706 (1993)
- Matter of Jamaal NN., 61 A.D.3d 1056, 1058 (3d Dep't 2009), lv. denied, 12 N.Y.3d 711 (2009)
- Matter of Richard W., 226 A.D.2d 941, 942 (3d Dep't 1996), lv. denied, 88 N.Y.2d 808 (1996)

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