IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest of E.C., a person under eighteen years of age. _____ M.C., Appellant, v. State of Utah, Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080540-CA F I L E D (September 25, 2008) 2008 UT App 347

Seventh District Juvenile, Castle Dale Department, 527343
The Honorable Scott N. Johansen

Attorneys: Mark H. Tanner, Orangeville, for Appellant
Mark L. Shurtleff, John M. Peterson, and Carol L.C. Verdoia, Salt Lake City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Billings, Davis, and McHugh.

PER CURIAM:

M.C. (Father) appeals the termination of his parental rights. Father first argues that the service plan should not have included a requirement that he undergo a psychosexual evaluation. He claims that he refused reunification services on that basis. There is nothing in the record demonstrating that Father objected to the proposed service plan in the juvenile court. Instead, the record establishes that Father declined reunification services and consistently supported reunification of E.C. with his mother only. In light of Father's past history of child molestation, requiring him to submit to a psychosexual evaluation was not an unreasonable condition. See generally Utah Code Ann. § 78A-6-117(2)(p)(i) (Supp. 2008) (stating the juvenile court may order parents to comply with "reasonable conditions").

Father next argues that the juvenile court erred by failing to appoint an attorney when he claimed for the first time at

trial that he had become indigent. The juvenile court found that Father waived his right to appointed counsel. The right to counsel in a parental rights termination proceeding is created by statute. See In re A.E., 2001 UT App 202, ¶ 10, 29 P.3d 31. To determine whether there has been a waiver of the statutory right to counsel, we assess whether "the record as a whole reflects [Father's] reasonable understanding of the proceedings and awareness of the right to counsel." Id. ¶ 12.

Father retained counsel shortly after E.C.'s removal and participated with counsel in a number of hearings. He was aware from at least February 11, 2008, when he appeared with counsel and indicated that he did not intend to relinquish his parental rights, that the case would proceed to a termination trial. Applying the record-as-a-whole standard, we conclude that Father reasonably understood the nature of the proceedings and his right to be represented by counsel. The juvenile court found that Father was personally served with a Summons and a Verified Petition for Termination of Parental Rights by "Captain Frank Clifton of the Garden City Police Department in Garden City, Georgia" on March 29, 2008. The Summons advised Father of his right to counsel and advised him that if he was unable to afford an attorney, he must complete an application for a court-appointed attorney. Father returned to Utah at least once between March 29 and the trial on June 5 and failed to complete an application for appointed counsel. At no time did he advise the Division of Child and Family Services that he was unable to afford an attorney or request assistance in applying for court-appointed counsel. Father did not contact the court to request an application. The juvenile court's conclusion that the failure to make any effort to obtain appointed counsel prior to the time of trial constituted a waiver of the right to appointed counsel for the trial was supported by the record as a whole.

The grounds for termination of Father's parental rights were based upon stipulated facts from the adjudication order and facts deemed admitted based upon the failure to respond to requests for admission. Under rule 36 of the Utah Rules of Civil Procedure, a matter is deemed admitted by operation of law if not denied. See In re E.R., 2000 UT App 143, ¶ 13, 2 P.3d 948. However, rule 36(b) allows a trial court to withdraw or amend an admission "if the merits of the underlying action will be advanced by such withdrawal and if the party [who] requested the admissions fails to convince the court that it will be prejudiced by such withdrawal." Id. "The best interests of the child and the facts and circumstances surrounding the child's current status are also properly considered in determining whether or not to permit withdrawal of the admissions." Id. ¶ 17.

Father acknowledged that he received the discovery requests but chose not to respond. The requests for admission comprised all of the facts supporting grounds for termination of parental rights. The State moved for partial summary judgment on the grounds for termination, preserving the best interests determination for trial. Father did not respond to the motion for partial summary judgment or move to withdraw any admissions he believed misrepresented the facts. Father now claims only that the juvenile court could have permitted the withdrawal of the admissions under rule 36 upon motion, but does not undertake any analysis under the rule. Father still does not argue that any admissions contained inaccurate statements of fact. Therefore, allowing the admissions to be withdrawn would not assist in presenting the merits of the case. Furthermore, the State would be prejudiced by withdrawal because the admissions were the basis for the unopposed partial summary judgment.

E.C. was removed when he was five days old. At the time of trial, Father had not visited E.C. in over one year, he had not paid child support, and he had sought to have E.C. returned only to his mother or her family, although she had relinquished her parental rights. He refused reunification services and left Utah. He did not provide DCFS with reliable contact information. 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." In re B.R., 2007 UT 82, ¶ 12, 171 P.3d 435. "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. At a minimum, Father abandoned E.C. by failing to communicate with him for over six months or to demonstrate the normal interest of a parent without just cause. See Utah Code Ann. § 78A-6-508(1) (Supp. 2008). The grounds for termination and the best interest determination are amply supported. Accordingly, we affirm the termination of Father's parental rights.

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Judith M. Billings, Judge

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge