STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: E.A., L.A., R.A., and B.A.

No. 11-1417 (Kanawha County 11-JA-77 - 80)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Jason S. Lord, arises from the Circuit Court of Kanawha County, wherein his parental rights were terminated by order entered September 15, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, Jennifer R. Victor, has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, 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.

The instant matter was initiated after law enforcement responded to a complaint at the Respondent Mother's home and found the house to be in deplorable condition, with feces and urine on the walls, sinks overflowing, mold on the walls and mattresses, and one mattress completely soaked with urine. Additionally, the home was filled with trash and insects, the children were covered in bug bites and scratches, and one child was suffering from ringworm. According to the abuse and neglect petition below, the home was in such terrible condition that Respondent Mother was arrested for child neglect and the home was condemned. Petitioner did not live in the home at this time, but the petition alleged that the children were additionally abused by his past history of domestic violence against Respondent Mother, and also by alleged statements petitioner made to relatives that he intended to make B.A. a "woman" on her tenth birthday. Petitioner was mostly absent during the abuse and neglect proceedings, failing to attend any of the hearings below. At adjudication, Respondent Mother stipulated to the allegations in the petition, and petitioner was found to be an abusive parent because he either knew or should have known about the conditions in which his children were living, but failed to take action to remedy the conditions, and further because of his failures to pay child support and maintain contact with the children. Shortly thereafter, petitioner's parental rights were terminated due to his failure to follow through with the family case plan and the fact that the conditions of abuse could not be substantially corrected.

On appeal, petitioner alleges that the circuit court erred in terminating his parental rights because the evidence was insufficient to support adjudication, and because his alleged failure to pay

child support was not a sufficient reason to terminate his parental rights without first granting an improvement period. Specifically, petitioner argues that no evidence or testimony was presented at adjudication to prove that petitioner knew or should have known of the deplorable conditions in which his children were living with Respondent Mother. Petitioner did not live in that home and had not for some time. Further, he argues that the State had the burden of proving that petitioner was an abusing parent, not simply that the children were abused. As such, he argues that the State failed to meet its burden. Petitioner also argues that the evidence below supported the granting of an improvement period to allow him to get current in his child support payments. Petitioner asserts that his failure to pay child support is not a reason to terminate his parental rights, as abuse and neglect proceedings are not meant to be punitive in nature. In short, petitioner argues that he should have been given an opportunity to rectify his failure to financially support his children and an improvement period would have done just that.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that there was clear and convincing evidence to establish that petitioner was an abusing parent, including testimony from a Child Protective Services ("CPS") worker regarding the agency's extensive history of involvement with petitioner and his children. According to the guardian, at adjudication, testimony was provided concerning unsuccessful efforts to contact petitioner and his lack of involvement with his children. Testimony was also provided regarding petitioner's admission that he had visited the children in the squalid conditions as recently as April of 2011. Respondent Mother corroborated that petitioner also refused to pay child support as ordered. In short, petitioner did not contradict or rebut any of the evidence presented at adjudication because of his failure to appear for the proceedings. Based upon this evidence, the guardian argues that the circuit court was correct in adjudicating petitioner as abusive. The guardian goes on to argue that petitioner was not entitled to an improvement period because he neither moved the circuit court for one, nor established that he was likely to fully comply with the terms thereof. According to the guardian, petitioner did not attend a single hearing in these proceedings, failed to attend two multi-disciplinary team ("MDT") meetings, and only attended supervised visitation with his children on one occasion. Lastly, contrary to petitioner's argument that the circuit court terminated his parental rights solely because of his failure to pay child support, the guardian argues that termination was based on petitioner's failure to acknowledge his parenting inadequacies, refusal to contact his case manager or children, refusal to participate in services, and refusal to visit with his children. For these reasons, the guardian argues that termination of petitioner's parental rights was the only reasonable alternative and the circuit court's decision should be affirmed.

The DHHR has also responded, and argues in support of affirming the circuit court's decision. To begin, the DHHR argues that petitioner had been receiving services from the DHHR for years, and that he should have been aware of the circumstances in which his children were living because they had not changed since he moved out of the home. Further, the petition included allegations of domestic violence, and the children confirmed that petitioner was also violent toward them. The evidence presented to adjudicate petitioner as abusive was sufficient, especially in light of testimony that the children had been living in an unsuitable environment for six years, according to the DHHR. Further, the DHHR argues that petitioner's failure to pay child support was not the

sole basis for termination of his parental rights. According to the DHHR, the circuit court also made findings that petitioner exposed the children to domestic violence, sexual abuse, and deplorable living conditions. In short, the DHHR argues that there was ample evidence that petitioner abused and neglected his children in multiple ways. The DHHR also argues that petitioner was not entitled to an improvement period because he failed to even attend a single hearing in this case, failed to properly move for an improvement period, and failed to establish that he was likely to fully participate should the same be granted.

"'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).

As noted above, the circuit court was presented with ample evidence upon which to adjudicate petitioner as an abusive parent. Petitioner's argument that the evidence was insufficient for his adjudication as an abusive parent is premised on the notion that the filthy living conditions formed the only basis of the abuse; this is simply not the case. As noted in the circuit court's adjudication order, Respondent Mother stipulated to adjudication and admitted to the allegations of abuse and neglect as set forth in Paragraph VI of the initial petition. That paragraphs states, in relevant part, that "there is a history of domestic violence between [Respondent Mother] and [petitioner]." This is only one of the many allegations to which Respondent Mother stipulated at adjudication, but it alone is sufficient to adjudicate petitioner as abusive without even taking into account the allegations that petitioner had little contact with the children or should have known of the deplorable conditions in which they lived. West Virginia Code § 49-1-3(1)(D) states that "'[a]bused child' means a child whose health or welfare is harmed or threatened by . . . [d]omestic violence." Based upon the circuit court's findings, petitioner engaged in a history of domestic violence with the children's mother. Petitioner was absent at adjudication and presented no evidence to refute this allegation or Respondent Mother's stipulation as to its accuracy. As such, it is clear that sufficient evidence existed upon which to adjudicate petitioner as an abusive parent.

Petitioner next argues that the circuit court erred in terminating his parental rights based upon his failure to pay child support without first granting him an improvement period. West Virginia Code § 49-6-5(b)(3) states that circumstances in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected include situations in which "[t]he abusing parent . . . [has] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed

to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." In terminating petitioner's parental rights, the circuit court noted that petitioner failed to attend hearings below, failed to participate in services, and attended only one supervised visitation. Based upon these failures, the circuit court noted that petitioner "demonstrated an inadequate capacity to solve the problems of abuse or neglect on his own, or with help," and further made the finding that petitioner did not follow through with the reasonable family case plan or other rehabilitative efforts. Based upon these findings, it is clear that petitioner's failure to pay child support was not the sole basis for the circuit court's termination. As such, because there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, the circuit court did not err in terminating petitioner's parental rights in accordance with West Virginia Code § 49-6-5(a)(6).

This is especially true in light of our prior holding that "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). Despite petitioner's argument that he should have been entitled to an improvement period, the Court notes that such improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. Additionally, West Virginia Code § 49-6-12(a)(1) requires that a parent file a written motion for an improvement period. As noted above, petitioner did not appear for any hearings in this matter, and the record is devoid of any motion filed on petitioner's behalf for an improvement period. For these reasons, the circuit court's decision to terminate petitioner's parental rights without granting an improvement period was not error, and we decline to disturb this decision on appeal.

This Court reminds the circuit court of its duty to establish permanency for the children. 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 the children within eighteen months of the date of the disposition order.[1] 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

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[1]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.

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).

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

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh