STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: T.M.:

No. 11-1317 (Kanawha County 08-JA-275)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Kanawha County, wherein Petitioner Father's parental rights to T.M. were terminated. The appeal was timely perfected by his counsel Jason S. Lord, with an appendix accompanying Petitioner Father's petition. The child's guardian ad litem, Sarah K. Bullman, has filed a response on behalf of the child supporting the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of termination.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

The instant petition was filed against Petitioner Father under West Virginia Code 49-6-5b(3). Petitioner Father and the subject child's mother were involved in prior abuse and neglect proceedings. These proceedings were instituted after their child J.M. I,[1] two months old, died on or about February 4, 2005, while in their custody. J.M.'s parents were both criminally charged and Petitioner Father pled guilty to permitting the death of a child by abuse, via starvation and criminal

[1] Middle initials were not provided in the appendix on appeal. The children with the initials J.M. will be differentiated by Roman numerals, as indicated.

neglect. Petitioner Father was subsequently sentenced to thirty years in prison, with a projected release date in 2023. At the time of J.M. I's death, his parents were also the biological parents or step-parents to three other children, H.R., J.M. II, and J.M. III. Their parental rights to these children were subsequently terminated. During the prosecution of J.M.I's death, his parents were in and out of jail on bail during which time they were able to conceive three more children, J.M. IV, T.R., and T.M. T.M., born November 25, 2008, is the youngest of all of Petitioner Father's children and is the subject child of the instant case.

At adjudication, the circuit court took judicial notice of Petitioner Father's guilty plea to permitting the death of a child, via starvation and criminal neglect. At disposition, the circuit court took judicial notice of Petitioner Father's prior terminations to other children, the aggravated circumstances which led to the filing of the first petition that terminated his parental rights, and to his extended incarceration arising out of these circumstances. Given the circumstances, the circuit court found that there were no other less restrictive alternatives to terminating Petitioner Father's parental rights to T.M. It is from this order that Petitioner Father appeals.

On appeal, Petitioner Father argues two assignments of error. First, he argues that the circuit court erred in finding abuse and/or neglect in this instance because the subject child was never in Petitioner Father's custody nor had the child lived in the same household as any other child where abuse and/or neglect had been found by the circuit court. He asserts that because the subject child never lived with him, the State improperly inferred from Petitioner Father's prior terminations that Petitioner Father would automatically abuse and/or neglect the subject child, too. Petitioner Father asserts that there was no evidence of him abusing or neglecting the subject child.

The child's guardian ad litem and DHHR respond, contending that the circuit court did not err in finding abuse and neglect by Petitioner Father to the subject child. DHHR argues that according to West Virginia Code § 49-6-5b(a)(3), DHHR must file a petition when a parent has killed or maliciously injured a child or where parental rights to a subject child's sibling have been terminated involuntarily. Further, West Virginia Code 49-6-11 directs that a parent is considered an abusing parent to another sibling if he or she is convicted in the killing of a sibling of the same household.

The Court agrees. The circuit court did not abuse its discretion when it found that Petitioner Father had abused and neglected the subject child. The appendix reflects that DHHR properly filed its petition to institute this case under West Virginia Code § 49-6-5b(a)(3). Subsequently, upon further findings at the proceedings of T.M.'s abuse and neglect case, the circuit court did not err in finding him as an abused and neglected child. Where there has been a prior involuntary termination of parental rights to a sibling, the circuit court must review whether the parent has remedied the problems which led to the prior involuntary termination. Syl. Pt. 3, in part, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000). The threshold of evidence necessary for termination in the instant petition is reduced. *Id.* Here, nothing changed in Petitioner Father's life between his prior involuntary terminations and the instant abuse and neglect proceeding. The Court finds no error in the circuit court finding T.M. as abused and neglected by Petitioner Father.

Second, Petitioner Father argues that the circuit court erred in terminating his parental rights without an improvement period. He asserts that the evidence in this case supports an improvement period for reunification. He argues that an improvement period is designed to facilitate the reunification of families whenever the reunification is in the best interests of the children involved. *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 258, 470 S.E.2d 205, 212 (1996). He acknowledges that a circuit court is not required to "exhaust every speculative possibility" in parental improvement, pursuant to Syllabus Point 4, in part, of *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011), but that there must also be a balance of interests of a child's natural parents where there has been a demonstration that the parents can fully participate in an improvement period. Petitioner Father argues that here, he testified that he would be wiling to participate in any services the circuit court ordered.

The guardian ad litem for the child and DHHR contend in their responses that the circuit court did not err in terminating Petitioner Father's parental rights without an improvement period. They assert that termination was proper given Petitioner Father's history and present circumstances. Petitioner Father was incarcerated when T.M. was born and has not cared for or nurtured the child since his birth. His projected release from incarceration is not until 2023. The Court has held as follows:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, the child's guardian ad litem and DHHR argue that "the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008) (internal citations omitted).

The Court finds no abuse of discretion by the circuit court in its order terminating Petitioner Father's parental rights without an improvement period. Pursuant to West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period. Rather, the subject parent has the burden of demonstrating by clear and convincing evidence that he or she is likely to fully participate in an improvement period. The circuit court thereafter has the discretion to grant it or deny it. Although Petitioner Father asserts in his petition for appeal that he "requested post-adjudication improvement periods on several occasions," there is no indication in the appendix that Petitioner Father ever made a written motion for such in accordance with West Virginia Code § 49-6-12. Moreover, the appendix also does not indicate that any transcripts of proceedings in this action were filed to indicate whether Petitioner Father may have even orally requested improvement periods. As such, Petitioner Father has not provided any support for his argument that he should have been

granted an improvement period nor does the appendix indicate that he met the burden of proving by clear and convincing evidence that he should have received an improvement period by the circuit court. The Court recognizes that a parent's prior termination does not mandate termination of parental rights merely upon filing of the petition, but the threshold of evidence necessary for termination is lower. *In re Rebecca K. C.*, 213 W.Va. 230, 234-35, 579 S.E.2d 718, 722-23 (2003) (quoting Syl. Pt. 5, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000)). The Court finds that given the subject child's tender age, the unchanged circumstances that led to the filing of this petition, and Petitioner Father's incarceration until 2023, the circuit court did not abuse its discretion in terminating Petitioner Father's parental rights to T.M. Accordingly, the Court finds no error in the circuit court's decision.

This Court reminds the circuit court of its duty to establish permanency for T.M. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for T.M. within eighteen months of the date of the disposition order.[2] As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard* , 185 W.Va. 648, 408 S.E.2d 400 (1991).

[2] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman