STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: I.H.

No. 14-0422 (Kanawha County 12-JA-240)

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

MEMORANDUM DECISION

Petitioner Father, by counsel Edward L. Bullman, appeals the Circuit Court of Kanawha County's April 10, 2014, order terminating his parental rights to I.H. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed its response in support of the circuit court's order. The guardian ad litem, Paul K. Reese, filed a response on behalf of the child supporting the circuit court's order. On appeal, petitioner alleges that the circuit court erred in terminating his parental rights based upon his incarceration.

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.

In October of 2012, the DHHR filed an abuse and neglect petition against the parents, alleging that neither could provide the child with necessary food, clothing, supervision, and housing. Specifically, the petition alleged that both of I.H.'s parents were currently in jail, among many other allegations related to other adult respondents. The petition included extensive statements from then five-year-old I.H. regarding the conditions of his care under his mother, including a failure to provide him with adequate and clean clothing, being left alone for extended periods of time, and witnessing his mother commit robbery to purchase controlled substances that she used in his presence.

In November of 2013, the circuit court held an adjudicatory hearing, and the DHHR presented evidence of petitioner's intermittent incarceration over the prior five years. During that time, petitioner had few visits with his son before being re-incarcerated, having repeatedly violated the terms of his parole. The circuit court adjudicated petitioner as an abusing parent because he failed to provide the child with necessary support or otherwise participate in the child's life. In January of 2014, the circuit court held a dispositional hearing, during which the DHHR recommended terminating petitioner's parental rights. Petitioner testified that the only support he provided the child came from deductions from his work release and work furlough checks, in addition to minimal support during the brief periods he was released from incarceration. However, petitioner provided no documentation in support of his assertion that child support was deducted by the Division of Corrections. Ultimately, the circuit court found that petitioner could not substantially correct the conditions of abuse or neglect in the near future

and terminated petitioner's parental rights. It is from the dispositional order that petitioner 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). Upon our review, the Court finds no error in the circuit court's termination of petitioner's parental rights.

Petitioner bases his argument mainly on our prior holding from Syl. Pt. 3 of *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011), wherein we directed as follows:

> When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

Upon our review, the Court finds no merit to petitioner's argument because the record clearly shows that the circuit court relied upon several factors in reaching disposition, not solely petitioner's incarceration. These factors include petitioner's minimal contact with the child when he was released from incarceration, his inability to follow simple rules as evidenced by his repeated parole violations for absconding and failure to report, and his failure to provide the child with appropriate support. As such, it is clear that the circuit court did not base termination of petitioner's parental rights solely upon petitioner's incarceration, as petitioner alleges on appeal.

Further, petitioner argues that he should have been entitled to a dispositional improvement period because he was due to be released from incarceration shortly after the

dispositional hearing. However, petitioner's argument ignores the fact that West Virginia Code § 49-6-12(c)(2) requires that, in order to obtain a dispositional improvement period, a parent must "demonstrate[], by clear and convincing evidence, that the [parent] is likely to fully participate in the improvement period . . . ." Here, the record is clear that petitioner could not satisfy this burden, as he presented no evidence in support of his request for an improvement period, other than testimony that he wished to be reunited with I.H.

To the contrary, the circuit court specifically found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect, given his past failures to adhere to the simple requirements imposed as a condition of parole. Specifically, the circuit court found that "regardless of what services might be offered to him," petitioner was simply unable to correct the conditions of abuse and neglect, in accordance with West Virginia Code § 49-6-5(b). The circuit court additionally found that termination of petitioner's parental rights was 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 these findings.

For the foregoing reasons, we find no error in the decision of the circuit court and its April 10, 2014, order is hereby affirmed.

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