

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest)	MEMORANDUM DECISION
of A.R. and A.R., persons)	(Not For Official Publication)
under eighteen years of age.)	
_____)	Case No. 20070994-CA
)	
M.R.,)	F I L E D
)	(February 22, 2008)
Appellant,)	
)	2008 UT App 54
v.)	
)	
State of Utah,)	
)	
Appellee.)	

Third District Juvenile, Salt Lake Department, 523616
The Honorable Sharon P. McCully

Attorneys: Joseph Lee Nemelka, Salt Lake City, for Appellant
Mark L. Shurtleff and Carol L.C. Verdoia, Salt Lake
City, for Appellee
Martha Pierce and Evan A. Nebeker, Salt Lake City,
Guardians Ad Litem

Before Judges Thorne, Bench, and Billings.

PER CURIAM:

Appellant M.R. (Father) appeals the termination of his
parental rights. We affirm.

The children were removed from their mother's custody on
January 28, 2007. Several months before the removal, Father was
deported to Colombia and was precluded from reentry into the
United States for five years. In May 2007, the juvenile court
adjudicated the children as neglected by Father. The court found
that reunification services were not appropriate for Father
because he had been deported. Father did not appeal that order.

Father contends that the termination order should be set
aside because he was not available for the first day of trial on
August 30, 2007. Father was unable to appear in Utah due to his
deportation, which was based upon his criminal convictions. The

court allowed the testimony of two witnesses attending from out of state and continued the trial to October 24, 2007. Father's appointed counsel cross-examined one of those witnesses in August and the other in October. Under the circumstances, the court did not err in allowing the two witnesses to testify in August.

Father also claims that the juvenile court abused its discretion by not granting the continuance requested by counsel who appeared on the second day of the termination trial in October. On that date, Father was represented by substitute counsel and by representatives of the Colombian consulate. The court denied a continuance, ruling that there had been adequate time for substitute counsel to review the transcript and confer with his client. The court continued:

It is recognized that [Father] cannot be personally present, that he has been deported and cannot return to the United States, or the State of Utah for purposes of this trial. And although a request has been made by his consulate for this court to facilitate his presence through an appropriate visa or parole, of course, this court has absolutely no authority to do so.

Father was available by telephone and testified. The court did not err in denying a continuance.

Father contends that the court erred by not allowing him reunification services. However, he did not appeal the adjudication order that contained this finding. In addition, Father was not living in Utah and was precluded from returning to Utah for five years. Accordingly, the court did not err in determining that reunification services could not be offered.

Father asserts that the court did not place appropriate weight on his claimed ability to take custody of the children in Colombia and also claims that the court accorded too much weight to his criminal convictions. "Because of the factually intense nature of [a parental fitness] inquiry, the juvenile court's decision should be afforded a high degree of deference." In re B.R., 2007 UT 82, ¶ 12, 171 P.3d 435. We overturn the juvenile court's decision "only if it either failed to consider all of the facts or considered all of the facts and its decision was nonetheless against the clear weight of the evidence." Id. (emphasis added). "When a foundation for the court's decision exists in the evidence, an appellate court may not engage in a reweighing of the evidence." Id. Although the juvenile court considered Father's testimony that he had "a job, family and a place to live in Colombia," the court found that "there was no evidence that he had remedied the circumstances that existed

before he was deported." In addition to receiving Father's telephonic testimony, the court admitted a psychological report and a "social protection report," both prepared in Colombia, as well as a court ruling from another state, and noted that the lack of foundation for the documents would go to their weight. The court considered Father's evidence, but also considered evidence that Father neglected the children by his behavior, drug use, and failure to financially support his children while they were in state custody. Although Father claimed that he was not aware that he was required to provide financial support, the court found this testimony not to be credible. The findings demonstrate that the court considered the evidence supporting Father's ability to care for the children in Colombia.¹ In addition, although Father's convictions were considered, they were not the sole basis for the decision. The court's decision was supported by the evidence, and we do not "engage in reweighing of the evidence." See id.

Father claims that he received ineffective assistance of counsel because trial counsel did not "do enough" to pursue his case. Although trial counsel operated under the difficult situation of having a client in Colombia, they represented their client by presenting his testimony, cross-examining the State's witnesses, and introducing documents. Father appeared telephonically and was available to confer with counsel. Father has not specifically identified any allegedly deficient performance. In addition, Father has not alleged or demonstrated that any prejudice resulted from counsels' performance. See In re E.H., 880 P.2d 11, 13 (Utah Ct. App. 1994) (stating that a defendant must demonstrate both that "counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the case").

We affirm the juvenile court's decision.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Judith M. Billings, Judge

1. We note that the children were born in the United States and are citizens of this country.