

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

In Re: L.B. and M.L.

No. 12-0278 (Raleigh County 10-JA-09 & 10-JA-12)

FILED

October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel Matthew Victor, appeals the Circuit Court of Raleigh County's order entered on February 9, 2012, terminating his parental rights to L.B. and his custodial rights to M.L.¹ Guardian ad litem Colleen C. McCulloch has filed her response on behalf of M.L. Guardian ad litem Teresa D. Daniel has filed her response on behalf of L.B. The West Virginia Department of Health and Human Services ("DHHR"), by counsel William L. Bands, has filed its response.

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.

The abuse and neglect petition was filed after Petitioner Father shot L.B. and M.L.'s mother in the head at close range. The mother died hours later. Petitioner Father claimed the shooting was accidental. Both L.B. and M.L. were in the home at the time. Although L.B. was asleep, M.L. has stated that she heard Petitioner Father fighting with her mother which woke her up, and then she heard the shooting. Both children disclosed frequent domestic violence between Petitioner Father and their mother. Petitioner Father was adjudicated as an abusing father and was incarcerated throughout the proceedings. He was eventually convicted of first degree murder and sentenced to life in prison without mercy. Petitioner Father's parental rights to L.B. and custodial rights to M.L. were terminated after the circuit court found that even if petitioner were successful in the appeal of his criminal conviction, his conduct precludes returning the children to him. Post-termination visitation was denied.

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

¹ M.L. is not petitioner's biological daughter, but is L.B.'s half-sister.

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 Father first argues that the circuit court erred in terminating his parental rights. Petitioner argues that his criminal case is not concluded, as he is appealing his conviction. He also argues that even though he had consumed approximately eighteen beers, if he had wanted to kill his wife, he was such a “good shot” that he would have killed her instantly. Petitioner further argues that the shooting was accidental and that the State failed to prove otherwise in the abuse and neglect proceedings.

L.B.’s guardian concurs in the termination of parental rights and argues that the testimony showed that pressure must be applied to the trigger of the gun in order for it to discharge; therefore, the shooting was not accidental. L.B.’s guardian also reiterates the testimony regarding domestic violence perpetrated by Petitioner Father. M.L.’s guardian also concurs in the termination of parental rights, arguing that the discharge of the gun in the house was sufficient to find that the children were abused and neglected and that the additional reports of domestic violence strengthen the need for termination. The DHHR’s response mirrors these arguments and also supports the termination of parental and custodial rights.

This Court finds no error in the termination of parental and custodial rights in this matter. Pursuant to West Virginia Code § 49-6-5(a)(7)(B)(i), no reasonable efforts were required to reunify this family due to the murder of the mother. The termination of parental and custodial rights is hereby affirmed.

Petitioner Father also argues that the denial of post-termination visitation was erroneous based on his strong bond with L.B. Moreover, petitioner argues that there was no evidence that visitation would be detrimental to the child. Both guardians argue that the denial of post-termination visitation is proper because L.B. knows Petitioner Father killed her mother and she has not seen him in two years. Moreover, they argue that it is not in the child’s best interest to be forced to visit her father in prison.

This Court has found as follows:

“When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other

contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 11, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). In the present matter, L.B. has disclosed the fact that she was exposed to domestic violence in the home, and that she knows Petitioner Father killed her mother. Visitation is not in L.B.'s best interest. Thus, the denial of post-termination visitation is affirmed.

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 and custodial rights is hereby affirmed.

Affirmed.

ISSUED: October 22, 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