STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: K.M. and J.L.:

No. 11-1510 (Kanawha County 07-JA-160 and 08-JA-135)

FILED
April 16, 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 were terminated by order entered on October 5, 2011. This appeal was timely perfected by Petitioner Father's counsel Jeffrey Blaydes, with an appendix accompanying his petition. The children's guardian ad litem, Sandra Bullman, filed a response on behalf of the children in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William Bands, filed a response joining in and concurring with the guardian ad litem.

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).

In August of 2007, DHHR filed the instant petition against the subject children's parents, based on allegations that the children's mother, S.W., was mentally impaired, exhibiting no knowledge of her first child's name[1], how to feed her, or that this child was not of appropriate age

[1] Only the first child, K.M., was born when DHHR filed the first petition against Petitioner Father and the children's mother. The second child was born in 2008 and an amended petition was filed to incorporate her into the proceedings.

to sit on her own. The petition also contained allegations that the children's mother reported that she and her first child would sometimes accompany her boyfriend, Petitioner Father, to the transit mall where he would "smoke crack," and that Petitioner Father once threatened the mother with a knife and hit the child on top of her head. In December of 2007, the circuit court granted Petitioner Father a pre-adjudicatory improvement period. DHHR filed an amended petition in 2008, re-asserting the allegations from the initial petition and also alleged that Petitioner Father had not taken a drug test since August of 2008; had engaged in domestic battery, malicious wounding, possession of a controlled substance, public intoxication, and obstructing an officer; had anger management problems; and was not sufficiently motivated to provide the needs of the children. The parental rights of the children's mother were terminated in 2009.

Throughout the course of these proceedings, from August of 2007 until the final dispositional hearing in July of 2011, the circuit court granted Petitioner Father a number of improvement periods and a number of extensions to these improvement periods. Inclusive in these improvement periods were services such as domestic violence counseling, parenting and adult life skills training, a psychological evaluation, random drug screening, and supervised visitation. At the adjudicatory hearing of June 30, 2008, Petitioner Father's social worker, Randy Koontz of Creating Parenting Alternatives, testified that Petitioner Father was doing well with his supervised visitation. At a review hearing in October of 2008, Petitioner Father's Child Protective Services ("CPS") worker, Lenore Willis, testified that Petitioner Father did not call in for his drug screens every day, as ordered. At Petitioner Father's adjudicatory hearing in June of 2009, Ms. Willis testified again, reporting that Petitioner Father was not able to complete some of his scheduled visits because he arrived intoxicated to several of them. Ms. Willis testified that Petitioner Father has a history of domestic violence and violence with other people. In support, she asserted that he had prior arrests for violence against others and issues with drug abuse, including a positive drug screen for cocaine and alcohol. She further testified that Petitioner Father missed some parenting and adult life skills services. The circuit court found abuse and neglect of the subject children, but continued to grant and extend Petitioner Father's requests for improvement periods throughout the duration of this case before his first dispositional hearing in February of 2010.

At this hearing in February of 2010, social worker Mr. Koontz continued to comment on Petitioner Father's progress with parenting and improvement, but also testified that he was not aware that Petitioner Father was required to make a call every day to check in for a drug screen and was not aware that Petitioner Father had not been calling every day. Ms. Willis testified again and reported that Petitioner Father was not consistent with his classes, was not compliant with random drug screens, and did not maintain housing or consistent employment. The circuit court denied DHHR's motion to terminate Petitioner Father's parental rights, but warned Petitioner Father about flunking even one drug screen. The parties did not reappear until July 26, 2011, when the circuit court held its final dispositional hearing as to Petitioner Father.

At Petitioner Father's final dispositional hearing, DHHR again moved to terminate Petitioner Father's parental rights. The guardian explained that Petitioner Father had been terminated from the Batterer's Intervention and Prevention Program for noncompliance again, despite the circuit court's

order to participate in the same. The guardian opined that Petitioner Father was "just not capable." The current visitation schedule was discussed, but no motions were made to continue it or terminate it. In particular, Petitioner Father did not make a motion to continue visitation if the circuit court terminated his parental rights. The circuit court issued an order terminating Petitioner Father's parental rights. The order did not address post-termination visitation with the subject children.

On appeal, Petitioner Father argues four assignments of error. He argues that the circuit court erred in finding abuse and neglect of the children, terminating his parental rights, denying him an improvement period at disposition, and failing to mandate post-termination visitation. With regard to the circuit court finding of abuse and neglect at adjudication, he argues that the record does not contain evidence that the children were abused and neglected by Petitioner Father in any manner, asserting that the physical and emotional conditions of the children were absent from the record. Petitioner Father further argues that the CPS workers who testified did not provide supportive evidence concerning the knife allegation and there was no evidence concerning a long criminal history. Petitioner Father asserts that the record only establishes one guilty plea to one count of battery.

The guardian ad litem responds, contending that the circuit court did not err in finding abuse and neglect or in terminating Petitioner Father's parental rights without a dispositional improvement period. The guardian notes that the circuit court did not give a ruling concerning visitation. The guardian highlights that despite four years of services and opportunities, Petitioner Father never corrected the conditions which led to the filing of the petition. Although he participated in some services, he did not take the vast majority of his drug screens and had a positive screen for cocaine and alcohol. The circuit court gave him ample opportunities to achieve reunification with his children, including an opportunity at a hearing in August of 2008, in which the circuit court directed that it would dismiss the case if in another forty-five days, Petitioner Father complied with his improvement period. However, upon review in October of 2008, Petitioner Father had not complied with calling in every day for his drug screens. Petitioner Father was given more opportunities for improvement but upon adjudication in June of 2009 and the initial dispositional hearing in February of 2010, Petitioner Father still failed to comply with the requirements of his improvement period. At the final dispositional hearing in July of 2011, the circumstances still had not changed. Accordingly, the guardian argues, the circuit court did not err in terminating Petitioner Father's parental rights without an additional improvement period. DHHR joins the guardian in support of the circuit court's termination order.

The Court agrees that the circuit court did not abuse its discretion in finding abuse and neglect by Petitioner Father. Under West Virginia Code § 49-1-3, a child whose health or welfare is harmed or threatened by a parent knowingly or intentionally inflicting physical, mental, or emotional injury, or allowing another in the home to do so, is considered abused. The Court has also held as follows:

> In making a determination of whether a child is an abused and/or neglected child as defined in W.Va.Code § 49-1-3 (1994) (Repl.Vol.1996), a court must consider

> evidence of a parent's progress, or lack thereof, during the pre-adjudication improvement period. However, pursuant to W.Va.Code § 49-6-2(c) (1996) (Repl.Vol. 996), such evidence is proper only if it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were alleged in such petition.

Syl. Pt. 2, in part, *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997). Further, this Court has indicated that "parents who do not adequately provide for a child's needs and are not sufficiently motivated or organized to provide for such needs on an ongoing basis should have their parental rights terminated." *In re Brandon Lee B.*, 211 W.Va. 587, 591, 567 S.E.2d 597, 601 (2001) (citing *State v. Krystal T.*, 185 W.Va. 391, 407 S.E.2d 395 (1991)). Here, the appendix reflects that the circuit court granted Petitioner Father a pre-adjudicatory improvement period in December of 2007. Throughout the proceedings, the circuit court continued to extend Petitioner Father's pre-adjudicatory improvement period before Petitioner Father's adjudicatory hearing in June of 2009. The appendix contains Petitioner Father's call logs and reflects his failure to call every day and consequent failure to submit to scheduled drug screens, rendering them positive. The appendix also reflects Petitioner Father's positive screen for cocaine and alcohol. Petitioner Father appeared at some visitations intoxicated. A court summary in the appendix also discusses the circumstances that led to Petitioner Father's arrest for malicious wounding in 2008. Petitioner Father had been drinking and became angry at another woman in the home. Petitioner Father threw a glass at this woman and cut her eye and forehead. Petitioner Father was also indicted for first-degree robbery in 2009, but this charge was later dropped. The initial petition against Petitioner Father and the children's mother alleged that Petitioner Father engaged in drug use and violence. The 2008 amended petition expanded on these allegations, providing further allegations of Petitioner Father's drug use, violence, and lack of motivation. Petitioner Father's failure to comply with the requirements of his drug screens, failure to comply with his classes, and his charge of malicious wounding during his pre-adjudicatory improvement period provide further evidence of Petitioner Father's drug use and violence that initiated this abuse and neglect case against him. The circuit court did not err at adjudication in finding abuse and neglect by Petitioner Father.

The Court also finds that the circuit court did not abuse its discretion in terminating Petitioner Father's parental rights without an additional improvement period. As provided in West Virginia Code § 49-6-5(a)(6), termination is proper when the circuit court finds that there is no reasonable likelihood that conditions or abuse or neglect can be substantially corrected in the near future. Further, the circuit court is not required to grant an improvement period at disposition. Rather, pursuant to West Virginia Code § 49-6-12, it is the subject parent's burden to first prove by clear and convincing evidence that he or she would substantially comply with the terms of an improvement period. This Court has held as follows: "'[C]ourts 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). Moreover, "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).

Petitioner Father was adjudicated in June of 2009. Prior to adjudication, he was granted a pre-adjudicatory improvement period in December of 2007. Petitioner Father's dispositional hearing did not occur until July of 2011. At this point, the circuit court found that Petitioner Father's circumstances had not changed since the filing of the petition. The appendix reflects that Petitioner Father had periods of time in which he showed improvement, but these periods were followed by relapses into noncompliance with his improvement period. The circuit court did not err in terminating Petitioner Father's parental rights. The circuit court also did not err in denying Petitioner Father an improvement period at disposition. The appendix shows that time and again, Petitioner Father was given opportunities to fully comply with his improvement period; yet, time and again, he failed to do so during the extensive period of time this case has been ongoing. Petitioner Father did not meet his burden to the circuit court for an improvement period at disposition. Petitioner Father only had physical custody of K.M. during the first few months of her life and has never had physical custody of J.L. The guardian has reported that the children have been in foster care together since 2007, almost five full years now. Given these circumstances, the Court finds no error in the circuit court's termination of Petitioner Father's parental rights without an additional improvement period.

Lastly, the Court does not find error in the circuit court's order concerning visitation. Although the visitation schedule was discussed at the dispositional hearing in July of 2011, Petitioner Father did not make a motion for post-termination visitation, nor did DHHR make a motion to terminate such visitation if the circuit court terminated Petitioner Father's parental rights. The circuit court did not make any rulings at this hearing, but rather, told the parties that it would "study this [c]ourt [s]ummary again . . . and [] make some decision . . . ." In Petitioner Father's motion for post-dispositional improvement period, he did not address visitation. The Court finds that the circuit court did not commit error for not mandating visitation in its final order of termination. Post-termination visitation is an issue still pending before the circuit court, should the parties desire to raise it.

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.[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).

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: April 16, 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

[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.