STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: G.R.

No. 14-0094 (Barbour County 13-JA-14)

FILED
August 29, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father filed this appeal by counsel, Roger D. Curry, from an order entered January 15, 2014, in the Circuit Court of Barbour County that terminated his parental rights to nine-year-old G.R. The guardian ad litem for the child, Karen Hill Johnson, filed a response in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney, Lee A. Niezgoda, also filed a response in support of the circuit court's order. The child's custodian, N.B., by her attorney, Timothy Shawn Litten, also filed a response in support of termination. Petitioner argues that the circuit court erred in terminating his parental rights because the great majority of his absence from the child's life was due to incarceration on convictions unrelated to children or violence. Petitioner also argues that the circuit court should have granted him an alternative disposition less restrictive than termination.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

This abuse and neglect proceeding was initiated by the child's custodian, N.B., when she filed a petition to adopt the child in April of 2013. Because there were allegations that the child's incarcerated parents abandoned him, the circuit court directed that an abuse and neglect petition be filed instead. At the adjudicatory hearing in October of 2013, N.B. testified that during her care of the child in the previous five years, petitioner never saw him and last had telephone contact with him two to three years prior to the abuse and neglect proceedings. N.B. also testified that petitioner failed to provide any financial support, clothing, or emotional support to the child. Petitioner testified and agreed with N.B.'s testimony that he never saw the child, that he was in and out of incarceration for the child's entire life, and that he provided no support to the child. Petitioner also testified that he was a drug addict, but in recovery. When asked whether he would test positive for any drugs that day, petitioner admitted that he would probably test positive for cocaine. Petitioner was subsequently drug tested and yielded positive results for cocaine and opiates. The circuit court adjudicated the child as abused and neglected.

Following a dispositional hearing in November of 2013, the circuit court entered an order terminating petitioner's parental rights to the child. The circuit court found that petitioner chose drugs over his son and that each time petitioner was released from incarceration on parole, he would use drugs again, violate his parole, and not attempt to parent his child. The circuit court

also found that despite opportunities given to him for assistance with his drug issues, petitioner continued to turn to drugs rather than address his chronic drug addiction. The circuit court concluded that there was no reason to believe that petitioner would address his addiction in the foreseeable future and that termination of his parental rights would be in the child's best interests. Petitioner now appeals the circuit court's termination order.

This 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).

Petitioner raises two arguments on appeal. First, petitioner argues that the circuit court's termination of his parental rights was in error because the great majority of his absence from the child's life was due to incarceration. Second, petitioner argues that the circuit court erred in denying petitioner's request for an alternative disposition less restrictive than terminating his parental rights.

Upon our review of the record, we find no error in the circuit court's termination of petitioner's parental rights. "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syl. Pt. 2, *In re Timber M.*, 231 W.Va. 44, 743 S.E.2d 352 (2013). We have also held as follows:

> "[I]ncarceration, *per se,* does not warrant the termination of an incarcerated parent's parental rights. At the same time, we have also acknowledged that an individual's incarceration may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect." [*In re*] *Emily,* 208 W.Va. [325,] 342, 540 S.E.2d [542,] 559 [(2000)].

In re Brian James D., 209 W.Va. 537, 540-41, 550 S.E.2d 73, 77-78 (2001).

> "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected 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." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

The record shows that the circuit court considered multiple factors aside from petitioner's incarceration, including his lack of support to the child, failure to meaningfully contact the child, and failure to address his drug addiction during the child's life. This evidence supports the circuit court's findings and conclusions that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected and that termination is necessary for the child's welfare. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon such findings.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: August 29, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II