

Parental Defense Association Conference April 2019
Appellate Case Update
2018 Case Summaries

IN RE B.T.B. AND B.Z.B: V.T.B. v. J.P.B., 2018 UT App 157 (cert granted)

This is a private petition case in which the juvenile court terminated Father's parental rights. Father did not challenge the grounds for termination but asserted that the juvenile court erred in determining that termination was in the children's best interests. Specifically, Father argued that the juvenile court erred in determining it was strictly necessary to terminate his parental rights. On appeal, the sole issue was whether the juvenile court properly interpreted and applied the "strictly necessary" language of the statute in concluding that Father's parental rights should be terminated, putting the language squarely before the court of appeals.

This case significantly changes the landscape for the "best interest" determination in TPR cases. The court of appeals disavowed prior case law stating that finding termination of a parent's rights to be in a child's best interest follows "almost automatically" from a finding that statutory grounds for termination exist. The court noted that the "almost automatically" concept could shift evidentiary burdens, remove tools from the juvenile court, and reduce the importance of a key element of a two part test. Additionally, it was inconsistent with the added statutory language that a juvenile court must find termination to be "strictly necessary."

The court re-emphasized the best interest prong as a meaningful and necessary element. It highlighted a robust and independent best interest analysis as part of the termination findings. "The best interest test is broad, and is intended as a holistic examination of all the relevant circumstances that might affect a child's situation." ¶ 47.

Additionally, the court held that the "strictly necessary" language in section 507 is part of the best interest analysis. The best interest test "is sufficiently comprehensive to encompass an inquiry into whether termination of a parent's rights is actually necessary." ¶ 48. And, "when we give the words 'strictly necessary' their plain meaning, we understand that the legislature intended for

courts to terminate parental rights only in situations when it is absolutely essential to do so.” ¶ 54. Incorporating “strictly necessary” into the best interest analysis, the court stated “this part of the inquiry also requires courts to explore whether other feasible options exist that could address the specific problems or issues facing the family, short of imposing the ultimate remedy of terminating the parent’s rights.” ¶ 55.

The court reversed and remanded to the juvenile court to evaluate “strictly necessary” as put forth in the opinion.

IN RE C.T.: A.T. v. STATE, 2018 UT App 233

This is the beginning of exploring the limits of BTB. In this case, Mother argued that the juvenile court erred in finding that termination was strictly necessary because DCFS should have provided services to Grandparents as guardians of Child. However, the court of appeals held that BTB did not go that far.

Mother was a minor herself, living with her parents, Child’s grandparents. Mother received reunification services for a time, but could not address her parenting issues. When Mother’s services were ended, the juvenile court considered Grandparents as potential guardians, and had pursued that as a permanency goal for a brief time before changing the goal to adoption with Child’s foster placement. No services were provided to Grandparents to better achieve that goal. Mother argued that BTB required services as part of exploring other options prior to termination.

The court of appeals stated that “nothing in B.T.B. suggests that certain services must be provided before a juvenile court may determine that such alternatives are not viable.” ¶ 15. The court held that B.T.B. “simply stands for the proposition that juvenile court must *consider or explore* alternatives to termination of parental rights before they may find that termination is ‘strictly necessary’ to the best interests of the child.” ¶ 16. “After this consideration, if a juvenile court determines that no such alternatives are available or articulates supported reasons for rejecting alternatives that do exist, such findings are entitled to deference on appeal.” *Id.*

So, although B.T.B. requires a robust best interests evaluation including considering available alternatives, the juvenile court is not required to order additional services to create better alternatives. Rather, once the court evaluates whether alternatives are available and determines that alternatives are either not available or are not in the child's best interests, that determination will be given deference on appeal.

IN RE C.C.W. AND Z.C.W.: R.D.T. AND GAL V. C.L.W., 2019 UT APP 34

This is another private petition in which Mother sought to terminate Father's parental rights. The juvenile court declined to terminate and instead granted Father's motion to dismiss after Mother presented her case-in-chief. Although it was established that Father had abandoned the children, the juvenile court determined that termination of Father's parental rights was not in the children's best interests. The court of appeals reversed and remanded for further proceedings.

Although this case was issued after BTB, it was briefed before that opinion issued. So, Mother argued that, particularly for abandonment, the best interest finding would "almost automatically" follow to allow termination. The court of appeals rejected the argument based on BTB. The court highlighted that "the best interest inquiry should be applied in a more thorough and independent manner than" the almost automatically line of cases suggested. ¶ 18.

However, the court remanded for further consideration of Father's extreme events of domestic violence, including a prolonged and very violent attack against Mother, as part of the best interest prong. In the context of determining unfitness, the juvenile court noted that the behavior was against an adult, not the children, and there was no evidence that the attack on Mother years prior had affected the children. The court of appeals found the juvenile court's statements "problematic" and stated "it is inappropriate to completely separate or compartmentalize a parent's history of domestic violence toward other adults from the best-interest inquiry regarding that parent's child." ¶ 19.

The court of appeals also stated that "a parent's history of domestic violence, even against other adults, is a factor that the [juvenile] court should consider as

part of the ‘best interest’ analysis, even if that history might also be relevant to one or more of the statutory grounds for termination.” *Id.* n. 5. The court of appeals found that the juvenile court had not considered Father’s history of violence in its best interest analysis and remanded for further consideration.

The court of appeals highlighted the harm to multiple generations that domestic violence can perpetuate. And, it made clear that, although the prior “almost automatic” link between grounds and best interest is broken, the evidence relating to grounds for termination is still relevant to the determination of best interest as part of the holistic evaluation of the circumstances.

IN RE K.J.: J.J. AND C.J. V. STATE, 2018 UT App 216

The issue in this case was whether the State could file and proceed on a termination petition before completing the adjudication of a neglect petition. The court of appeals held that it could.

Child was born addicted. DCFS removed the child and filed a neglect petition against both parents. The petition was adjudicated and reunification services were provided. The parents were successful in their first plan. Child was returned to their custody and juvenile court jurisdiction was terminated. However, about five months later, another report was made and DCFS again removed Child. DCFS filed a new neglect petition after the shelter hearing. But, before that petition was fully adjudicated, DCFS filed a termination petition. Parents argued that the neglect petition should be adjudicated first. The juvenile court denied their objections and proceeded on the termination petition. After Parents’ rights were terminated, Parents appealed.

The court of appeals held that the juvenile court could proceed on the termination petition without first adjudicating the neglect petition. Under the statute, a termination petition independently invokes the juvenile court’s jurisdiction. *See* Utah Code § 78A-6-103 (providing juvenile court jurisdiction over termination of parental rights actions). Accordingly, the juvenile court had jurisdiction to adjudicate the termination petition without proceeding on the neglect petition first.

IN RE N.M.: E.M. v. STATE, 2018 UT App 141

Father appealed the termination of his parental rights and argued that the juvenile court erred in refusing to accept an agreement for permanent guardianship rather than termination. Child was removed from parents because both were incarcerated. Initially, reunification was the goal. However, parents did not progress and services were terminated at the permanency hearing. The goal was changed to adoption with a concurrent goal of permanent guardianship. DCFS filed a termination petition.

At the pretrial on the termination petition, DCFS moved to dismiss the petition and instead award permanent custody and guardianship of Child to Grandparents, the current placement and potential adoptive parents. DCFS, the Guardian ad Litem, and Parents all agreed with this outcome and represented to the court that it was in Child's best interest. Grandparents desired to adopt.

The juvenile court denied the motion to dismiss the petition and declined to accept the agreement. It noted that the decision regarding what was in the best interest of Child belonged to the court, and it had not heard the evidence in the matter. The court required DCFS to continue on the termination petition. Prior to trial, both DCFS and Parents filed other motions to avoid trial and obtain guardianship as the outcome. The juvenile court denied those motions also and the petition proceeded to trial.

At trial, Mother relinquished her rights and the trial proceeded on Father's rights. The juvenile court terminated Father's rights, accepted Mother's relinquishment, and moved toward adoption of Child.

Father appealed. He argued that the juvenile court was required to accept the agreement to dismiss the petition and award permanent custody and guardianship to Grandparents, preserving his parental rights.

The court of appeals disagreed. The court emphasized the unique role of juvenile courts as the arbiter of a child's best interests and that the juvenile court could disregard alleged agreements that invaded this core function. The court stated: "This core authority to determine a child's best interest cannot be stipulated

away by the parties.” ¶ 21. “Because that stipulation was necessarily predicated upon a determination by the parties regarding what was in Child’s best interest, the court was not bound by it or obligated to accept it. . . . The juvenile court, not the parties, retains the final authority to determine, once reunification services to both parents are terminated, what permanency goal . . . would be in a child’s best interest.” ¶ 23.

IN RE K.W. AND A.W.: A.W. v. STATE, 2018 UT App 44

Father appealed the termination of his parental rights and argued that DCFS failed to provide reasonable services because it did not provide reasonable accommodation for his disabilities under the ADA. The court of appeals affirmed the termination.

Father had mental health issues and brain injury issues that affected his functioning. Children were removed from his custody after Father called law enforcement for a ride to a shelter. After arriving at the shelter, Father was taken to a facility to receive psychiatric treatment and Children were placed in DCFS custody.

Father was provided with reunification services. Although the ADA was not mentioned at the time, the juvenile court required modifications to further assist Father and accommodate his needs. However, Father failed to appear at appointments and did not progress with services. Ultimately, services were terminated and the case moved to a termination trial. The first time the ADA was mentioned was during closing arguments at trial.

On appeal, Father asserted that DCFS “failed to make reasonable modifications to services as mandated under the ADA.” The court of appeals noted that the juvenile court had found that DCFS had made reasonable efforts to provide services. Accordingly, Father had “the burden of proving that this determination was clearly erroneous.” Father did not meet that burden.

Although Father argued that DCFS could have done more, he did not show that what DCFS did was unreasonable, particularly with the modifications already provided by the juvenile court. Additionally, Father’s argument for further

modifications was undermined by his lack of cooperation during the case and a lack of communication of his needs. He did not request additional help from DCFS in a timely manner.

Although an ADA claim may be raised for the first time at a termination trial, the reasonableness of any additional accommodation request is likely to suffer if not communicated in a timely manner when DCFS could actually provide more assistance. By the time of trial, Children's needs are paramount and any delay to provide additional services when the request could have been made sooner is likely not to be seen as reasonable. The bottom line is that communication early in the case is critical.

IN RE A.W. AND A.W.: A.W. v. STATE, 2018 UT App 217

Father sexually abused Child, resulting in the removal of Child and Sister. Reunification services were provided to Father. The child welfare matter proceeded in parallel to the criminal case against Father. Eventually, reunification services were ended and the case proceeded to a termination trial. The juvenile court terminated Father's parental rights and he appealed.

On appeal, Father asserted that the juvenile court violated his due process rights by improperly delaying the child welfare case pending the resolution of the criminal charges and by considering evidence outside of the record. The court of appeals determined that Father failed to preserve the constitutional issues and did not reach them on the merits.

Beyond the constitutional challenge, Father asserted a pretty straightforward insufficiency of evidence challenge. The court of appeals found that Father had not shown any finding to be clearly erroneous and that the evidence was sufficient to support the juvenile court's findings that DCFS made reasonable efforts to provide reunification services and that there were grounds for termination.

Although this was legally pretty straightforward, the court of appeals noted a couple of deficiencies in Father's arguments as well. First, the court noted that Father had failed "to identify any facts in the record that suggest DCFS did not

make reasonable efforts to provide him with reunification services.” ¶ 30. This indicates that simply arguing that services were not reasonable is insufficient without supporting facts. When a case gets to briefing, appellant has the obligation to support arguments with citations to the record, or they will not carry their burden of persuasion.

Second, the court noted that Father ignored “the several times in the record in which the juvenile court made an unchallenged periodic finding . . . that DCFS had made reasonable efforts to provide him with reunification services.” ¶ 31. At a couple of review hearings when the service plan was discussed and/or modified, the juvenile court had made a finding that the service plan constituted reasonable efforts. Father had not objected. This again emphasizes that early communication and making specific requests is important because it may be difficult to overcome those interim “reasonableness” determinations.

IN RE E.A., N.L., E.L. AND J.L.: S.A. v. STATE, 2018 UT App 83 (per curiam)

This is the rare case when the court of appeals reversed and remanded without full briefing. Mother appealed the termination of her parental rights and argued that they were terminated “solely on Mother’s failure to complete the requirements of her service plan.” Although the court of appeals reversed, it did not actually reach the merits of Mother’s argument. Rather, the court reversed because “the juvenile court’s termination order is inadequate to demonstrate grounds for termination and the evidence presented at trial was insufficient to support the juvenile court’s conclusion that termination is warranted.”

The termination order primarily listed procedural events without including actual subsidiary facts that demonstrated Mother’s conduct toward her children was inappropriate or that her mental illness was severe enough to affect her ability to parent. As a result, there was not enough information in the order to show the basis for the juvenile court’s decision. Additionally, the deficiency in the order was not made harmless by a review of the record on appeal. The evidence at trial failed to establish a link between conduct and any harmful effect on the children. The service plan and evaluations were not made exhibits and therefore were not part of the record on appeal. Overall, both the order and the trial evidence lacked sufficient detail to support termination.

IN RE J.B.: J.M.B. v. STATE, 2018 UT 15

J.M.B. (Guardian) appealed the removal of J.B. from her custody and the termination of her guardianship through juvenile court proceedings. This case was certified to the Utah Supreme Court by the court of appeals to address the issue of whether a non-parent could acquire a parental interest beyond guardianship in a child. Guardian asserted on appeal that the juvenile court erred in determining she was only a guardian rather than a parent under the *in loco parentis* doctrine or Utah Code § 30-5a-103 (Custody and Visitation for Persons Other than Parents Act). The supreme court affirmed without reaching the merits of that issue because Guardian did not preserve the matter for appeal and had not established plain error.

The supreme court addressed other issues in the case. The Guardian ad Litem had argued that the appeal was moot because J.B. had been adopted more than a year before. Utah Code section 78B-6-133(7)(b) provides that no person may contest an adoption after one year from the day the adoption was finalized. The supreme court disagreed that the matter was moot because the statute excepted timely appeals of a “decision in an action challenging an adoption.” The supreme court held that the appeal from the juvenile court proceeding came within the meaning of the statutory exception to the one year limit to challenge adoptions.

The supreme court also addressed Guardian’s challenge to the juvenile court’s jurisdiction to alter the district court’s custody order that awarded Guardian custody of Child after Guardian and Mother ended their relationship. The supreme court determined that the juvenile court clearly had jurisdiction to modify the order under the concurrent jurisdiction statute, Utah Code § 78A-6-104. The court stated “the juvenile court’s concurrent jurisdiction encompasses the power to alter the district court’s dispositions so long as it is necessary to secure the safety and welfare of the child.”