IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of J.S., a person under eighteen years of age. _____ C.S., Appellant, v. State of Utah, Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050438-CA F I L E D (September 15, 2005) 2005 UT App 392

Third District Juvenile, Salt Lake Department, 451829
The Honorable Andrew A. Valdez

Attorneys: Jeffrey J. Noland, Salt Lake City, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce and Anthony Ferdon, Salt Lake City, Guardians Ad Litem

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Before Judges Billings, Bench, and McHugh.

PER CURIAM:

C.S. appeals an order terminating his parental rights. We affirm.

C.S. argues that he was deprived of due process when he was not allowed to take part in certain hearings prior to the termination trial due to lack of proper notice and that the proper remedy is reversal of the order terminating his parental rights. C.S. relies solely on our decision in In re A.H., 2004 UT App 39, 86 P.3d 745, for this proposition. However, C.S. fails to make any showing that his parental rights were affected in any manner or that failure to attend these hearings denied him a "meaningful opportunity to demonstrate interest in his children and assume parental responsibility for them." Id. at ¶23.

Indeed, the only manner in which C.S. argues that his parental rights were affected is that he was not allowed to argue in favor of certain kinship placements. However, as set forth in In re W.P.O., 2004 UT App 451, 104 P.3d 662, "nothing in the plain language of the [Termination of Parental Rights Act] requires a juvenile court to consider possible kinship placements when deciding whether termination is in the best interest of the child." Id. at ¶10. Thus, "the juvenile court's alleged failure to comply with section 78-3a-307(5)(a) [regarding kinship placements] has no bearing on the propriety of the termination order." Id. at ¶11. C.S. makes no further argument that his rights were affected by the State's lack of notice.[1]

To the contrary, C.S. has been incarcerated in Wisconsin throughout the life of the child and throughout these proceedings. He is not eligible for release until 2009. Therefore, this is not a case such as In re A.H. where "we can only speculate about what [C.S.] would have done if he had received proper notice at or close to the time his children were removed from their mother." In re A.H., 2004 UT App 39 at ¶20. Moreover, this is not a case where "the failure by DCFS to properly serve [father] with notice of the removal and to inform him of the many proceedings during this same time period, deprived [him] of the opportunity to take steps and assert his parental rights." Id. at ¶22. C.S.'s incarceration prevented any request to assume custody of the child at the shelter hearing pursuant to Utah Code section 78-3a-307(1)(a). See Utah Code Ann. § 78-3a-307(1)(a) (Supp. 2004). In addition, Utah Code

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[1]The State recently made a motion to supplement the record on appeal, pursuant to rule 11(h) of the Utah Rules of Appellate Procedure, with a summons served on C.S. on February 23, 2005 for the termination trial. We deny this motion, as this document was never part of the juvenile court record. See Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah Ct. App. 1991) ("a motion under Rule 11(h) is appropriate only when the record must be augmented because of an omission or exclusion, or a dispute as to the accuracy of reporting, and not to introduce new material into the record") (quotations and citations omitted). We note, however, that the basis for C.S.'s petition on appeal was not the absence of notice of the termination trial, but of previous hearings. This is clear from the petition itself, which states "[C.S.] became aware of the Utah action when the state served a petition for termination of parental rights upon [C.S.]. Upon service he asked the trial court to appoint counsel and to appear for the trial via telephone. [C.S.] did not receive notification from the state until at the time of termination." Indeed, C.S. appeared telephonically at the termination hearing, and was represented by counsel.

section 78-3a-408(2)(e) provides that in determining parental fitness, the court is required to consider, in the case of a child in DCFS custody, the incarceration of a parent for a felony conviction when the incarceration will deprive the child of a normal home for more than one year. See Utah Code Ann. § 78-3a-408(2)(e) (2002). The plain language of subsection (2)(e) allows for termination of parental rights "where a child, already in DCFS custody, will continue to be 'deprived of a normal home for more than one year' as a result of her parent's felony conviction." In re D.B., 2002 UT App 314,¶10, 57 P.3d 1102 (quoting Utah Code Ann. § 78-3a-408(2)(e)). At the termination trial, the juvenile court appropriately held that C.S.'s lengthy felony incarceration justified termination of his parental rights.

C.S. has not shown that his due process rights were violated in a manner that requires reversal of the juvenile court's order. We therefore affirm the order terminating C.S.'s parental rights.

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Judith M. Billings,
Presiding Judge

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Russell W. Bench,
Associate Presiding Judge

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Carolyn B. McHugh, Judge