STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.R.:

No. 11-0487 (Mercer County 10-JA-114-OA)

FILED
October 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein the Petitioner Father's parental rights to his child, J.R., were terminated.[1] The appeal was timely perfected by counsel, with an appendix accompanying the petition. The guardian ad litem has filed his response on behalf of the child, in support of the circuit court's termination order. The West Virginia Department of Health and Human Resources ("DHHR") also filed a response in support of termination.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. The case is mature for consideration. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Petitioner Father challenges the circuit court's order terminating his parental rights to J.R. He argues that the circuit court failed to properly consider case law relevant to granting improvement periods for parents who have previously had parental rights terminated to other children. The Petitioner Father asserts that because an improvement period would be helpful here, the circuit court improperly terminated his parental rights.

The petition for this case was filed on October 14, 2010,[2] pursuant to W.Va. Code §

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[1] The Court notes that the circuit court also terminated the parental rights of the child's mother, M.R. She has filed a separate appeal for her termination.

[2] The Court notes that the circuit court's Initial Order Upon Filing of Petition indicates that the petition was filed on October 13, 2010. A copy of the petition included in the Petitioner Father's appendix, however, is stamped as filed with the Mercer County Circuit Clerk's office on October 14, 2010.

49-6-5b(a)(3).[3] J.R. was born on October 12, 2010. Less than one month earlier, in September 2010, her parents' parental rights had been terminated to six other children. Accordingly, when J.R. was born, DHHR filed a petition to remove J.R. from the custody of the Petitioner Father and the child's mother, M.R.

In its decision to terminate, the circuit court considered testimony taken at the February 14, 2011, hearing. At this hearing, testimony was given by the Petitioner Father, the child's mother, Patrolman J.D. Lambert, and Child Protective Services ("CPS") worker Cristal Tabor. The Petitioner Father testified that in the last case in which his rights were terminated, DHHR had arranged for him to go to Amity Detox Center. He did not complete this twenty-eight day program, however, leaving after only six days. The Petitioner Father testified that since his last termination, he has tried calling various rehabilitation facilities. Although he has not made any commitments to undergo long-term rehabilitation, he indicated that he recognizes his need to do so and the Petitioner Father testified that he would be willing to do whatever the court asked him to do. He mentioned a visit he missed with J.R. because he had been drinking. He admitted that on another occasion, he had been drinking when he "knock[ed] [his] wife around a little bit there around Christmas."

The subject child's mother, M.R., also provided testimony at the February 14, 2011, hearing. With regard to the Petitioner Father, she testified to his tendency to be violent when he drinks alcohol. She also testified about an incident of domestic violence with him in December 2010, in which she had been lying in bed when the Petitioner Father elbowed her off the bed and slapped her in the face.

Patrolman J.D. Lambert provided further testimony of this domestic violence incident. He testified that in December 2010, he, along with other officers of the Princeton Police Department, responded to a call of domestic violence between the Petitioner Father and the child's mother. Upon arriving at the scene, they learned that the child's mother had been lying in bed when the Petitioner Father pushed her out of it, elbowed her in the ribs, and struck her face. Patrolman Lambert testified that he could see swelling and redness underneath M.R.'s eye. Thereafter, Patrolman Lambert and the other officers placed the Petitioner Father into custody for domestic battery. Patrolman Lambert further testified that the Petitioner Father was intoxicated and did not appear to have any visible signs himself of

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[3] W.Va. Code § 49-6-5b(a)(3) reads, in part: "Except as provided in subsection (b) of this section, the department shall file or join in a petition . . . to terminate parental rights: (3) If a court has determined . . . the parental rights of the parent to a sibling have been terminated involuntarily."

being hit or physically hurt.

The family's CPS worker, Cristal Tabor, also testified at the dispositional hearing. In her testimony, she pointed out that the concerns over J.R.'s parents' domestic violence, instability, and the Petitioner Father's alcohol abuse existed at the first termination and remained as concerns. She reported of another instance where the Petitioner Father had been scheduled to receive long-term treatment at a rehabilitation facility but, shortly before the first day of this program, he decided not to go. She also testified of the Petitioner Father's cocaine use. Due to all of these circumstances, Ms. Tabor testified that J.R. would be in danger if she remained in her parents' custody.

After considering the testimony and evidence provided on February 14, 2011, the circuit court found that nothing appeared to have changed for the better since the Petitioner Father's prior termination, but only for the worse. The circuit court outlined on the record, with regard to the Petitioner Father, that although the Petitioner Father testified that he has "hit rock bottom," he has done nothing to improve his situation except, at best, start to make phone calls for rehabilitation merely six days ago, when he knew of the scheduled hearing for months. The Petitioner Father did nothing in preparation for this hearing to improve his circumstances but rather, has continued to drink, has used cocaine, and has abused his wife. Finding nothing to suggest that the conditions of neglect could be substantially corrected in the near future, the circuit court found it necessary for J.R.'s welfare to terminate the Petitioner Father's parental rights.[4]

"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." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Petitioner Father argues that the circuit court failed to properly consider case law

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[4] The Court notes that the circuit court also made findings to terminate the parental rights of J.R.'s mother.

which addresses improvement periods for parents who have previously had their parental rights terminated. In support, the Petitioner Father discusses this Court's prior holdings from the cases of *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999); *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000); and *In re: Rebecca K.C.*, 213 W.Va. 230, 579 S.E.2d 718 (2003). From these cases, the Petitioner Father points out that this Court has held that: "When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to W.Va. Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syl. Pt. 4, *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000), quoting Syl. Pt. 4, *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). In this same opinion, the Court also held that for petitions filed under W.Va. Code § 49-6-5b(a)(3), DHHR continues to bear the burden of proving that the subject child is abused or neglected pursuant to W.Va. Code § 49-6-2. *In re George Glen B., Jr.*, 207 W.Va. 346, 353, 532 S.E.2d 64, 71 (2000). As such, the burden of proving abuse or neglect by clear and convincing evidence remains the same.

In further support of his position, the Petitioner Father recites this Court's prior holding from *In re: Rebecca K.C.*, 213 W.Va. 230, 579 S.E.2d 718 (2003). In essence, this Court held that a parent's prior termination does not mean that he or she does not have a right to "another chance," such as in the form of an improvement period. *Id.* at 235, 579 S.E.2d at 723. At the same time, however, a circuit court has the discretion to not grant an improvement period if clear and convincing evidence shows that conditions constituting abuse and neglect are present, and if the court explains why it concludes that an improvement period would be pointless. *Id.* The child's guardian ad litem responds that nothing has improved since the Petitioner Father's prior termination to support an improvement period for him in J.R.'s case. In addition, DHHR highlights that, under West Virginia Code §49-6-5(a)(6),[5] it was not required to make reasonable efforts at reunification due to the Petitioner Father's prior termination.

Here, in deciding to terminate the Petitioner Father's parental rights, the circuit court

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[5] While this subsection outlines what factors a circuit court shall consider in awarding custody, West Virginia Code §49-6-5(a)(7)(C) more succinctly states that the "department is not required to make reasonable efforts to preserve the family if the court determines: (C) The parental rights of the parent to another child have been terminated involuntarily."

adhered to this Court's prior rulings. The record shows that the court considered the standard the State had to meet in determining whether the parents had made efforts to improve the circumstances that led to their first termination. In doing so, the circuit court also allowed the development of evidence surrounding the prior termination. At the November 15, 2010, adjudicatory hearing, Ms. Tabor testified that the Petitioner Father's housing situation and use of alcohol were concerns at the first termination and remained as concerns in determining J.R.'s matter in the instant case. As discussed herein, at the February 14, 2011, hearing, Ms. Tabor also outlined that the concerns of domestic violence, instability, and the Petitioner Father's alcohol abuse were present at the first termination and continued in the current matter. Subsequently, a review of the transcript from the February 14, 2011, hearing reveals that there was little remedy, if at all, to the Petitioner Father's lifestyle. At this last hearing, he had made no efforts to commit to a long-term rehabilitation program. Between his first termination and the February 14, 2011, hearing, he had continued to drink alcohol, had used cocaine, and was taken under custody once for domestic battery on his wife. In its ruling on the record, and as outlined in its Order of March 1, 2011, the circuit court made findings that nothing had changed for the better in the parents' situation since their first termination. Rather, the only changes were negative ones and the Petitioner Father had not yet secured treatment for his addiction. Accordingly, based on these reasons, the circuit court concluded that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and further, that it is necessary for the welfare of the infant child to terminate the Petitioner Father's parental rights.

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: October 25, 2011

CONCURRED IN BY:

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