

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest)	MEMORANDUM DECISION
of E.A., a person under)	(Not For Official Publication)
eighteen years of age.)	
_____)	Case No. 20080491-CA
)	
C.G.A.,)	F I L E D
)	(July 31, 2008)
Appellant,)	
)	2008 UT App 295
v.)	
)	
State of Utah,)	
)	
Appellee.)	

Third District Juvenile, Salt Lake Department, 543462
The Honorable Sharon P. McCully

Attorneys: Joseph L. Nemelka, Salt Lake City, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake
City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Greenwood, Thorne, and Billings.

PER CURIAM:

C.G.A. (Father) appeals the termination of his parental rights in E.A. We affirm.

Father first asserts that the juvenile court abused its discretion in determining that there was sufficient evidence to terminate his parental rights. Specifically, Father asserts that his rights were improperly terminated solely on the ground that he is incarcerated. A juvenile court may terminate parental rights if the court finds that the parent has abandoned a child, neglected a child, or is an unfit or incompetent parent. See Utah Code Ann. § 78-3a-407(1)(a)-(c) (Supp. 2007). Pursuant to section 78-3a-407(1), the finding of any single ground is alone sufficient to warrant the termination of parental rights. See id. § 78-3a-407(1); see also In re F.C. III, 2003 UT App 397, ¶ 6, 81 P.3d 790. A juvenile court's findings will not be overturned unless they are clearly erroneous. See In re A.G.,

2001 UT App 87, ¶ 7, 27 P.3d 562. A finding is clearly erroneous only when, in light of the evidence supporting the finding, it is against the clear weight of the evidence. See id.

The record demonstrates that there was sufficient evidence to support the juvenile court's determinations that Father was unfit or incompetent and that he had neglected E.A. Utah Code section 78-3a-408(2)(e) provides that if a parent is incarcerated as a result of a conviction of a felony, and the sentence is of such length that the child will be deprived of a normal home for more than one year, there is evidence to find that a parent has neglected his or her child or is an unfit parent. See Utah Code Ann. § 78-3a-408(2)(e). In analyzing this section, this court has determined that a parent's incarceration alone is an insufficient basis for terminating his or her parental rights. This court ruled that the plain language of section 78-3a-408(2)(e) does not allow for termination of parental rights based solely on incarceration for a period of more than a year. See In re D.B., 2002 UT App 314, ¶ 10, 57 P.3d 1102.

However, the requisite distinction pertaining to section 78-3a-408(2)(e) is that such section allows for termination of an incarcerated parent's rights in the much more narrow circumstance where a child, already in the Division of Child and Family Services's (DCFS) custody, will continue to be deprived of a normal home for more than a year as a result of a parent's felony conviction. See id. In such cases where the other parent's rights have also been terminated or restricted and the child is in the custody of DCFS, subsection (e) is an appropriate ground for termination of parental rights. See id. ¶ 11. To clarify, "it is the deprivation of a normal home for a period of more than a year that renders the incarcerated parent unfit, not the incarceration itself." Id. A convicted felon sent to prison for many years could not have his parental rights terminated under subsection (e) if his child was not in DCFS custody. See id.

Father was incarcerated in early 2007 as a result of a felony conviction. E.A. was removed on January 21, 2008, and placed in DCFS custody.¹ The only conclusive evidence regarding Father's potential parole is that he will have a parole hearing in April of 2009. If not paroled, Father may remain in prison until the year 2019. Because there is no evidence that Father

¹As required for the application of subsection (e), E.A.'s mother's parental rights had also been terminated. See In re D.B., 2002 UT App 314, ¶ 11.

will have the opportunity for parole prior to April of 2009, his incarceration will have deprived E.A. from a normal home for more than one year.

Additionally, the record demonstrates that Father's history of incarceration is so prevalent that within mere months of E.A.'s conception, Father was again incarcerated. A court may also determine that a child is neglected if the child lacks proper parental care by reason of the fault or habits of a parent. See Utah Code Ann. § 78-3a-103(1)(u)(i)(C) (Supp. 2007). The record demonstrates that the juvenile court considered that E.A. lacked proper parental care due to Father's choices to engage in activity that led to repeated incarceration. Father knew that in order to provide proper parental care, he must be available to act as E.A.'s father. Father is responsible for his choices that have placed himself in a position where he is unable to have physical custody of E.A. and provide E.A. with a normal home. Father's incarceration has also caused a continuous failure to provide for E.A.'s health and development. Thus, we cannot say that the juvenile court erred in determining that Father has neglected E.A. or that he is an unfit or incompetent parent.

Father next asserts that the State had an obligation to provide reunification services prior to seeking a termination of his parental rights. The record demonstrates that the juvenile court did not order reunification services due to Father's incarceration and unavailability. Furthermore, the juvenile court concluded that based on Father's incarceration, DCFS's lack of efforts to provide reunification services was reasonable. A court is not required to make a finding under section 78-3a-407(3) that DCFS made reasonable efforts to provide services unless the court has directed DCFS to provide such services. See Utah Code Ann. § 78-3a-407(3)(a) (Supp. 2007). Thus, the juvenile court was not required to make the challenged finding.

Father also asserts that the juvenile court failed to consider the legislative mandate to strengthen and preserve family life under Utah Code section 78-3a-402. However, such mandate is applicable "whenever possible." Utah Code Ann. § 78-3a-402(2). Where the juvenile court has determined that a parent is unfit or incompetent, the "best interest of the child [is] of paramount importance in determining whether termination of parental rights shall be ordered." Id. The record demonstrates that the juvenile court determined that Father was unfit or incompetent. The record further demonstrates that there was sufficient evidence to support the juvenile court's determination

that it was in E.A.'s best interests to be free from neglect and remain in a stable home where he is loved and is forming a bond with foster parents who desire to adopt him.

Accordingly, the juvenile court's May 22, 2008 order terminating Father's parental rights is affirmed.

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr.,
Associate Presiding Judge

Judith M. Billings, Judge