

IN THE UTAH COURT OF APPEALS

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| State of Utah, in the interest |) | MEMORANDUM DECISION |
| of I.B., a person under |) | (Not For Official Publication) |
| eighteen years of age. |) | |
| <hr/> |) | Case No. 20100515-CA |
| |) | |
| J.B., |) | F I L E D |
| |) | (August 26, 2010) |
| Appellant, |) | |
| |) | 2010 UT App 234 |
| v. |) | |
| |) | |
| State of Utah, |) | |
| |) | |
| Appellee. |) | |

Third District Juvenile, Salt Lake Department, 1002999
The Honorable Frederic M. Oddone

Attorneys: Julie George, Salt Lake City, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake
City, for Appellee
Sheleigh A. Harding, Salt Lake City, Guardian Ad
Litem

Before Judges McHugh, Thorne, and Roth.

PER CURIAM:

J.B. (Father) appeals the termination of his parental rights to I.B. We affirm.

"In reviewing a decision to grant or deny a termination petition, '[w]e will not disturb the juvenile court's findings and conclusions unless the evidence clearly preponderates against the findings as made or the court has abused its discretion.'" In re R.A.J., 1999 UT App 329, ¶ 6, 991 P.2d 1118 (citation omitted). "When a foundation for the court's decision exists in the evidence, an appellate court may not engage in a reweighing of the evidence." In re B.R., 2007 UT 82, ¶ 12, 171 P.3d 435.

Father claims that the juvenile court erred by allegedly terminating his parental rights based solely upon his incarceration. Although parental "incarceration alone cannot

support the termination of parental rights," a parent's lengthy or "repeated . . . incarceration occurring . . . after a child has been removed from the parent's custody" is an appropriate consideration in assessing parental fitness. In re M.L., 965 P.2d 551, 558 (Utah Ct. App. 1998). Furthermore, Utah Code section 78A-6-508(2) states that a juvenile court determining whether a parent is unfit or has neglected a child "shall consider, but is not limited to" consideration of circumstances including the following:

(e) with regard to a child who is in the custody of the division, if the parent is incarcerated as a result of 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

Utah Code Ann. § 78A-6-508(2)(e) (Supp. 2009).

The juvenile court found that, dating from the time of I.B.'s birth, Father's multiple felony convictions and resulting lengthy incarcerations rendered him unable or incapable of caring for I.B. This finding focused on the effect that Father's incarcerations had on his ability to parent I.B. "[I]t is the child's deprivation of a normal home for a period of more than a year that renders the incarcerated parent unfit, not the incarceration itself." In re D.B., 2002 UT App 314, ¶ 11, 57 P.3d 1102. Furthermore, "lengthy unavailability to parent a child due to incarceration may be sufficient to support a finding of unfitness because termination is proper when a parent is either unable or unwilling to perform the duties and responsibilities of a parent." Id. ¶ 12 (citation and internal quotation marks omitted).

Father was incarcerated when I.B. first came into state custody in August 2008. Father stipulated that no reunification services should be provided due to his incarceration. While Father was not incarcerated during February 2009, he had two one-hour supervised visits with I.B. Shortly thereafter, he was again incarcerated. When I.B.'s mother relapsed in March 2010 and I.B. was returned to state custody, Father was still incarcerated and unable to assume parental responsibility. At the time of the termination trial, the mother had relinquished her parental rights to I.B., but Father was incarcerated and unable to assume a parental role. Father argued that I.B. should remain in State custody until an unknown future time when he could assume a parental role. Although Father suggested through counsel that he might be released from prison within two weeks, there was no evidence supporting that assertion or demonstrating what his conditions of release on the unexpired sentence(s) would

be. Father had not completed any services that may be necessary to become a fit parent for I.B.

The juvenile court did not rely solely upon the fact of Father's incarceration in finding him to be an unfit or neglectful parent. Instead, the juvenile court appropriately considered the impact of Father's criminal activity and repeated incarcerations on parental fitness. In addition, the evidence demonstrated that Father had not remained in contact with the Division of Child and Family Services (DCFS), had not participated in the case when he was not incarcerated, and had only two one-hour supervised visits during the entire case. The decision to terminate Father's parental rights on grounds of unfitness and neglect is sufficiently supported by the evidence.

Father does not directly challenge the best interests decision, but a challenge is implied by Father's argument that he should be allowed additional time to become a fit parent after his release from prison. The juvenile court rejected this argument. The juvenile court found that although I.B. was an adoptable child, his increasing age and the effects of his multiple placements would make him less adoptable. At the time of trial, I.B. was integrating into the legal risk foster family, and the foster parents desired to adopt both I.B. and his half brother. In contrast, the juvenile court found that I.B. was not bonded with Father. The juvenile court found that the children had a strong sibling bond. The decision that it was in I.B.'s best interests to terminate Father's parental rights and allow I.B. to be adopted with his half brother is amply supported by the evidence. Accordingly, we affirm.

Carolyn B. McHugh,
Associate Presiding Judge

William A. Thorne Jr., Judge

Stephen L. Roth, Judge