

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

In Re: B.J. and C.H.

No. 12-0403 (Mercer County 11-JA-21-WS & 11-JA-22-WS)

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

MEMORANDUM DECISION

Petitioner Father, by counsel Natalie N. Hager, appeals the Circuit Court of Mercer County’s order entered on March 21, 2012, terminating his parental rights to B.J. and C.H. The guardian ad litem, Julie Lynch, has filed her response on behalf of the children. The West Virginia Department of Health and Human Resources (“DHHR”), by William Bands, its attorney, 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 petition in this matter was filed based on allegations of drug abuse in the home and physical abuse of the children. Petitioner Father stipulated to the allegations in the petition, and was granted an improvement period. Petitioner Father was somewhat compliant with services, but went to jail within three months of the granting of his improvement period. Upon his release, he failed to contact the DHHR and failed to engage in services. After another review hearing, he sporadically participated in services, but agreed to go to inpatient drug treatment. Thus, the circuit court extended his improvement period in order to allow him to attend drug treatment. However, Petitioner Father only remained at the detoxification center for three days, and between the time he left the detoxification center and disposition, he failed to participate in any services, appear in court relating to these proceedings, or visit his children. The circuit court then terminated his parental rights, after it found that petitioner has a substance abuse problem and was incarcerated through much of the proceedings. Moreover, the circuit court found that immediately upon his release, petitioner continued his drug use, and that he left his court-ordered drug treatment after three days. Finally, the circuit court noted that “illegal drugs are more important to [Petitioner Father] than being a father, and therefore neither continuation in the home nor reunification is in the best interest of the infant children.”

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).

Petitioner Father argues that the circuit court erred in terminating his parental rights to his children. He argues that the circuit court erred in proceeding with disposition in his absence, as he did not have the opportunity to testify on his own behalf. Moreover, petitioner argues that he should have been afforded additional time for his improvement period.

In response, the guardian argues in favor of termination, noting that petitioner suffers from substance abuse, but has made no progress toward improvement of this condition. He left detoxification after only three days, and the guardian argues that termination was proper considering petitioner’s continued use of drugs. The DHHR also responds in favor of termination, arguing that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected while petitioner remains addicted to drugs.

West Virginia Code §49-6-5(b)(1) 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] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning[.]

The circuit court specifically found that Petitioner Father was addicted to drugs, and this addiction led to him being unable to parent his children. This Court finds no merit to the argument that the circuit court should not have proceeded with disposition in this matter due to Petitioner Father’s voluntary absence from the proceedings.

With regard to the termination of Petitioner Father’s parental rights, this Court notes that the least restrictive alternative is generally employed as per West Virginia Code § 49–6–5. However, this Court has held as follows:

“[C]ourts 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). In the present matter, Petitioner Father showed that he was either unable or unwilling to improve. He was given an improvement period, as well as an extension, and was placed in drug treatment. However, he showed no improvement. This Court finds no error.

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 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