STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: **P.B. and J.B. Jr.**

No. 12-0402 (Boone County 10-JA-81 & 10-JA-82)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel, K. Brian Adkins, arises from the order terminating Petitioner Father's parental rights entered by the Circuit Court of Boone County on March 2, 2012. The children's guardian ad litem, L. Scott Briscoe, 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, also filed a response supporting the circuit court's termination order.

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.

In October of 2010, DHHR filed the initial petition in the instant case based on allegations that the family's home was unsanitary and unlivable. On October 25, 2010, police officers reported to the family's home around 12:00 p.m. after Child Protective Services ("CPS") asked for their assistance to check on the welfare of the children. When police officers arrived, Petitioner Father and his wife, the children's stepmother, were still asleep in bed. The home contained human waste, recently-used drug paraphernalia within reach of the children, little food, and no electricity or water. West Virginia State Trooper Jackie McClung discovered the dirty and hungry children locked in a bedroom that contained a small training toilet that was filled with urine and feces and covered with flies. Petitioner Father admitted to another officer present, Sergeant Perdue, that he used methamphetamines and became very volatile during this visit by law enforcement. DHHR's petition also discussed Petitioner Father's previous involvement with CPS in 2008, when police officers were called to the home due to its poor sanitation. In that earlier case, Petitioner Father reunified with his children.

In November of 2010, DHHR filed an amended petition alleging physical abuse by Petitioner Father against child P.B., including cigarette burns on her arms, buttocks, and vaginal area. In January of 2011, DHHR filed a second amended petition alleging sexual abuse by Petitioner Father against child P.B. The children's foster mother reported that she discovered J.B. Jr., then three years old, licking the vaginal area of P.B., then five years old. When their foster mother questioned them about this, P.B. told her that her father had done the same thing to her before more than once.

After the adjudicatory hearings concluded in April of 2011, the circuit court found that the children had been neglected and sexually abused, but that DHHR had not met its burden of proving that Petitioner Father directly participated in the sexual abuse. The circuit court denied Petitioner Father's motion for a post-adjudicatory improvement period and set the matter for disposition.

At disposition, psychologist Monica Ballard, who interviewed P.B., testified that P.B. disclosed during their first interview that her father had "licked her on her private and had also licked her brother on his private" and that she had described the cigarette burns on her and her brother, showing her own scars from these burns. Petitioner Father presented one witness, a psychologist who criticized the interview process with P.B., but agreed that all of the child's reports were consistent with the fact that "[J.B]. licked [P.B.]'s vaginal area because her dad licked her brother's genitals" and agreed that in her first interview, P.B. had disclosed the sexual abuse.

In its termination order, the circuit court found that Petitioner Father's expert witness never concluded that P.B. was lying, but simply attacked the interview process. The circuit court denied Petitioner Father's motion for a post-dispositional improvement period and, after finding that there was no reasonable likelihood that Petitioner Father could substantially correct the conditions of abuse and neglect in the future, the circuit court terminated Petitioner Father's parental rights. Petitioner Father appeals.

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." Syl. Pt. 1, *In 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).

On appeal, Petitioner Father first argues that there were less restrictive alternatives short of terminating his parental rights because the evidence did not show that the children were malnourished, unhealthy, or delayed developmentally. He argues that he should have received an improvement period because he and his wife both testified that their living conditions could improve and that he would be willing to participate in services. In response, the guardian ad litem and DHHR contend that the circuit court did not err in terminating Petitioner Father's

parental rights or in denying his motions for post-adjudicatory and post-dispositional improvement periods because Petitioner Father has been unable to comply with services throughout two abuse and neglect cases over the last four years.

The Court finds no error in either the termination of Petitioner Father's parental rights or the denial of improvement periods. The Court has held that "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). Moreover, children's paramount needs include permanency, security, stability, and continuity. Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). "'[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). The Court has also held as follows:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglect children, *W. Va. Code*, [§] 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, [§] 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected.

Syl. Pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980). A review of the record on appeal supports the circuit court's findings and its termination of Petitioner Father's parental rights. Further, pursuant to West Virginia Code § 49-6-12, the circuit court has the discretion to grant or deny a parent an improvement period. Such parent must prove by clear and convincing evidence that he or she will substantially comply with the terms of an improvement period. The failure to acknowledge a problem that causes abuse and/or neglect renders the problem uncorrectable and an improvement period futile. *W.Va. Dep't of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). A review of the record supports the circuit court's denial of an improvement period to Petitioner Father and, accordingly, we find no error.

Petitioner Father next argues that the circuit court erred in allowing psychologist Monica Ballard to testify. Petitioner Father argues that testimony of a social worker, counselor, or psychologist is inadmissible if the evidence was gathered strictly for investigative or forensic purposes, relying on Syllabus Point 9 of *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), and if the content of his or her statements are reasonably relied upon by a physician in treatment or diagnosis. Syl. Pt. 5, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990). Petitioner Father argues that he objected to Ms. Ballard's testimony on the grounds that her report was hearsay and was not obtained in pursuit of medical treatment. He also argues that Ms. Ballard testified regarding a number of inconsistencies and could not conclude that P.B. had been sexually abused. Petitioner Father argues that even though the circuit court stated in its termination order that it did not make any findings concerning the sexual abuse allegations, it is clear that Ms. Ballard's testimony weighed heavily in the circuit court's decision to terminate Petitioner Father's parental rights.

In response, the guardian and DHHR contend that the circuit court did not err in allowing Ms. Ballard to testify at disposition. DHHR argues that the psychologist observed P.B.'s scars from cigarette burns and testified that the children's sexual behavior could only have been learned. DHHR argues that Ms. Ballard thoroughly described the interview process, along with recommended treatments. Both the guardian and DHHR argue that even without the sexual abuse allegations, the circuit court had enough evidence to terminate Petitioner Father's parental rights, due to the deplorable living conditions in the home and Petitioner Father's drug use. "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 1, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001) (internal citations omitted). Here, a review of the record supports the circuit court's decision to allow Ms. Ballard to testify. We find no 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 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 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