

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

In Re: O.J.

No. 12-0426 (Wood County 10-JA-34)

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

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Ernest Douglass, arises from the Circuit Court of Wood County, wherein Petitioner Father's parental rights were terminated by order entered on March 19, 2012. The child's guardian ad litem, Courtney Ahlborn, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response supporting the circuit court's termination order. Petitioner Father thereafter filed two separate replies to respondents' responses.

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.

DHHR filed the petition in the instant case in April of 2010, based on an unexplained spiral fracture to the femur of infant child A.K. while in Petitioner Father's care. At the time of A.K.'s injury, Petitioner Father and his child O.J., born on May 24, 2005, were residing with child A.K.; A.K.'s mother, who was Petitioner Father's girlfriend at the time; and the girlfriend's other child. The petition alleged that Petitioner Father stated that he smoked marijuana at least once a day. Petitioner Father waived his rights to a preliminary hearing and at the adjudicatory hearing in July of 2010, Petitioner Father stipulated to neglecting his child by his failure to provide appropriate supervision to the children in the home, including the infant child who sustained a broken leg while in his care. Petitioner Father's written stipulations also outlined issues and deficiencies to be addressed during his improvement period; these issues included parenting, being protective of a child, domestic violence issues, and other issues to be determined by the Multi-Disciplinary Treatment Team ("MDT"). The circuit court granted Petitioner Father a six-month post-adjudicatory improvement period in September of 2010 with directions to participate in classes, counseling, and drug screens. In April of 2011, the circuit court granted Petitioner Father an extension to his improvement period. During the pendency of his improvement period, Petitioner Father's former girlfriend made allegations of domestic violence against him, Petitioner Father was arrested for a misdemeanor charge, and Petitioner Father and his former girlfriend were untruthful to DHHR about their relationship status. The circuit court heard testimony on Petitioner Father's disposition over several different hearings, beginning in the fall of 2011 before concluding in December of 2011. In light of the evidence

presented, the circuit court entered its March of 2012 order terminating Petitioner Father's parental rights to O.J. after finding that although Petitioner Father complied with some aspects of his improvement period, he also failed to comply with several other terms and conditions of his improvement period. Such terms and conditions with which Petitioner Father failed to comply included his failure to maintain a safe and appropriate home, submit to his regular drug screens, participate in anger management counseling, and submit to a psychiatric evaluation. Petitioner Father appeals this circuit court decision, arguing three assignments of error.

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 Father first argues that the circuit court erred by terminating his parental rights to O.J. and not returning O.J. to his legal and physical custody. He relies on the cases of *In re Samantha M.*, 205 W.Va. 383, 518 S.E.2d 387 (1999), and *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991), in arguing that a natural parent has the right to his or her children. He argues that his case is similar to that of *In re Samantha M.* because the Court reversed and remanded the termination of parental rights of Samantha's father when it found that there were no allegations against him outlined in the petition that initiated the proceedings. Petitioner Father further argues that pursuant to Syllabus Point 5 of *In re Randy H.*, 220 W.Va. 122, 640 S.E.2d 185 (2006), the circuit court here should have ordered DHHR to file a new petition and it erred in not doing so before terminating his parental rights based on new allegations, namely, those pertaining to domestic violence or drug use. Petitioner Father argues that there were no allegations in the petition of the instant case that referenced any previous Child Protective Services (“CPS”) involvement or instances of O.J.'s neglect and that he and O.J. had lived together all of O.J.'s life. Petitioner Father argues that although the allegations in the petition of the instant case discuss his marijuana usage, they do not make any claims that he was responsible for injuring his former girlfriend's child, but only that he was in the same home as the child when she was injured; he only stipulated to a failure to supervise. Moreover, Petitioner Father argues that his improvement period did not require any sort of domestic violence program. He did not stipulate to any sort of domestic violence at adjudication and he complied

with the anger management component of his improvement period, visitation with his child, and parenting classes.

The guardian ad litem and DHHR respond, contending that the circuit court did not commit error in terminating Petitioner Father's parental rights to O.J. Both argue that Petitioner Father's stipulations agreed to address domestic violence issues and other issues determined by the MDT. DHHR contends that in *In re Samantha M.*, there were no allegations against the father, whereas here, there were allegations in the petition against Petitioner Father, giving him notice and due process in regard to the abuse and neglect proceedings against him. DHHR notes that even though Petitioner Father stated that he did not use marijuana in his child's presence, his disclosure of his daily use of marijuana indicates that he would parent his son while under its influence. Both the guardian and DHHR also point out that DHHR had offered to recommend a post-dispositional improvement period for Petitioner Father if he agreed to participate in the Batterer's Intervention and Prevention Program ("BIPP"); however, Petitioner Father refused to do so. Guardian and DHHR further argue that Petitioner Father failed to comply with his drug screens and testified that his employment did not allow for him to submit to his drug screens regularly. Given these circumstances, the child's guardian ad litem and DHHR contend that the circuit court did not err in termination.

In his reply briefs, Petitioner Father argues that his case is largely similar to *In re Samantha M.* because his termination, like that of the father in *In re Samantha M.*, was based on issues that arose subsequent to the adjudicatory hearing. He argues that here, the circuit court terminated his rights based on domestic violence, his refusal to participate in the BIPP, an unsubstantiated misdemeanor charge, and alleged drug use, all issues that he argues were either not raised in the petition or not proven or admitted at adjudication. Therefore, Petitioner Father argues, he was not afforded due process on these issues. Petitioner Father further elaborates that his former girlfriend recanted her allegations of domestic violence, particularly those pertaining to a hostage situation. He also argues that he "did not admit to daily drug use" in his stipulations. He also argues that he stopped using marijuana during the improvement period, and that "his only culpability was a failure to supervise a child that wasn't even his."

The Court finds no error in the circuit court's decision to terminate Petitioner Father's parental rights to the subject child. A review of *In re Samantha M.* supports the circuit court's actions in regard to the petition that DHHR filed against Petitioner Father and his former girlfriend. West Virginia Code § 49-1-3(4) provides the definition for "child abuse or neglect," indicating that negligent treatment or maltreatment of a child by a parent, guardian, or custodian who is responsible for the child's welfare, under circumstances which cause threat or harm to a child's health or welfare, constitute child abuse or neglect. The allegations in the *In re Samantha M.* petition all focused on the child's mother and not her father, and did not make any specific allegation against her father that would render him unfit to parent her or inform him of reasons for terminating his parental rights. *In re Samantha M.*, 205 W.Va. at 389, 518 S.E.2d at 593. That case focused on lack of due process afforded to Samantha's father without any notice of abuse or neglect allegations. Here, unlike the case of *In re Samantha M.*, allegations in the instant petition included Petitioner Father and provided a factual basis for finding him unfit to parent his child. The petition provided that Petitioner Father and O.J. were residing with injured child A.K. and A.K.'s mother at the time of A.K.'s injury. The petition further stated that physicians found that

the child's injury was inconsistent with the explanation provided by her mother and that non-accidental trauma was suspected. Moreover, Petitioner Father's argument that the stipulations "did not admit to daily drug use" or did not concern domestic violence between him and his girlfriend are clearly contradicted by the petition's discussion of Petitioner Father's admission to DHHR that he "smokes marijuana at least once per day, but that he does not smoke around the children" and the stipulations that identify domestic violence as an issue to be addressed. Given the circumstances outlined in the petition, Petitioner Father was given notice of reasons for terminating his parental rights to O.J. due to his daily marijuana usage and the threat of harm to O.J. after he failed to properly care for A.K. The circuit court did not err in proceeding forward with the April of 2010 petition.

Not only did the circuit court correctly proceed forward with the April of 2010 petition, but it also did not err in terminating Petitioner Father's parental rights. We have 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 . . ." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Further, the Court has also held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). Here, the documents provided in the appellate record support the circuit court's findings that Petitioner Father failed to fully comply with the terms of his improvement period and demonstrate that DHHR proved by clear and convincing evidence that Petitioner Father's parental rights should be terminated. At disposition, Petitioner Father's former girlfriend testified that although Petitioner Father did not punch her, he had held her down, shoved her, and hit her. Petitioner Father's stipulations clearly indicate that one of the issues to be addressed in his case centered on domestic violence. Moreover, although Petitioner Father argues that he stopped using marijuana during his improvement period, he provides no evidence in his record to support this. Although the DHHR reports provide that Petitioner Father was making fair progress with parenting classes and visitations, the more recent dispositional hearing transcripts shed greater light on Petitioner Father's actions and attitude throughout the latter portion of his case. For instance, Petitioner Father himself testified that he did not take all of his drug screens due to being "very busy;" that he did not participate with BIPPS, and that he felt that he was "being punished by CPS" in this case. Accordingly, in light of the circumstances of this case, we find no error in the circuit court's decision to terminate Petitioner Father's parental rights to O.J.

Petitioner Father next argues that the circuit court erred in denying Petitioner Father post-termination visitation with O.J. The Court has held 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. 2, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999). Petitioner Father asserts that here, he has a strong bond with his child that DHHR recognized. Petitioner Father further asserts that DHHR also recognized that interactions between them were appropriate. Moreover, Petitioner Father asserts that psychologist Mary Longmore-Gable testified that the child spoke of him favorably and did not testify that contact between the child and Petitioner Father would be detrimental to the child.

The guardian ad litem and DHHR respond, arguing that the circuit court did not err in denying Petitioner Father post-termination visitation rights to O.J. DHHR notes that play therapy has been recognized by the Court as an acceptable means to gather information from a child who is too young to provide testimony. *See In re the Marriage of Misty D.G. v. Rodney L.F.*, 221 W.Va. 144, 650 S.E.2d 243 (2007). DHHR argues that in this case, psychologist Longmore-Gable also testified that over eleven sessions with the child, she observed themes of aggression by the child's play father figure and found that the child's relationship to Petitioner Father was more akin to a friendship than a parent-child relationship with a parental bond. The guardian further asserts that the psychologist testified that it would not be in the child's best interests for visits to continue with Petitioner Father. DHHR stresses that the last component of the *Christina* standard cited by Petitioner Father was omitted in Petitioner Father's case: Petitioner Father did not show how visitation would be in the child's best interests, but only asserted that visitation would not be detrimental. Both the guardian and DHHR argue that the circuit court did not commit error here in denying visitation rights to Petitioner Father. Petitioner Father replies that the psychologist did not observe any visits between the child and Petitioner Father and that her recommendation is contradicted by "every report filed by [DHHR]."

The Court finds no error in the circuit court's decision to deny Petitioner Father post-termination visitation with O.J. The standard set forth in Syllabus Point 5 of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), provides that the circuit court has discretion to grant or deny further visitation between parent and child after parental rights have been terminated. A review of the circuit court's dispositional order reveals the findings and conclusions it used as a basis to terminate Petitioner Father's parental rights to O.J. These findings included excerpts from testimony taken at the dispositional hearings, such as the psychologist who advised that visits should not continue and testimony by Petitioner Father and his caseworkers who testified regarding Petitioner Father's failure to fully comply with the terms and conditions of his improvement period. Transcripts of proceedings in this case were also included in the appellate record for review. Although DHHR's reports of Petitioner Father's visits were generally positive, DHHR also discussed a number of other issues that Petitioner Father failed to address, such as noncompliance with drug tests and BIPP. Concurrently, in its termination order, the circuit court decided at that time to deny Petitioner Father of visitation with O.J. Given the circumstances of this case, we find that the circuit court did not abuse its discretion in denying visitation.

Lastly, Petitioner Father argues that the circuit court failed to sufficiently question him regarding his stipulation at adjudication as required by Rule 26 of the West Virginia Rules of

Procedure for Child Abuse and Neglect Proceedings, which could involve plain error. Petitioner Father notes that Rule 26(b) provides as follows:

Before accepting a stipulated or uncontested adjudication, the court shall determine that the parties understand the content and consequences of the admission or stipulation, the parties voluntarily consent, and that the stipulation or uncontested adjudication meets the purposes of these rules and controlling statute and is in the best interests of the child.

Petitioner Father argues that here, the circuit court failed to explain the purpose behind the adjudicatory hearing and DHHR's burden of proof at this hearing, as outlined in West Virginia Code § 49-6-2. Petitioner Father further argues that the circuit court did not provide full explanations concerning his right to appeal, the possibility that stipulating to neglect could lead to termination of his parental rights, or the impact of his improvement period.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in accepting Petitioner Father's stipulations at adjudication. Both the guardian and DHHR argue that the circuit court properly questioned Petitioner Father regarding his decision to enter stipulations and that Petitioner Father entered his stipulations at adjudication knowingly and voluntarily and did not voice any objections to these stipulations at any point during this case. DHHR adds that Petitioner Father entered into his stipulations in both oral and written fashion and DHHR quotes excerpts from the adjudicatory hearing transcript to support its position that Petitioner Father made his stipulations knowingly and voluntarily. Moreover, DHHR argues that the circuit court complied with the rules in accepting Petitioner Father's stipulations and was not required to provide detailed explanations of the purpose behind an adjudicatory hearing, the burden of proof necessary, and the right to counsel.

We find no error with the circuit court's acceptance of Petitioner Father's stipulations to neglect at adjudication. As quoted by Petitioner Father, Rule 26(b) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings directs that the circuit court ensure that the responding parent enters his or her stipulations voluntarily and with the understanding of the stipulations' content and consequences. Further, Rule 26(a) requires that the stipulated information includes the "(1) [a]greed upon facts supporting court involvement regarding the [parent's] problems, conduct, or condition" and "(2) [a] statement of the [parent's] problems or deficiencies to be addressed at the final disposition." Here, the record on appeal includes a copy of the transcript of the adjudicatory hearing. A review of this transcript indicates that the circuit court properly inquired as to Petitioner Father's understanding of his stipulations and his understanding of its content and consequences. The circuit court clearly questioned Petitioner Father about his decision to enter stipulations, including his decision to give up his right to have a hearing and his decision to do so without coercion or force. Moreover, the circuit court clearly questioned Petitioner Father as to his decision to agree to the neglect of his child, to which Petitioner Father affirmatively answered. Petitioner Father also included a copy of his written stipulations in his record on appeal. A review of these stipulations reveal that Petitioner Father stipulated to neglecting the subject child by failing to provide appropriate supervision of other children in the home, including the infant child who sustained an unexplained broken leg while in Petitioner Father's care. As previously discussed, Petitioner Father's written stipulations also

discuss the issues and deficiencies to be addressed during his improvement period. Given the circumstances of this case, we find no abuse of discretion in the circuit court's decision to accept Petitioner Father's stipulations at the adjudicatory hearing. Accordingly, we affirm the circuit court's termination order, including its decision to deny Petitioner Father post-termination visitation.

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 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