STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* A.B.**

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 20-0248 (Cabell County 19-JA-39)

MEMORANDUM DECISION

Petitioner Father M.B., by counsel Justin H. Moore, appeals the Circuit Court of Cabell County's February 14, 2020, order terminating his parental rights to A.B.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed a response in support of the circuit court's order. The guardian ad litem, Allison K. Huson, filed a response on behalf of the child also in support of the circuit court's order. On appeal, petitioner argues that the circuit court erred in adjudicating him as a neglecting parent and terminating his parental rights.

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 March of 2019, the DHHR filed an abuse and neglect petition against petitioner, the mother, and the child's grandmother who served as the child's guardian after receiving a referral regarding A.B.'s poor behavior in school. Based upon its investigation, the DHHR alleged that the child's grandmother was using controlled substances and that her boyfriend was a registered sex offender who threatened and frightened the child. According to the DHHR's initial referral, the child was living with a friend's family outside the grandmother's home. During the investigation, the child indicated that she was scared to return to live with her grandmother because her grandmother's boyfriend threatened to kill the child and her grandmother. The DHHR also asserted that the boyfriend committed domestic violence against the grandmother in the presence of the child. The DHHR further alleged that, according to the grandmother, the mother was using heroin while living out of town and that petitioner was incarcerated. Additionally, the DHHR alleged that

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

petitioner neglected A.B. by failing to provide her with emotional or financial support. Thereafter, the circuit court held a preliminary hearing wherein petitioner was not present but was represented by counsel. At the hearing, the circuit court found that the child was in imminent danger and ratified her removal.

The next month, the circuit court held an adjudicatory hearing wherein petitioner appeared by video conference. Petitioner testified that he was incarcerated for a robbery conviction and had been incarcerated for two years. He further testified that he had eighteen more months of incarceration before he was eligible for a parole hearing. Petitioner also affirmed that he was A.B.'s biological father. Before his current confinement, petitioner had been incarcerated from 2007 to 2015 for a prior robbery conviction. As a result, petitioner acknowledged that he had spent only seven months with eleven-year-old A.B. and had signed over guardianship to the grandmother in 2009 due to his incarceration. Petitioner testified that he had last seen the child in early 2017, prior to his incarceration for robbery in March of that year. Petitioner further testified that he made numerous attempts to call and see A.B. but that the grandmother would not let him see or speak to the child. Petitioner also claimed that he had been paying $50 per month in child support for the last ten years but acknowledged he was in arrearage and had not made a support payment since 2017. Petitioner minimized his failure to make support payments by saying he had not been contacted about back payments since his most recent incarceration. Finally, petitioner testified that he had not spoken with the mother in several years. After taking additional evidence in regard to petitioner's conduct, the circuit court adjudicated him as neglectful, finding that he had neglected the child "due to his long-term incarceration." Further, the court stated that "he is not able to parent the child. I'm not going to place him on an improvement period until such time that he is released from the penitentiary."

In December of 2019, the circuit court held a dispositional hearing wherein the DHHR moved for termination of petitioner's parental rights. Petitioner testified that he was currently incarcerated but expected to be granted parole when he became eligible in December of 2020. Petitioner further testified that he had been incarcerated for much of A.B.'s life and his incarcerations were due in large part to his drug addiction. According to petitioner, he participated in several programs and classes to better himself and work on his substance abuse while incarcerated. However, petitioner admitted that he had been incarcerated for a prior robbery offense several years ago, received treatment while incarcerated, and then engaged in additional drug activity upon release. Petitioner also admitted that he had not seen A.B. since 2017 and that he owed over $2,500 in child support obligations. Nevertheless, petitioner requested that the court not terminate his parental rights, stating that he would never abandon the child or make a "wrong decision to put her in harm's way."

The DHHR presented the testimony of a Child Protective Services ("CPS") worker who recommended termination of petitioner's parental rights. The CPS worker testified that petitioner had been incarcerated throughout the proceedings and had been unable to participate in any services offered by the DHHR. Specifically, the CPS worker testified that she had not even seen petitioner prior to the dispositional hearing and that her only contact with him was through two letters she received. The worker testified that one of petitioner's letters said he would be free from incarceration in a year. However, the worker testified that, even accepting petitioner's speculative claim as true, it was too long to wait for the child to achieve permanency. After hearing evidence,

the circuit court found that petitioner had "not been a significant factor in the child's life" due to his two convictions. The circuit court further found that the child is entitled to permanency and that uncertainty over petitioner's parole would not provide the child with stability. Finally, the court went on to make additional findings about petitioner's relationship with the child prior to incarceration, the length of his incarceration, the nature of the offenses, and additional substance abuse treatment that may be needed even if he were to be released in one year. Accordingly, the circuit court terminated his parental rights upon finding that there was no reasonable likelihood that petitioner could correct the conditions of neglect in the near future and that termination was necessary for the child's welfare. It is from the February 14, 2020, dispositional order that petitioner appeals.[2]

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 first argues that the circuit court erred in adjudicating him as a neglectful parent because he did not fail to provide the child with financial or emotional support. Although petitioner acknowledges his lengthy periods of incarceration, he denies that his criminal and CPS history render him a neglecting parent with regard to A.B. According to petitioner, no evidence was presented to demonstrate that "the minor child's physical or mental health was harmed by the [p]etitioner." He further argues that he signed over guardianship of the child to the grandmother, financially supported the child, and attempted to have a relationship with her that the grandmother prevented. As such, he avers that his criminal acts and incarceration, when viewed in isolation, did nothing to harm the child. He also contends that the child suffered no harm and did not go without necessities due to any of his actions. We disagree.

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[2]Both parents' parental rights were terminated below. The child's grandmother's guardianship rights were also terminated. The child was placed in a relative foster home with a permanency plan of adoption therein.

We have previously noted as follows:

> At the conclusion of the adjudicatory hearing, the 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. . . . The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

In re F.S., 233 W. Va. 538, 544, 759 S.E.2d 769, 775 (2014). This Court has explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Id.* at 546, 759 S.E.2d at 777 (citation omitted). However, "the clear and convincing standard is 'intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.'" *Id.* at 546, 759 S.E.2d at 777 (citation omitted). Pursuant to West Virginia Code § 49-1-201, a "neglected child" is one

> [w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, failure, or inability is not due primarily to a lack of financial means on the part of the parent, guardian, or custodian.

There was sufficient evidence presented upon which to adjudicate petitioner as a neglectful parent. The record demonstrates, and petitioner admits, that he has an extensive criminal history involving drug-related robbery charges dating back to 2007. Petitioner has been incarcerated off and on since that time. In fact, petitioner's most recent incarceration occurred as a result of a second robbery conviction. Due to his incarceration, petitioner has spent just seven months with eleven-year-old A.B. over the course of her life. Further, he had no ability to provide the child with the necessary food, clothing, shelter, supervision, medical care, or education she required. While petitioner does argue that he provided $50 in monthly child support, he does not dispute that he stopped these payments in 2017 and is currently nearly $3,000 in arrears.

Moreover, contrary to petitioner's argument, the circuit court considered factors in addition to his criminal history and incarceration. The circuit court heard testimony that petitioner had signed over his guardianship rights to the child to the maternal grandmother, who later fell into drug abuse herself. After petitioner's initial incarceration, he admitted that he was released from 2015 to 2017 but did not see the child often during this time period. While petitioner claims this was because the grandmother precluded him from seeing the child, petitioner compounded his absence from A.B.'s life by committing a second robbery, resulting in his current incarceration. Further, in the six months preceding the abuse and neglect petition, petitioner had no contact with the child and provided no financial or emotional support to her. Rather, petitioner left the child in the care of the grandmother, who exposed the child to substance abuse, threats, and domestic violence. Due to lengthy periods of incarceration, petitioner was unable to take any measures to protect the child from the grandmother's abuse. Further, petitioner later admitted at the dispositional hearing that he was aware of the grandmother's drug abuse but simply maintained that she was a suitable placement when he signed over his custodial rights during his first period

of incarceration. Even so, the fact remains that petitioner knew of the grandmother's substance abuse but failed to protect the child. Further, petitioner failed to provide the child with the necessary food, clothing, shelter, supervision, medical care, or education as a result of his multiple years of incarceration. Accordingly, we find no error in the circuit court's decision to adjudicate petitioner as a neglecting parent.

Petitioner also argues that the circuit court erred in terminating his parental rights rather than granting him a less-restrictive disposition. According to petitioner, the circuit court was required to give precedence to the dispositions as listed in West Virginia Code § 49-4-604(c) and that it should have granted him disposition pursuant to § 49-4-604(c)(5).[3] We find no error in the circuit court's termination of petitioner's parental rights.

Pursuant to West Virginia Code § 49-4-604(c)(6), circuit courts are directed to terminate parental rights upon findings that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that termination is necessary for the child's welfare. West Virginia Code § 49-4-604(d) defines "[n]o reasonable likelihood that [the] conditions of neglect or abuse can be substantially corrected" as follows: "the abusing [parent] . . . ha[s] demonstrated an inadequate capacity to solve the problems of abuse or neglect on [his] own or with help."

Here, petitioner's parental rights were terminated due to his lack of financial or emotional support to the child, failure to protect the child from the grandmother's drug abuse, the length of his incarceration, the nature of his offenses, and additional substance abuse treatment that may be needed upon release. Petitioner already failed to provide for the child during his first period of incarceration, and then he committed a second robbery offense which resulted in a new lengthy sentence. To the extent petitioner argues that he has completed classes while incarcerated, cured his substance abuse, and now argues that he is on the cusp of release, we note that his release date is still uncertain and he still fails to meaningfully acknowledge how his substance abuse and convictions affected the child. As such, we find no error in the circuit court's refusal to grant petitioner a less-restrictive alternative to termination of his parental rights, given that we have previously held that

> "[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, [West Virginia Code § 49-4-604] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under [West Virginia Code § 49-4-604(d)] that conditions of neglect or abuse can be

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[3]West Virginia Code § 49-4-604(c)(5) provides that

> Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court.

substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011). Due to petitioner's failure to address the conditions of neglect and meaningfully acknowledge how his actions affect his child, we find no error in the circuit court's finding that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future and that termination was necessary for the child's welfare. Therefore, we likewise find no error in the circuit court's termination of petitioner's parental rights.

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 14, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison