

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: Y.F. and S.F.

No. 11-1478 (Kanawha County 09-JA-54 & 10-JA-11)

FILED

June 25, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father’s appeal, by counsel Matthew A. Victor, arises from the Circuit Court of Kanawha County, wherein his parental rights to the children, Y.F. and S.F., were terminated by order entered on October 7, 2011. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Lee A. Niezgoda, has filed its response. The guardian ad litem, Sandra K. Bullman, has filed her response on behalf of the children. The petitioner has further filed a reply brief.

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 abuse and neglect proceedings below were initiated upon allegations that the petitioner’s home was unfit for human habitation. According to the initial abuse and neglect petition, the home had areas where the ceiling was caving in and where the floor had holes, and the home was also “literally filled with trash, garbage[,] and feces.” In fact, the lone child in the home at the time, Y.F., had trash in her crib and was placed in a car seat on top of the refuse to sleep. The initial petition also contained allegations of undiagnosed mental health conditions against Respondent Mother, and stated that “the [petitioner and Respondent Mother] are not sufficiently motivated and organized to provide for the needs of the infant child on an ongoing basis.” The petitioner entered into a stipulated adjudication, and the circuit court found the child to be neglected. The circuit court granted petitioner a post-adjudicatory improvement period, with the following terms and conditions: 1) participate in parenting and adult life skills education; 2) follow the recommendations of a psychological evaluation; 3) obtain and maintain education or employment; 4) obtain and maintain suitable housing; and, 5) receive supervised visitation with the children. According to the record, the petitioner did initially comply with the terms of this improvement period such that the same was continued several times, as memorialized in multiple orders regarding review of the improvement period.

On January 16, 2010, petitioner and Respondent Mother had another child, S.F. Four days later, on January 20, 2010, the DHHR filed an amended petition to include this child in the abuse and neglect proceedings below. At the conclusion of petitioner's improvement period, the circuit court set the matter for a dispositional hearing and found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. This finding was based upon evidence that petitioner did not follow through with the reasonable family case plan or other rehabilitative efforts. Based upon the children's best interests, the circuit court terminated petitioner's parental rights.

On appeal, petitioner alleges that the circuit court erred in terminating his parental rights. Specifically, he argues that the conditions which led to the petition's filing had been addressed and remedied by obtaining suitable housing. Further, according to petitioner, the record is devoid of any rationale for the circuit court's drastic decision to terminate his parental rights, and the evidence did not support termination. Lastly, petitioner argues that under the specific facts and circumstances of the case, the circuit court's lack of consideration for an additional improvement period is unduly harsh and capriciously extreme.

In his reply, petitioner further argues that the differing focus of the guardian's response and the DHHR's response underscores their disjointed efforts to terminate his parental rights by pointing to any potentially negative aspect of his case. He further argues that the guardian improperly focuses on Respondent Mother's actions, while failing to point to any support for termination of petitioner's parental rights. Petitioner argues that both respondents have minimized the significant achievements he made during the action below, and that they have misstated the evidence by arguing that he suffered from serious deficiencies in judgment such that his mental health issues could jeopardize the children. He argues that nothing in the psychological reports indicates that his alleged judgment deficiency had any impact upon the safety and security of the children. Further, petitioner blames the DHHR for his inability to treat his mental health issues because of the failure to reinstate his medical card or provide him with transportation to his appointments. Petitioner argues that the DHHR's characterization of his employment as sporadic is unsupported by the evidence, as he held an excellent track record of employment. Lastly, petitioner argues that the DHHR's comment on his personal hygiene is simply not present in the record, noting that the comment states that he was well groomed.

The guardian responds and argues in support of affirming the circuit court's termination of petitioner's parental rights. In support, the guardian argues that petitioner had mixed compliance during his improvement period. While he did obtain employment at different times throughout the proceedings, petitioner was not consistently employed and also failed to attend the required psychological appointments. In fact, the guardian argues that petitioner was discharged from his psychologist for noncompliance. Further, the guardian argues that petitioner missed several visitations with the children, did not know how to calm or quiet the young children, and admitted that the children cried so much that neighbors complained. According to Respondent Mother, petitioner would leave when the children cried too much, necessitating her taking the children out in the night to look for him. Lastly, the guardian argues that the children would often go missing in

the small apartment, and that the parents admitted that this happened “all the time,” and for as long as two hours on one occasion. According to the guardian, petitioner never told anyone that this was the result of playing hide and seek, and it was not until petitioner’s counsel suggested the same, that petitioner began referring to these incidents as a game. The guardian argues that at the time of the dispositional hearing, petitioner had not seen his children for five weeks, and it had become obvious that he was not capable of providing a safe and nurturing environment for the children. For these reasons, the guardian supports termination of petitioner’s parental rights.

The DHHR also responds and argues in favor of affirming the circuit court’s termination of parental rights. The DHHR argues that petitioner had over two years to remedy the issues of neglect, but that he failed to make the necessary improvements. The DHHR argues that the conditions as alleged in the abuse and neglect petition below were not remedied, as petitioner argues. The DHHR cites to the concerns over mental health and competency issues raised in the petition to argue that petitioner failed to comply with his improvement period when he did not complete the recommendations of his psychological evaluation. The evaluation, according to the DHHR, showed that petitioner had issues with poor judgment which could jeopardize a child in his care, and argues that these deficiencies did not significantly improve throughout the proceedings. The DHHR argues that petitioner testified that he failed to show up for psychological appointments which resulted in his provider refusing to schedule more appointments. The DHHR further argues that petitioner had issues with job stability, and that maintaining working utilities in the house was a problem that persisted from the petition’s filing all the way up through disposition. Additionally, the DHHR notes that the record reflects petitioner’s serious hygiene issues throughout the matter below. In short, the DHHR argues that the circuit court was presented with evidence establishing that petitioner made little progress below, despite over one and a half years of parenting services. According to the DHHR, petitioner failed to acknowledge his mental health issues and the fact that the same needed to be treated. For these reasons, the DHHR argues that the circuit court did not err in terminating petitioner’s parental rights.

The Court has previously established the following standard of review:

“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).

Upon review of the appendix, the Court finds no error in the circuit court's termination of petitioner's parental rights. Petitioner's main argument is that the evidence below was insufficient to support termination, especially in light of what he views as substantial improvements made during the pendency of the action below. When reviewing the testimony introduced at the dispositional hearing, however, it is clear that the circuit court did not err in finding there was no reasonable likelihood that petitioner could substantially correct the issues of neglect. To begin, petitioner argues that termination below was abrupt, given that he had received multiple continuations of his improvement period for substantial compliance. However, in its July 13, 2011, order, the circuit court found that petitioner's improvement period had expired and therefore set the matter for a dispositional hearing. This is in compliance with our prior holdings, wherein we have stated as follows:

“At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child[ren].” Syllabus Point 6, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. Pt. 4, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010). During the dispositional hearing, the circuit court was presented with ample evidence upon which to support its finding that petitioner had not followed through with the reasonable family case plan and other rehabilitative efforts during the extended period he was receiving services. This includes evidence that petitioner missed scheduled visitations with his children without attempting to cancel or reschedule those visitations, and further that he was discharged from his psychological treatment for failure to attend his scheduled appointments. While petitioner argues that his failure to attend his psychological treatments was due to lapses in his bus pass and medical card provided by the DHHR, the record indicates that petitioner chose to attend his treatment in Winfield, West Virginia, as opposed to choosing a closer option that was available in Kanawha County. Further, the evidence indicated that petitioner was unable to maintain steady employment, having held at least three jobs during the pendency of the proceedings below. Petitioner's testimony also established that he was not employed at the time of the dispositional hearing.

West Virginia Code § 49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where “[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” While it appears that petitioner made some progress in his improvement period, the record clearly establishes that petitioner failed to follow through with the reasonable family case plan. As outlined above,

petitioner's improvement period required that he follow through with the recommendations of his psychological evaluation, find and maintain employment, and also participate in visitation with his children. However, the evidence established that petitioner was discharged from his psychological treatment for failure to attend his scheduled appointments, failed to maintain employment, and did not attend visitation with his children as scheduled. This is all in spite of approximately two years of services to support petitioner in his compliance with these terms and conditions. As such, the circuit court did not err in proceeding to termination of parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

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 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.

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.

Affirmed.

ISSUED: June 25, 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