STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: L.R., K.R., and M.R.

No. 11-1762 (Fayette County 11-JA-08 - 10)

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

MEMORANDUM DECISION

This appeal with accompanying appendix record, filed by counsel John Thompson Jr., arises from the Circuit Court of Fayette County, wherein Petitioner Father's parental rights were terminated by order entered on November 29, 2011. The children's guardian ad litem, Thomas Rist, 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 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.

"'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).

DHHR filed the petition in this case in January of 2011. The petition was based on allegations that the parents knew of a relative's sexual abuse against the children. The petition also indicated that one of the children reported that she had seen her parents and grandfather use drugs, and that two of the children reported witnessing sexual abuse of their cousin by the same relative who abused the subject children. The petition also notes that the family has had open cases with DHHR in the past due to allegations of substance abuse and educational neglect and that the parents have failed to cooperate in offered services. DHHR filed an amended petition in March of 2011,

alleging medical neglect. These allegations were based on medical records indicating that K.R. was severely behind on her immunizations required for school, and dental records indicating that the parents neglected to keep several of their children's appointments. When the children were eventually examined, M.R. needed to have three teeth removed and six fillings, and L.R. was prescribed antibiotics for an infection resulting from visible tooth decay and needed two teeth extracted.

Both parents waived their rights to a preliminary hearing. Accordingly, the circuit court found imminent danger to the children's well-being and ordered that the parents may participate in supervised visitation with the children, at the discretion of the guardian ad litem and as long as they produce negative drug screens. Shortly after the preliminary hearing, both parents entered stipulations to abuse and neglect at the adjudicatory hearing. The circuit court granted each parent a post-adjudicatory improvement period, which outlined orders for them to submit to random drug screens, maintain a suitable home, participate in available programs, submit to a substance abuse evaluation, participate in supervised visitation, and maintain employment. Both parents had their improvement periods revoked in August of 2011 when the circuit court found that neither parent had complied with the terms of their improvement periods. The circuit court also found that the parents had since been arrested by the federal authorities on drug charges, to which they both entered guilty pleas.

At the dispositional hearing in November of 2011, neither parent appeared in person, although their lawyers were present. Earlier that day, someone who claimed to be the children's mother called the circuit court and claimed that she and her husband were caught in traffic behind an automobile accident in Danese, Fayette County. The same call and claim were made to a Child Protective Services ("CPS") worker. Upon investigation of this alleged accident, however, Corporal Legg found that no such accident had occurred at either the time or place claimed by the caller. Nevertheless, the circuit court and everyone else present waited for nearly an hour before beginning the hearing. Neither parent ever appeared. The circuit court found that both parents were voluntarily absent from the hearing and accepted proffers from DHHR for its motion to terminate parental rights. The circuit court's termination order reflects twenty-four separate findings, outlining the parents' drug use and knowledge of their children's sexual abuse; their failure to maintain a suitable home; their failure to maintain employment; their failure to maintain contact with service providers and their attorneys; their failure to participate in services, including Multi-Disciplinary Treatment Team ("MDT") meetings; their failure to submit to drug screens and pill counts; and their failure to participate in supervised visitation. Accordingly, the circuit court terminated both parents' parental rights to the subject children, without visitation. Petitioner Father appeals this order, arguing one assignment of error.

On appeal, Petitioner Father argues that the circuit court erred by allowing DHHR to proffer evidence instead of being required to call witnesses to the stand. He argues that although the parents did not appear at the dispositional hearing, they were nevertheless deprived of their right of confrontation and cross-examination in this regard. Petitioner Father submits that he does not dispute any of the facts found by the circuit court or that any different facts would have come out by

allowing cross-examination, but argues that "it is unknown if some of the facts may have appeared had [c]ounsel been given the opportunity to cross-examine the witnesses." In support, Petitioner Father argues that the right to cross-examine is fundamental and intended for the use of an opponent to "bring to light qualifying or contradictory facts and circumstances not disclosed by the witness on cross-examination and [] for the further purpose of developing those facts which may diminish the personal trustworthiness or credit of the witness which may have remained undisclosed on cross-examination." *Kominar v. Health Mgmt. Assoc. of W.Va., Inc.*, 220 W.Va. 542, 559, 648 S.E.2d 48, 65 (2007) (internal citations omitted). Petitioner Father requests reversal of the circuit court's termination order and a remand for further hearings.

In response, the guardian ad litem argues that the circuit court did not err in accepting DHHR's proffered evidence and did not err in terminating both parents' parental rights. The guardian argues that this Court has held as follows:

> "W.Va.Code [§] 49-6-2(c) [1980], requires the [DHHR], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the [DHHR] is obligated to meet this burden." Syllabus Point 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 1, in part, *In re Joseph A.*, 199 W.Va. 438, 485 S.E.2d 176 (1997). The guardian further argues that "[i]n all cases involving the disposition of an abuse and neglect case, [the Court has] repeatedly stated that 'the best interests of the child is the polar star by which decisions must be made which affect children.' *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted)." *In re Kristin Y.*, 227 W.Va. 558, 569, 712 S.E.2d 55, 66 (2011). The guardian argues that termination was proper and that this Court should deny Petitioner Father's petition for appeal because (1) he served his petition to the guardian out of time in disregard of the Court's Scheduling Order, (2) allowing proffer is proper, and (3) the best interests of the children support upholding termination. The guardian argues that Petitioner Father's argument for appeal is unsupported by the facts of this case. The guardian asserts that the parents failed to follow through with every facet of the case and their improvement periods, discussing their failure to participate in services, visitation, drug screens, communication, and court hearings, along with their failure to maintain employment or a suitable home. The guardian discusses that there were several times in which the children were driven nearly an hour for a planned visitation only to find that the parents did not appear. These failed appearances elicited tears and confusion, with one of the children asking the guardian if her parents had died. Moreover, the guardian argues that Petitioner Father's reliance on *Kominar* is misplaced. DHHR also responds, joining in and concurring with the guardian ad litem's response.

The Court finds that the circuit court did not err in accepting proffers by DHHR at the dispositional hearing and it did not err in making its subsequent findings in the termination order. The Court recognizes the guardian's three arguments in response to Petitioner Father's argument on

appeal. The Court finds most significant that a review of the appendix submitted by Petitioner Father does not reveal anything that refutes the circuit court's findings in its termination order. The parents had been involved with DHHR since 2003 without any success. The dispositional hearing was not the first hearing the parents failed to attend. The appendix lacks any drug test results, visitation records, services logs, or employment records that could refute the circuit court's findings of the parents' lack of participation in such. Petitioner Father does not dispute that his counsel did not offer any proffers to refute DHHR's proffers at the dispositional hearing. Petitioner Father provides his own contradiction in his petition for appeal, noting at one point that "the allegation of sexual abuse was later found to be untrue," yet also submits that "[c]ounsel for the [p]etitioners presents this legal argument only [i.e., right to cross-examination of witnesses] and does not dispute any of the facts found by the [t]rial [c]ourt." Given the circumstances of this case, a review of the appendix, and the best interests of the children, the Court finds no reversible error.

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).

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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.

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: 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