IN THE UTAH COURT OF APPEALS

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| State of Utah, in the interest of T.L. and A.L., persons under eighteen years of age. | ) | MEMORANDUM DECISION (Not For Official Publication) |
| | ) | Case No. 20050641-CA |
| J.L., | ) | F I L E D (October 14, 2005) |
| Appellant, | ) | 2005 UT App 442 |
| v. | ) | |
| State of Utah, | ) | |
| Appellee. | ) | |

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Seventh District Juvenile, Monticello Department, 453998
The Honorable Mary L. Manley

Attorneys: William L. Schultz, Moab, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee
Martha Pierce and Daniel G. Anderson, Salt Lake City, Guardians Ad Litem

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Before Judges Davis, McHugh, and Orme.

PER CURIAM:

J.L., father of the children, appeals the termination of his parental rights on grounds of parental unfitness. See Utah Code Ann. § 78-3a-407(1)(c) (Supp. 2005). J.L. claims on appeal that (1) the evidence was insufficient "to justify the findings of fact"; (2) the court erred in denying a directed verdict; and (3) the court erred in allowing Albert Young to testify as an expert over J.L.'s objection.

J.L. admitted the factual allegations of the petition, including facts regarding several incidents of domestic violence and his related convictions for attempted murder and aggravated assault, both involving the children's mother. He contested allegations that (1) he had a "violent history;" (2) he would be

incarcerated for "over one year";[1] and (3) it is in the best interests of the children to terminate his parental rights. The juvenile court also took judicial notice of the findings of fact supporting its adjudication order. Based on the admissions and judicially noticed facts, the juvenile court found, by clear and convincing evidence, that J.L. was an unfit parent and further found that he had a history of violent behavior. See Utah Code Ann. § 78-3a-4-8(2)(f) (Supp. 2005) (stating a history of violent behavior is a consideration in determining parental unfitness). Trial proceeded on the remaining issue of whether it would be in the best interest of the children to terminate J.L.'s parental rights.

"Utah law requires a court to make two distinct findings before terminating a parent-child relationship." In re R.A.J., 1999 UT App 329,¶7, 991 P.2d 1118. The court must first determine that the "parent is unfit or incompetent based on any of the grounds for termination under section 78-3a-407 of the Utah Code." Id. "Second, the court must find that the best interests and welfare of the child are served by terminating the parents' parental rights." Id. We "review the juvenile court's factual findings based upon the clearly erroneous standard." In re E.R., 2001 UT App 66,¶11, 21 P.3d 680. "[W]e defer to the juvenile court because of its advantaged position with respect to the parties and the witnesses in assessing credibility and personalities." In re S.L., 1999 UT App 390,¶20, 995 P.2d 17. Finally, a challenge to the termination based upon the findings is reviewed for correctness. See In re C.K., 2000 UT App 11,¶17, 996 P.2d 1059.

J.L. does not identify specific findings that he challenges. To the extent that J.L. challenges the findings that he. was an unfit parent and has a violent history, those findings are

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[1]The State concedes that the asserted ground for termination based upon deprivation of a normal home for over a year due to J.L.'s incarceration is not appropriate in this case because the children were returned to their mother's custody and were not deprived of their "normal home" for over a year. See In re D.B., 2002 UT App 314,¶11, 57 P.3d 1102 ("[W]hen the child of a convicted felon remains in, or will soon return to, her 'normal home,' despite the parent's incarceration, the fact that the parent may be incarcerated for over a year does not, by itself, justify termination of that parent's rights."). However, J.L.'s incarceration may be considered along with other facts in determining unfitness. See id. at ¶11 n.2.

supported by his admissions and the judicially noticed facts and are not clearly erroneous. To the extent J.L. challenges the findings supporting the determination that it was in the children's best interest to terminate his parental rights, those findings are not clearly erroneous. The juvenile court adopted portions of the testimony of witness Kevin Webb, a clinical social worker and consultant to the Division of Child and Family Services (DCFS). The court found that it was "confusing and traumatic" to children to observe parents "as persons they trust" hurting one another, and that children need "predictability and certainty in their lives," which is undermined when their father is sometimes "kind and loving" and other times "mean and hurtful." The court also found "that a father who is willing to attempt murder of the primary caretaker of the children is absolutely not aware of the needs of his children." The court acknowledged testimony about J.L.'s good qualities, but found those qualities "are outweighed by his propensity for violence." Ultimately, the court found that "[i]t is not in the children's best interests to maintain a relationship with a person who has overlooked their most critical needs for safety and protection." The findings of fact on the best interests of the children are not clearly erroneous.

J.L. next claims that the court erred in denying a directed verdict. "When reviewing any challenge to a trial court's denial of a motion for directed verdict, we review the evidence and all reasonable inferences that may be fairly drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict." Smith v. Fairfax Realty, Inc., 2003 UT 41,¶12, 82 P.3d 1064. The facts underlying the unfitness determination were undisputed and the testimony at trial related only to the best interests determination. The juvenile court found that the State provided prima facie evidence to establish that it was not in the best interest of the children to be reunited with their father. The juvenile court did not err in denying the motion for directed verdict.

Finally, J.L. contends the juvenile court erred in overruling his objection to Albert Young's "expert testimony." The record simply does not demonstrate that Young testified as an "expert," as opposed to testifying in his role as a DCFS supervisor. After J.L.'s objection, the court required further foundation for Young's opinion, and Young testified without further objection. Even assuming that this issue was preserved,

the record does not support the assertion that Young testified as an expert.

We affirm the order terminating parental rights.[2]

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge

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[2]J.L. requests full briefing to allow marshaling of the evidence and "protect his right to a meaningful appeal." An appellant in a child welfare appeal is required to file a petition on appeal including a statement of all material facts and a concise statement of the issues to be raised on appeal. See Utah R. App. P. 55(d). "After reviewing the petition on appeal, any response and the record, the Court of Appeals may rule by opinion or memorandum decision" or "may set the case for full briefing." Utah R. App. P. 58(a). An appellant is not required to marshal the evidence unless the court orders full briefing. If a petition on appeal challenges the sufficiency of the evidence to support the juvenile court's findings of fact, this court shall independently review the record and determine whether the evidence supports the challenged findings. Thus, an appellant is not denied a meaningful appeal.