

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

In Re: J.S.

No. 12-0412 (Logan County 10-JA-58)

FILED

September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father’s appeal, by counsel Allison Dingess, arises from the Circuit Court of Logan County, wherein his parental rights to the child, J.S., were terminated by order entered on March 22, 2012. The West Virginia Department of Health and Human Resources (“DHHR”), by counsel William L. Bands, has filed its response. The guardian ad litem, Erica Barker Cook, has filed her response on behalf of the child.

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.

Abuse and neglect proceedings were initiated following two separate referrals reports of ongoing domestic violence between J.S.’s parents and drug abuse in the home. DHHR found the home to be in a filthy and unsafe condition. On July 28, 2010, J.S.’s mother filed a domestic violence petition against petitioner. On August 10, 2010, the family court granted the mother a ninety-day restraining order against petitioner, and a temporary protection plan was implemented whereby the child was placed with her maternal grandparents. However, on August 17, 2010, the DHHR filed a petition for immediate custody of the child. Petitioner thereafter waived his right to a preliminary hearing and, according to the parties, was adjudicated by admission. Petitioner was granted a post-adjudicatory improvement period, but on March 2, 2011, the circuit court found that petitioner had abandoned his improvement period, and revoked the same. At the May 23, 2011, dispositional hearing, petitioner was granted a dispositional improvement period. After twice extending the dispositional improvement period, the circuit court denied a third extension and terminated petitioner’s parental rights on February 22, 2012. On appeal, petitioner alleges three assignments of error. These assignments of error, as well as the respondents’ responses thereto, are addressed in turn below.

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." Syllabus Point 1, *In the 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).

As to his first assignment of error, petitioner argues that the DHHR directed a course of conduct against him that prevented him from engaging in any meaningful improvement, that his success was impaired by the DHHR's continued advocacy for termination of his parental rights even in the face of improvement, that the DHHR failed to follow the circuit court's directives by restricting court-ordered visitation, and that his CPS worker was adversarial and wrongly denied him visitation with the child. The DHHR and guardian ad litem respond that there is no evidence of bias against petitioner and that the decision related to ending visitation with the child and terminating parental rights was based solely on petitioner's substance abuse and failure to abide by the terms of his improvement period.

Upon a review of the record, the Court finds petitioner's first assignment of error to be without merit. Our review of the record reveals no specific bias against petitioner throughout the proceedings below. Petitioner's argument on this issue is based upon his allegations that certain drug screens yielded positive results for substances he argues he did not abuse, and that he was denied visitation with his child on two occasions. However, the circuit court's findings indicate that petitioner "failed to regularly attend his drug screens," that he failed in his treatment at a methadone clinic "because he was unable to participate in that program and refrain from using other controlled substances, particularly cocaine," and that he specifically declined in-patient treatment for his substance abuse. As such, the circuit court was not clearly erroneous when it found no reason to question the validity of petitioner's positive drug screens. Further, as to petitioner's allegations that the DHHR did not follow the circuit court's directives regarding visitation, the Court again finds this argument to be without merit, as this argument also turns on petitioner calling into question a positive drug screen. Further, as discussed more fully below, the circuit court relied upon petitioner's failure to regularly attend visitation as a basis for terminating his parental rights. For these reasons, the circuit court was not clearly erroneous in failing to find that the DHHR engaged in behavior that evidenced a bias against petitioner or that prevented petitioner from meaningfully engaging in any improvement period below.

Petitioner next alleges that the circuit court erred in terminating his parental rights. He argues that the circuit court failed to use the least restrictive alternative at disposition, and he denies that the conditions of abuse or neglect could not have been substantially corrected. In support of this argument, petitioner alleges that the circuit court should have granted his motion

to extend his dispositional improvement period because he substantially complied with the terms thereof. Petitioner also argues that he was not given proper notice of termination because of the death of the child's mother just prior to the dispositional hearing in February of 2012, and the DHHR's failure to properly serve its motion to terminate upon him.

In response, the DHHR argues that the circuit court did not err in terminating petitioner's parental rights, noting that petitioner and his counsel were clearly on notice of the dispositional hearing and the possibility that his parental rights could be terminated. The DHHR also argues that the circuit court was correct to proceed to termination because it found that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected. The guardian responds and states that petitioner's argument that he did not have proper notice of the dispositional hearing is simply false. Further, the guardian argues that the circuit court was correct in finding that petitioner's continued use of illegal drugs impaired his ability to care for himself and his child such that no less restrictive alternative to termination existed.

Upon a review of the appendix, the Court finds no error in the termination of petitioner's parental rights. To begin, we find no error in the circuit court's decision to proceed with the dispositional hearing despite petitioner's absence. As noted in the responses hereto, the record shows that both petitioner and his counsel were present at the January 9, 2012, evidentiary hearing regarding the parents' respective dispositional improvement periods. During that hearing, the circuit court not only found that petitioner had failed to prove by clear and convincing evidence that he had complied with the terms of his improvement period, but also specifically denied his motion for any further extension thereto and set the matter for disposition. Petitioner obviously had notice of the date and time of the dispositional hearing and knew, or should have known, that termination of his parental rights was a possible outcome.

Further, the circuit court was not clearly wrong in finding sufficient evidence upon which to base termination of petitioner's parental rights. Specifically, the circuit court found that petitioner had failed to comply with the terms of his improvement period in the following ways: failure to submit to drug screens twice a week; failure to follow up on recommended treatment; failure to maintain weekly contact with the DHHR; failure to establish a separate, stable home for the child; failure to maintain consistent visitation with the child; and, failure to complete in-patient substance abuse treatment. Pursuant to West Virginia Code §§ 49-6-5(b)(1) and (3), it is clear that the circuit court was presented with sufficient evidence to find that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect in the near future. As noted above, the circuit court was presented with ample evidence of petitioner's drug abuse problem, and it specifically found that petitioner "has a substance abuse problem that has impaired his ability to care for himself as well as his child." Further, based upon the findings detailed above, it is obvious that petitioner failed to respond to or follow through with the family case plan or other rehabilitative efforts, as evidenced by his failure to attend visitations, drug screens, and other required activities.

In response to petitioner's argument that he should have been granted an extension to his improvement period for purposes of obtaining in-patient treatment for his substance abuse, the Court finds this argument to be without merit. Specifically, we have held that "[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 . . .’ 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). Based upon a review of the record, it is clear that petitioner had ample time to participate in two separate improvement periods, yet he abandoned the first and failed to comply with the terms of the second. For these reasons, the circuit court did not err in denying petitioner’s motion for an extension to his dispositional improvement period or in terminating petitioner’s parental rights.

Lastly, petitioner argues that the circuit court’s failure to mandate post-termination visitation was clearly erroneous in light of the close emotional bond between petitioner and the child. In response to this assignment of error, the guardian argues that the circuit court did not err in leaving visitation to the DHHR’s discretion because the DHHR has relied upon the child’s therapist to make recommendations in regard to ongoing visitation. Upon review of the record, the Court agrees with the guardian, and finds no error in regard to the circuit court’s decision as to post-termination visitation. We have previously held that

“[w]hen 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). The record shows that the circuit court appropriately considered these issues in determining whether post-termination visitation was appropriate in this matter. Further, nothing in our statutory provisions or case law prevents a circuit court from allowing the DHHR to exercise discretion in regard to post-termination visitation, and we find no error in the circuit court’s decision.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child 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 24, 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