

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

In Re: J.H., C.H., and P.H.

No. 12-0569 (Mason County 10-JA-25, 26 & 27)

FILED

September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father’s appeal, by counsel Rebecca S. Johnson, arises from the Circuit Court of Mason County, wherein his parental rights to the children, J.H., C.H., and P.H., were terminated by order entered on April 4, 2012. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel William L. Bands, has filed its response. The guardians ad litem for the children, Jason D. Holdren and Tanya Hunt Handley, have filed a joint response on behalf of the children.

This Court has considered the parties’ briefs and the 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 record 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 proceedings below were initiated upon allegations of educational neglect after Respondent Mother was arrested for the truancy of the children. According to the initial abuse and neglect petition, even after this arrest, the children continued to be absent from school. The parents admitted to the allegations in the petition concerning the children’s over-abundance of absences from school at adjudication. Both parents were thereafter granted post-adjudicatory improvement periods. On May 9, 2011, the DHHR filed a motion to revoke the petitioner’s post-adjudicatory improvement period, citing a positive drug screen and continued issues with the children’s school attendance. The following day, the DHHR filed an amended petition alleging drug use by the parents. On June 6, 2011, petitioner admitted to abusing illegal drugs and the circuit court revoked his post-adjudicatory improvement period. Petitioner thereafter moved for a second post-adjudicatory improvement period, but the circuit court ultimately denied that motion. On April 4, 2012, the circuit court terminated petitioner’s parental rights to the children.

On appeal, petitioner alleges that the circuit court erred in the following ways: in finding that he had not substantially completed the requirements of his improvement period; in using his lack of participation during a time when he was not in an improvement period as a reason to deny his motion for a second post-adjudicatory improvement period; and, in finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. Specifically, petitioner argues that the circuit court did not order that he provide a doctor’s excuse for every day the children missed school. Despite this fact,

petitioner argues that the DHHR still used the lack of a doctor's excuse as a basis to seek revocation of his improvement period, and that the circuit court relied on this erroneous information. Petitioner further argues that one month of an improvement period was insufficient to learn anything from the services provided and modify his negative behaviors and habits. Petitioner also argues that, although he was offered no services after his improvement period was terminated, the circuit court later used petitioner's lack of compliance as a reason to deny him a second improvement period. Petitioner argues that the DHHR is required to make reasonable efforts to reunite a family, but failed to do so here. Lastly, petitioner argues that the circuit court erred in finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future because he was not given an opportunity to meaningfully participate in any services.

The DHHR responds and argues in favor of the circuit court's termination of petitioner's parental rights. According to the DHHR, there was a legitimate finding that the petitioner was an abusing parent and that the children were abused and/or neglected. The DHHR argues that such a finding triggers the circuit court's analysis of its disposition options. According to the DHHR, petitioner continued to deny he even had a drug problem, refused treatment, and failed to fully participate in regular visitation. Therefore, the DHHR argues that the circuit court was correct to find that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. The guardians ad litem for the children respond jointly and also argue in favor of the circuit court's termination of petitioner's parental rights. The guardians argue that the petitioner's admission to drug abuse and the fact that the children had not been attending school were sufficient to support revocation of petitioner's improvement period. Further, the guardians argue that petitioner was denied a second improvement period because he failed to show that he was likely to fully participate in the same. Lastly, the guardians argue that petitioner was habitually addicted to drugs such that his proper parenting skills were impaired, and further that he failed to follow through with the family case plan or other rehabilitative efforts.

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 Cecil T.* 228 W.Va. 89, 717 S.E.2d 873(2011). To begin, the Court finds no merit in petitioner's argument that the circuit court erred in finding that petitioner had not substantially complied with the terms of his post-adjudicatory improvement period. Simply put, a term of petitioner's improvement period was that "[t]he children must attend school on a regular basis." However, the record shows that all three children missed numerous days of school after the improvement period commenced. Further, the Court notes that petitioner's improvement period was terminated, in part, upon the DHHR's discovery that petitioner was abusing multiple controlled substances, including cocaine, methadone, opiates, and oxycodone. In light of the new evidence and allegations against petitioner, the circuit court was wholly correct in finding that petitioner failed to substantially complete the terms of his improvement period and in terminating the same.

Next, the Court finds no error in regard to the circuit court relying upon petitioner's lack of participation in services as a reason to deny him a second post-adjudicatory improvement period. The record clearly establishes that the DHHR continued providing services to petitioner after his improvement period was terminated, including visitation with the children and drug screens. However, the record also establishes that petitioner moved to Ohio during the proceedings, and that the move affected the DHHR's ability to provide services to him as an out-of-state resident. West Virginia Code § 49-6-12(b)(2) requires a parent to demonstrate, by clear and convincing evidence, that he or she is likely to fully comply with the terms of a post-adjudicatory improvement period in order to obtain the same. The record shows that petitioner failed to satisfy this burden, as evidenced by his failure to admit that he had a substance abuse problem, his dishonesty regarding substance abuse counseling, his failure to regularly attend visitation with the children, his failure to complete parenting classes, and his regular failures to appear for hearings in the abuse and neglect proceedings below. For these reasons, the circuit court did not err in denying petitioner a second post-adjudicatory improvement period.

Lastly, these same facts support the circuit court's finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. Pursuant to West Virginia Code § 49-6-5(b)(3), it is clear that the circuit court was presented with sufficient evidence to make such a finding, and we find no error in this regard.

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 twelve months of the date of the disposition order. As this Court has stated,

[t]he [twelve]-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.

Affirmed.

ISSUED: September 24, 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