

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

In Re: A.B.

No. 12-0821 (Mercer County 11-JA-60)

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Michael P. Cooke, arises from the Circuit Court of Mercer County, wherein his parental rights to the child, A.B., were terminated by order entered on June 25, 2012. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed a 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.

On April 23, 2011, the DHHR received a referral from the West Virginia Child Abuse Hotline regarding the death of T.B., A.B.'s older sibling. The DHHR was informed that the child's lab work was positive for unspecified bacteria and there were concerns about the health of A.B., who was still in the home. The DHHR thereafter visited the home with law enforcement and found it in deplorable condition. When questioned about T.B.'s death, petitioner stated that the child had thrown up the night of April 21, 2011, and then went to bed. The next morning, the child was found unresponsive in bed with blue lips and a purple tongue. He died on April 22, 2011, and was diagnosed with sepsis and spinal meningitis. At adjudication, petitioner stipulated to neglect due to the conditions in the home and was granted a post-adjudicatory improvement period. After an extension to this improvement period, the circuit court eventually terminated petitioner's parental, custodial, and guardianship rights due to his non-compliance with services offered.

On appeal, petitioner alleges that the circuit court erred in denying him a dispositional improvement period and in terminating his parental rights. In support, he argues that he remedied the conditions in the home by divorcing Respondent Mother, remarrying, and obtaining suitable housing. While he admits that his move to Virginia and associated transportation problems sometimes precluded his compliance with visitation and other services, petitioner argues that he was focused on integrating his daughter A.B. into his new family. Petitioner adds that the DHHR failed to consider his grieving process and that a dispositional improvement period would have permitted him time to work on these issues.

The DHHR responds in support of the circuit court's decision and argues that the circuit court was provided with ample evidence upon which to base termination, including petitioner's addiction and/or abuse of drugs or alcohol, his failure to comply with a reasonable family case plan and other rehabilitative efforts, and his failure to acknowledge the problems creating the neglect. Further, the DHHR argues that petitioner clearly expressed a desire to favor his new wife and stepchildren over A.B.'s interests. The guardian also responds in support of the circuit court's decision and argues that the circuit court had discretion to deny petitioner a dispositional improvement period because of his lack of compliance with the terms of his prior improvement period. The guardian argues that petitioner's visitations often resulted in problems between petitioner and his child and further notes that a DHHR employee testified that petitioner smelled of alcohol during visitations with A.B. For these reasons, the guardian argues it was not error to terminate petitioner's 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 our review, the Court finds no error in the circuit court's denial of petitioner's motion for a dispositional improvement period or in the termination of petitioner's parental rights. Pursuant to West Virginia Code § 49-6-12(c)(2), a parent seeking a dispositional improvement period must demonstrate, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. The record in this matter shows that petitioner failed to satisfy this burden. In the order terminating petitioner's parental rights, the circuit court noted petitioner's non-compliance with the services offered, including his failure to attend therapy, his “sporadic and problematic” compliance with visitation, and his decisions evidencing a desire to place his new family's needs above those of A.B. Despite the DHHR providing services, the circuit court found that petitioner “did not avail himself to all of those services, nor has he exhibited progress in significant areas.” For these reasons, the circuit court did not err in denying petitioner a dispositional improvement period.

Further, the circuit court specifically found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future, and that termination was necessary for the child's welfare. In accordance with West Virginia Code § 49-6-5(b)(3), this finding was based on petitioner's failure to follow through with the reasonable family case plan or other rehabilitative efforts, as supported by the evidence detailed above. Pursuant to West Virginia Code § 49-6-5(a)(6), circuit courts are directed to terminate parental rights upon these findings.

For the foregoing reasons, we find no error in the decision of the circuit court, and the termination of petitioner's parental, custodial, and guardianship rights is hereby affirmed.

Affirmed.

ISSUED: November 19, 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