

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

In Re: B.C., N.C., A.C., and M.C.

No. 12-0395 (Barbour County 11-JA-21 through 24)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father’s appeal, by counsel Megan M. Allender, arises from the Circuit Court of Barbour County, wherein his parental rights to his children were terminated by order entered on February 27, 2012. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel Lee A. Niezgodka, has filed its response. The guardian ad litem, Karen Hill Johnson, has filed her response on behalf of the children.

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.

This matter was initiated when the DHHR began providing pre-petition services to petitioner and Respondent Mother in May of 2011. Despite these services, the amended petition below indicates that the conditions in the home remained unchanged and that abuse and neglect proceedings had to be instituted as a result. According to the amended petition, law enforcement responded to the home when Respondent Mother struck one of the children in the face. The amended petition also alleged that Respondent Mother was abusing drugs, as multiple empty packages of bath salts were found in the home. The DHHR further alleged that the home was not kept in an appropriate condition, as evidence by clutter and dog feces found throughout. Educational neglect was also alleged, as the children were often allowed to be truant from school. In specific regard to petitioner, he was alleged to have abused and/or neglected the children by failing to protect them and ensure their safety and wellbeing, including failure to provide a safe living environment. Further, petitioner was alleged to have abused and/or neglected the children by subjecting them to educational neglect. At adjudication, petitioner stipulated to abuse and neglect of the children by failing to protect them from Respondent Mother’s substance abuse and by failing to make himself knowledgeable about the children’s academics.

Petitioner was thereafter granted a post-adjudicatory improvement period. Because there had not been allegations that petitioner abused drugs, he was not required to make daily calls to the drug line and test when required. He was, however, required to submit to random drug testing at the DHHR’s request. According to the parties, petitioner was required to submit to testing on

August 3, 2011, but failed to test as requested until August 23, 2011. Then, during a review hearing on September 21, 2011, petitioner admitted that he had consumed bath salts approximately two weeks prior and that he had taken a klonopin without a prescription. Additionally, the circuit court was informed that petitioner had been involved in an armed standoff with the Barbour County Sheriff's Department at his mother's home, which is where the children at issue had been residing. Based upon all of this information, the circuit court terminated petitioner's post-adjudicatory improvement period and proceeded to a dispositional hearing on October 19, 2011. During the hearing, the circuit court denied petitioner's request to voluntarily relinquish his parental rights to the children, and instead terminated his parental rights.

On appeal, petitioner alleges that the circuit court erred in revoking his post-adjudicatory improvement period and in terminating his parental rights. In support of his first assignment of error, petitioner argues that he had substantially complied with the terms of his improvement period and had admitted his problems in properly parenting the children. Petitioner argues that he had participated in a psychological evaluation, had attended all hearings and associated meetings, and had attended visitation. Further, petitioner argues that the psychological evaluation and the related recommendations were not filed until twenty days prior to the revocation of his improvement period, which was an insufficient amount of time to comply. According to petitioner, the treatment plan in place for him was estimated to take three months longer than the term of his improvement period to complete, and the family case plan was not provided to counsel until twenty-three days after his improvement period was revoked. As to the allegations of substance abuse, petitioner argues that no services were in place to deal with his issues in this regard. Taking all of these issues into account, petitioner argues that it was outside the realm of possibility to think that he could have been successful in his improvement period.

As to his second assignment of error, petitioner argues that the circuit court should have employed a less restrictive alternative to termination because no home had yet been secured for the children. Further, he argues that he was prepared to comply with the terms of any improvement period necessary for reunification. Petitioner argues that termination was not necessary for the welfare of the minor children because a less drastic alternative would not have disrupted the permanency plan for them. Accordingly, petitioner argues that he should have been granted a six-month dispositional improvement period so he could have demonstrated additional improvement.

The guardian responds and argues in support of both the revocation of petitioner's improvement period and the termination of his parental rights. According to the guardian, the evidence was overwhelming that petitioner did not comply with the terms of his improvement period. This includes missed appointments with an in-home service provider, failure to attend his scheduled psychological evaluation, and accompanying his wife to a home where she was injected with heroin by an individual who also threatened to kill the children while holding a firearm. Further, the guardian argues that petitioner did not have to remedy all of his issues within the three-month improvement period, but simply had to demonstrate a willingness to comply with the terms thereof. If petitioner had been fully compliant, the guardian argues that he surely would have been granted an additional three months to his improvement period. The

guardian argues that while West Virginia Code § 49-6-12(b) provides that a circuit court may grant an improvement period not to exceed six months, there is no requirement that it grant the entire six months. Further, the guardian argues that petitioner fails to acknowledge that he was not complying with the in-home service provider for his required parenting curriculum, and that he violated the requirement that he not enable Respondent Mother's drug use by giving her half of a pain pill. Lastly, the guardian argues that petitioner continued to engage in dangerous and illegal behavior, citing the armed standoff with law enforcement at his mother's residence and his substance abuse. As such, the guardian argues that the circuit court was correct in revoking petitioner's improvement period because he was not complying with the conditions thereof.

As for termination of parental rights, the guardian argues that the circuit court did not err in this regard because petitioner could not substantially correct the conditions of abuse and neglect in the near future. Because petitioner was not fully complying with the terms of the improvement period, the guardian argues that none of the issues necessitating removal of the children were remedied. Based upon the circuit court's finding that the conditions of abuse and neglect could not be substantially corrected, the guardian argues that the circuit court was correct to terminate parental rights pursuant to the applicable statutes and case law. Further, the guardian argues that concurrent planning is necessary to ensure that permanency is achieved as quickly as possible for the children, and that there is no requirement that the children be in a prospective home before termination of parental rights. According to the guardian, the children had been residing with the paternal grandmother throughout the proceedings, and they were not removed until the day of the dispositional hearing. The guardian argues that the removal and disruption of a possible permanent home was, in part, the fault of petitioner and his mother by not following the circuit court's orders regarding contact. Because petitioner could not demonstrate a willingness to comply with the services already in place, the guardian argues that there was no indication that he would have complied more fully once additional requirements were added. For these reasons, the guardian argues that termination of petitioner's parental rights was appropriate.

The DHHR also responds and argues in support of the circuit court's order below. According to the DHHR, petitioner is responsible for any delay in services addressing his own substance abuse issues because he failed to fully disclose the same throughout the proceedings below. The DHHR argues that petitioner is twisting his own dishonesty into a deficiency on the DHHR's part in failing to provide him with services that it never knew were necessary. Further, the DHHR argues that contrary to petitioner's assertion that he was substantially compliant with the terms of his improvement period, the circuit court specifically found that he was not taking part in the requirements of the same. The DHHR also notes that at disposition, petitioner admitted, through counsel, that he had not been totally compliant with the terms of his improvement period. Further, the DHHR cites petitioner's inconsistency in attending visitation with his children as evidence of his non-compliance. As for petitioner's argument that he was not given enough time to remedy the conditions of abuse and neglect, the DHHR argues that the record demonstrates that petitioner was given only three months because he failed to make a strong showing that he would be willing to participate in an improvement period. As such, the DHHR argues that petitioner was given an opportunity to show he was willing to comply in order to earn an extension, but failed to do so, actually deteriorating in mental health and drug abuse during the improvement period.

As to petitioner's second assignment of error, the DHHR argues that the circuit court attempted a less drastic alternative to termination of parental rights by granting petitioner an improvement period, but that the improvement period failed. The DHHR mirrors the guardian's argument concerning permanent placement of the children, noting that petitioner's own actions caused the children to be removed from their relative placement. Further, the DHHR argues that petitioner has failed to establish how granting him an additional improvement period would have benefitted the children's best interests. According to the DHHR, because the evidence supports the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and neglect in the near future, the circuit court was correct to terminate his parental rights.

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 review of the appendix, the Court finds no error in either the circuit court's decision to revoke petitioner's post-adjudicatory improvement period or in terminating his parental rights. The record reflects that petitioner was not truthful with the circuit court in regard to his own substance abuse issues, and that he failed to comply with the basic terms of his improvement period. In terminating petitioner's parental rights, the circuit court noted that petitioner's improvement period was revoked because of his failure to participate in the services set forth in the family case plan. According to West Virginia Code § 49-6-12(g), a circuit court may extend a post-adjudicatory improvement period when, among other requirements, “the court finds that the respondent has substantially complied with the terms of the improvement period.” In the present matter, the record shows that petitioner was granted an improvement period of three months only, so that he could demonstrate his willingness to fully comply with the terms thereof. During that time, petitioner admitted to abusing bath salts and klonopin, and was further engaged in an armed standoff with law enforcement at his mother's home where the children were residing. The circuit court found that instead of complying with the terms of his improvement period, petitioner continually violated its orders and endangered the children by

using a firearm and drugs. As to petitioner's argument that he had insufficient time to remedy the issues of abuse and neglect, it is important to note that compliance with the terms of the improvement period was all that was required of petitioner at this stage. However, petitioner prevented any extension to his post-adjudicatory improvement period by failing to comply with the terms thereof. For these reasons, the circuit court did not err in revoking petitioner's post-adjudicatory improvement period.

As to petitioner's argument that the circuit court erred in terminating his parental rights, we find no merit in this assignment of error. Upon a review of the record, it is clear that the same facts and evidence that support the circuit court's revocation of petitioner's improvement period also support termination of his parental rights. In its order terminating petitioner's parental rights, the circuit court specifically found that the conditions of abuse and neglect could not be substantially corrected in the near future because of petitioner's failure to cooperate or comply with the terms of the family case plan, failure to abide by the circuit court's orders, and failure to participate in random drug testing, among other issues. West Virginia Code §49-6-5(b)(3) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future includes situations in which

“[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, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.”

As noted above, instead of complying with the terms of his improvement period, petitioner was dishonest as to the issues affecting his ability to properly parent the children, abused drugs, and was involved in an armed standoff with law enforcement. Based upon the circuit court's findings in this regard, it was not error to terminate petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6). Further, we have previously held that

“courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.” Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Petitioner's argument that the circuit court should have granted him an improvement period simply because a home for the children had not yet been secured is totally without merit. Nothing in our prior case law suggests that parental rights may not be terminated until the DHHR has secured an adoptive home for the children. Further, the record indicates that petitioner was partial responsible for the children's removal from their relative placement because of his own failure to comply with the circuit court's orders in regard to contact with the children, thereby disrupting their potential permanent

placement. Based upon all of the foregoing, the Court finds that the circuit court committed no error in terminating petitioner's parental rights.

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 petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: September 7, 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