

IN THE UTAH COURT OF APPEALS

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| State of Utah, in the interest |) | MEMORANDUM DECISION |
| of K.A., a person under |) | (Not For Official Publication) |
| eighteen years of age. |) | |
| _____ |) | Case No. 20090585-CA |
| |) | |
| L.A., |) | |
| |) | F I L E D |
| Appellant, |) | (November 5, 2009) |
| |) | |
| v. |) | 2009 UT App 320 |
| |) | |
| State of Utah, |) | |
| |) | |
| Appellee. |) | |

Third District Juvenile, Tooele Department, 1017224
The Honorable Mark W. May

Attorneys: David J. Angerhofer, Sandy, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake
City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Greenwood, Bench, and Davis.

PER CURIAM:

L.A. (Mother) appeals the termination of her parental rights to K.A. We will 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.

In May of 2007, the juvenile court terminated Mother's rights to two older children--B.H. and M.H. On April 15, 2009, Mother gave birth to K.A. The State of Utah removed K.A. from Mother's custody upon his release from the hospital and petitioned to terminate Mother's parental rights. The petition alleged, in part, that K.A. was a sibling at risk of abuse or neglect based upon the termination of Mother's parental rights to B.H. and M.H. The sole issue raised in the petition on appeal is that the State could not rely upon findings from the 2007 termination trial involving B.H. and M.H. in the termination

trial regarding K.A. Mother argues that this essentially results in a life-long ban on her retention of after-born children and improperly shifts the burden from the State to prove unfitness to the parent to prove fitness.

After-born children qualify as siblings at risk of abuse or neglect. See In re E.K., 913 P.2d 771, 773-74 (Utah Ct. App. 1996). "The parents . . . are allowed an opportunity to demonstrate that the home environment has changed and that an after-born child is not 'at risk.'" Id. at 774. In In re E.K., 913 P.2d 771 (Utah Cr. App. 1996), we held that once the State had established a prima facie case that an after-born child is at risk of abuse or neglect, the juvenile court "properly shifted the burden of production of evidence to the parents to allow them to persuade the court that the State had not established by clear and convincing evidence that E.K. was a neglected child." Id. at 775. In re J.B., 2002 UT App 267, 53 P.3d 958, involved a child born while the termination trial regarding his older siblings was pending. The juvenile court took judicial notice of the prior termination proceedings and found that the mother had done nothing to modify her behavior or correct the circumstances that caused her to lose custody of five older children. See id. ¶ 13. We concluded that "[b]ecause the record reflect[ed] no substantial changes in Mother's circumstances, and based on the minimal amount of time that elapsed between the first termination proceeding and the second, the juvenile court's conclusion that J.B. was at risk was correct." Id. ¶ 24.

K.A. was born approximately two years after the prior termination proceeding. Mother did not object to the juvenile court's taking judicial notice of the adjudicated facts from the prior termination trial. Furthermore, the State did not rely exclusively on those adjudicated facts. Although evidence of B.H.'s later claims regarding sexual abuse by Mother was found not to be clear and convincing, B.H.'s adoptive mother and B.H.'s therapist provided detailed testimony about B.H.'s sexualized behaviors resulting from abuse while in Mother's custody. B.H. remained in residential treatment for over two years and was still extremely sexually reactive at the time of placement with her adoptive family. A caseworker testified that Mother had not provided evidence that she had complied with the objectives of her previous service plans. The caseworker also testified that during supervised visits with K.A., Mother showed little insight into child development and relied upon prompts from the caseworker in caring for K.A. Mother had not obtained employment in the interim since the termination.

Given the severe abuse of B.H. while in Mother's custody, Mother's refusal throughout the earlier termination proceedings to accept evidence that B.H.'s father perpetrated the abuse, and Mother's drug addiction while that abuse was occurring, we conclude the juvenile court did not err in determining that the previously adjudicated facts, when combined with the additional

evidence, established a prima facie case that K.A. was a child at risk of abuse or neglect. The juvenile court then correctly considered whether Mother met the burden of producing evidence demonstrating that the circumstances that led to the termination of her parental rights to B.H. and M.H. had been remedied, making her a fit parent. The juvenile court found Mother's testimony that she had satisfied the objectives of her service plans after the first termination not credible. Mother also testified that she lived with her married boyfriend and relied upon him for support, and would depend upon family for support if that relationship ended. Her boyfriend had been substantiated for child endangerment in May 2009. Mother now agreed that B.H.'s biological father had sexually abused B.H. The juvenile court did not err in finding that Mother failed to satisfy her burden to demonstrate a change in the circumstances that led to the termination of her parental rights to K.A.'s older siblings.

The juvenile court found that K.A. is a neglected child because he is a sibling at risk of abuse or neglect. See Utah Code Ann. § 78A-6-105(25)(iv) (2008). The court found that Mother failed to rectify the problems that led to the termination of her parental rights to B.H. and M.H. Noting its previous finding that Mother was addicted to illegal drugs but failed to complete the required treatment, the court found that this also justified termination of parental rights to K.A. See id. § 78A-6-508(2). The court found there was no substantial likelihood that Mother will be capable of exercising proper and effective parental care in the near future. See id. § 78A-6-507(1)(d). The juvenile court also found there had been a failure of parental adjustment in that Mother had not substantially corrected the circumstances that led to K.A.'s placement in an out of home placement and she failed to make the necessary changes to avoid being an unfit parent. See id. § 78A-6-507(1)(e). Finally, the court found that it was in K.A.'s best interest to be adopted by the foster parents. The findings are amply supported by the evidence and the juvenile court's remaining factual findings. Accordingly, we affirm.

Pamela T. Greenwood,
Presiding Judge

Russell W. Bench, Judge

James Z. Davis, Judge