

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

In Re: P.D. and A.D.

No. 11-1698 (Marion County 09-JA-96 & 97, 10-JA-88 & 89)

FILED

June 25, 2012

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

MEMORANDUM DECISION

Petitioner Father’s appeal, by counsel Scott A. Shough, arises from the Circuit Court of Marion County, wherein his parental rights to his child, P.D., were terminated by order entered on November 18, 2011.¹ The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Katherine M. Bond, has filed its response. The guardian ad litem, Frances C. Whiteman, has filed a response on behalf of the child.

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.

On December 18, 2009, both of petitioner’s children were removed when P.D. disclosed that Respondent Mother hit him with a stick. This abuse resulted in abuse and neglect proceedings against only Respondent Mother in Marion County Circuit Court Case Nos. 09-JA-96 and 09-JA-97. Petitioner was incarcerated on unrelated charges at the time, and was not considered an abusing parent for purposes of the proceedings. Following her adjudication as an abusive parent, Respondent Mother was granted a post-adjudicatory improvement period and participated in parenting and adult life skills classes. Because she appeared to be making progress in these proceedings, the multidisciplinary team (“MDT”) decided to gradually attempt reunification of Respondent Mother and her children by returning A.D. to her home. As part of this process, the MDT agreed for P.D., who suffers from autism and ADHD, to have an overnight visit with Respondent Mother the weekend of October 15, 2010. However, after the visit, the child disclosed that Respondent Mother sexually abused him, which resulted in the filing of an additional abuse and neglect petition in Marion County Circuit Court Case Nos. 10-JA-88, 10-JA-89. Again, petitioner was not considered

¹Petitioner’s rights to the other child, A.D., were not terminated, based upon his age and specific request that petitioner’s parental rights remain intact. A.D. was, however, ordered to remain in the legal and physical custody of the DHHR. However, petitioner does not raise any assignments of error related to A.D.’s disposition, and as such, the circuit court’s decision regarding his permanency is not addressed herein.

an abusing parent in the proceedings. Ultimately, Respondent Mother was adjudicated as having sexually abused P.D., and her parental rights to that child were terminated. Upon his release from incarceration, petitioner attempted to regain custody of his children. The DHHR referred petitioner for services upon his release, including a request for supervised visitation, and parenting and adult life skills education. Services commenced for petitioner in March of 2011, but eventually an amended abuse and neglect petition was filed against him on August 31, 2011, due to allegations that he was continuing his relationship with Respondent Mother, despite her parental rights being terminated, and further, that he could not provide the children with food, shelter, or clothing. Petitioner was adjudicated as an abusing parent and was denied an improvement period prior to termination of his parental rights by order entered on November 18, 2011. On appeal, petitioner alleges the following assignments of error: that the DHHR failed to make reasonable efforts to preserve the family; that the circuit court considered inappropriate evidence in deciding to terminate the petitioner's parental rights; and, that the circuit court improperly denied him a post-dispositional improvement period or an alternative to termination of his parental rights at disposition. Each of these specific assignments of error, as well as the respondents' rebuttals, are addressed below in turn.

The Court has previously recognized:

“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).

To begin, petitioner alleges that the DHHR failed to make reasonable efforts to preserve the family below, arguing that the DHHR did nothing to support him in his efforts to obtain employment or housing. According to petitioner, he is functionally illiterate and had no income with which to obtain housing. As such, petitioner was forced to rely on Respondent Mother, his wife, for support and housing upon his release from incarceration. However, petitioner notes that he was told he could not continue his relationship with Respondent Mother and be reunified with his children, despite the fact that he was not allowed unsupervised visitation with the children. According to petitioner, he should have been allowed to continue his relationship with Respondent Mother while attempting to obtain housing and employment because the children would be in no danger as a result of the continued relationship. While petitioner does not dispute that he received generalized parenting

classes, he argues that the DHHR offered him no services to overcome the main impediments to reunification. Petitioner further argues that the allegations of abuse and neglect in this matter were based upon the petitioner's intellectual incapacity, and that termination should have only occurred after a thorough effort by the DHHR to determine if petitioner could have adequately cared for the children with intensive long-term assistance pursuant to our holding in Syllabus Point 4 of *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999). Petitioner argues that no such investigation was conducted in this matter.

The guardian ad litem responds and argues in support of the circuit court's termination of parental rights. In response to this particular assignment of error, the guardian argues that the DHHR did make the reasonable efforts required of it, but petitioner failed to comply. While the guardian acknowledges that petitioner participated in the services offered, the guardian states that petitioner "was unable to mentally progress through his services." Further, the guardian argues that petitioner's service provider did attempt to help him secure employment and stable housing, but that petitioner refused to gain employment because he was concerned it would interfere with his social security disability benefits.

The DHHR also responds and argues in support of termination of petitioner's parental rights. In regard to this assignment of error, the DHHR argues that petitioner's adult life skills services specifically addressed issues to help with his lack of housing and income. Unfortunately, because of petitioner's criminal history and status as a registered sex offender, the usual means for obtaining low income housing were not available, according to the DHHR. Further, the DHHR notes that petitioner admitted that he could work, but did not want to jeopardize his appeal for social security disability benefits by obtaining gainful employment. The DHHR argues that because petitioner insisted on waiting on the social security appeal instead of working, there were no additional services it could offer. Further, the petitioner's continued relationship with Respondent Mother evidenced his inability to properly care for the children on his own.

Upon review of the appendix, the Court finds no error in the circuit court's finding that the DHHR made reasonable efforts to achieve preservation of the family below. Contrary to petitioner's arguments on appeal, he was provided with services aimed at remedying the issues he had with housing and income through adult life skills services, as evidenced by reports from petitioner's service provider. Further, it was the petitioner's prior criminal actions that prevented him from benefitting from the usual means of obtaining low income housing, such as a homeless shelter or Housing and Urban Development financed housing. That the DHHR could not obtain such housing on his behalf does not constitute a failure on its part to put forth reasonable efforts to achieve reunification. Lastly, as noted in the October 20, 2011, court summary, petitioner indicated that he was choosing not to find gainful employment for fear that it would jeopardize his social security disability benefits. Based upon this evidence, it is clear that the DHHR put forth reasonable efforts to achieve reunification, and the circuit court's finding on this issue does not constitute error. Further, upon review of the appendix, the Court finds no merit in petitioner's argument that termination of his parental rights was based upon his intellectual capacity. Petitioner argues that his illiteracy prevented him from obtaining employment and therefore the income necessary for suitable

housing. However, the record reflects that termination was based, in part, on petitioner's conscious decision not to seek gainful employment, not on any alleged intellectual incapacity of the petitioner. As such, the DHHR was not required to make any investigation into petitioner's ability to properly care for the child with long-term assistance.

Petitioner next argues that the circuit court considered improper evidence in reaching its disposition, including the fact that petitioner did not testify at the dispositional hearing, and that the subject child's foster family wished to adopt him. According to petitioner, a permanency plan is to be determined after disposition, and the questions of termination and ultimate placement of the child should be separate and apart. Further, petitioner argues that his decision not to testify in the proceedings below is in no way relevant to the issue of his parental rights, and he further argues that holding such silence against him is analogous to punishing a criminal defendant for asserting his Fifth Amendment right to not testify in a criminal prosecution.

In response, the DHHR argues that both the petitioner's failure to testify and the foster parents' willingness to adopt the child are valid considerations in abuse and neglect cases. Citing our prior holding in Syllabus Point 2 of *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), the DHHR argues that petitioner's failure to respond to the probative evidence against him was properly considered as affirmative evidence of his culpability. Further, the DHHR argues that this Court has tasked it and the circuit courts with engaging in concurrent planning for the placement of abuse and neglected children. According to the DHHR, the circuit court did not err in considering the foster parents' willingness to adopt the child if petitioner's parental rights were terminated, because both the DHHR and the circuit court were responsible for planning for the child's placement under those circumstances. The guardian ad litem did not address this assignment of error directly.

Based upon our review of the appendix, the Court finds no error in the circuit court's findings of fact related to either petitioner's decision not to testify in the proceedings below or to the foster family's willingness to adopt the child. First, we have previously held as follows:

“Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.” Syl. Pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

Syl. Pt. 2, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). As such, it is apparent that the circuit court did not commit error in considering the petitioner's refusal to testify in reaching disposition. Further, the Court finds no error in the circuit court's consideration of the foster parents' willingness to adopt the child at issue. As the DHHR points out, that agency is tasked with engaging in concurrent planning for abused and neglected children in the event that reunification with the parents is unsuccessful. *Kristopher O. v. Mazzone*, 227 W.Va. 184, 191 n. 9, 706 S.E.2d 381, 388

(2011) (quoting Syl. Pt. 5, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999)). Further, the record reflects that the child suffers from developmental issues, including autism and ADHD. As such, the circuit court was correct to analyze the child's best interests by addressing the foster parents' willingness to adopt a child with special needs, in furtherance of its duty to engage in concurrent planning for the child's permanency. For these reasons, we find no error in either of these findings.

Lastly, petitioner argues that the circuit court erred in denying him an improvement period or alternative disposition that did not result in the loss of his parental rights. In support, petitioner argues that he had, at most, seven months within which to secure housing and employment. While the children were in foster placement for an extended period during Respondent Mother's proceedings, petitioner argues that the time from his release in March of 2011 until disposition in October of 2011 should be the only period that continued foster placement should be attributed to his conduct. Petitioner argues that he was compliant with services during this period, having attended visitation and implemented some of what he was taught through services during his visitations. According to petitioner, he was attempting to have his social security disability benefits reinstated, but that without income he was at the mercy of friends and family for support. In short, petitioner argues that he never stopped trying to achieve the stability that was required to regain his child, and that he had demonstrated that he would be likely to fully participate in an improvement period. For these reasons, petitioner argues that he should have been granted an improvement period, or at least he should have retained his parental rights until such time as he could have regained custody of the child.

In response, the DHHR argues that while petitioner did participate in services below, he did nothing in the seven months those services were offered to rectify the underlying issues of employment and housing. This lack of progress was due, in part, to petitioner's desire to reinstate his social security disability benefits rather than obtain gainful employment, according to the DHHR. For these reasons, the DHHR argues that the circuit court was correct in finding that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future. The DHHR argues that the child's best interests required termination because of his special needs. According to the DHHR, the child could not be left waiting on the petitioner to obtain benefits to which he may never be entitled. Lastly, the DHHR argues that petitioner could have discontinued his relationship with Respondent Mother in order to prove that he was committed to protecting his child, but he chose to remain in that relationship. Because of petitioner's lack of progress, the DHHR argues that termination was proper.

The guardian's response mirrors that of the DHHR. The guardian argues that while petitioner did participate in services, he was never in a position to take custody of the child or appropriately provide for him. The guardian argues that petitioner was provided services to address his issues of housing and employment, but that he instead refused to gain employment because it might have jeopardized his social security disability benefits. According to the guardian, the DHHR offered all services available to petitioner, but it was clear that he could not progress toward reunification. Further, the guardian argues that petitioner continued his relationship with Respondent Mother after

her parental rights were terminated, and the guardian further does not believe petitioner will end that relationship in the future. As such, the guardian argues that the circuit court was correct in denying petitioner an improvement period and in permanently terminating his parental rights.

Upon review of the appendix, the Court finds no error in the circuit court's denial of an improvement period or in its termination of petitioner's parental rights. Improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. Pursuant to West Virginia Code § 49-6-12(a)(2), respondent parents in abuse and neglect proceedings are entitled to improvement periods only if he or she "demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period." As noted above, petitioner had already made a decision as to his compliance with the services being offered by choosing to forego gainful employment in favor of attempting to regain his social security disability benefits. Further, in its order terminating his parental rights, the circuit court found that petitioner's "Parenting and Adult Life Skills . . . have been terminated due to [petitioner]'s lack of progress." Because petitioner willfully chose to disregard the requirement that he obtain gainful employment in order to achieve reunification with his child, and because his services had already been terminated due to a lack of progress, it is clear that petitioner did not satisfy the burden of showing he was likely to fully comply with an improvement period. For these reasons, the circuit court did not err in denying petitioner the same.

Further, these same facts support the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect or abuse in the near future. 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 did attend visitations and educational training, the record clearly establishes that petitioner failed to follow through with the reasonable family case plan. As outlined above, petitioner was required to find gainful employment and suitable housing in order to achieve reunification with the child. However, the evidence established that petitioner's services were terminated for lack of progress, that he continued his relationship with Respondent Mother after her parental rights were terminated, and that he willfully chose not to seek gainful employment. 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 child. 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 child 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 petitioner’s parental rights is hereby affirmed.

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

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.