STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: C.S.

No. 11-0233 (Mercer County No. 09-JA-26-OA)

FILED
September 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein the Petitioner Father's parental rights to his child, C.S., were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response, as well as a supplemental appendix. The guardian ad litem has filed his response on behalf of the child, C.S. Petitioner has also filed a reply brief.

Having reviewed the record and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the record presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Petitioner challenges the circuit court's order terminating his parental rights and alleges two assignments of error. First, petitioner argues that the circuit court erred in finding that his act of rape against Respondent Mother that resulted in the subject child's conception constitutes an aggravated circumstance under West Virginia Code § 49-6-5(a)(7) such that the DHHR is not required

to make reasonable efforts to achieve reunification.[1] Petitioner argues that by making this finding, the circuit court impermissibly violated the State Legislature's inherent authority to create legislation. Further, the language of the section indicates that the legislature decided to omit rape, and further chose not to vest circuit courts with discretion in making their own determinations as to what can constitute an aggravated circumstance.

However, petitioner's argument ignores the circuit court's finding that "due to the extended incarceration of [petitioner], it was impossible or impractical for the Department to make reasonable efforts aimed at reunification." Only after noting that such reunification efforts were not feasible in light of petitioner's extended incarceration did the circuit court go on to make the finding upon which petitioner predicates the alleged error. This Court has held that "[w]hen no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity." Syl. Pt. 3, *In re Cecil T.*, 2011 WL 864950 (W.Va. Mar. 10, 2011).

While petitioner's incarceration was not the only factor the circuit court considered at disposition, this syllabus point is still applicable. Specifically, the circuit court considered the length of the incarceration in determining that such confinement precluded any attempts at reunification, as well as the fact that petitioner made clear that he was not requesting an improvement period or even visitation. More importantly, however, the circuit court considered the best interests of the child in making this determination. This Court has 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." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948). The record below shows that the child at issue is totally unaware of petitioner and the circumstances of her conception, believing Respondent Step-Father to be her biological father. As such, the circuit court found that "it

[1]Petitioner refers to this act as "statutory rape" throughout the petition for appeal. However, the record indicates that he pled guilty in North Carolina to attempted second degree rape as a result of the act, which that state's law defines as "vaginal intercourse with another person: (1) By force and against the will of the person; or (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless." N.C.Gen.Stat. §§ 14-27.3(a)(1) and (2).

would be a travesty of justice to force an association between this child and the [petitioner], when this child has no knowledge that she is the product of sexual assault." Based upon this finding, it is clear that the circuit court made its decision based upon the child's best interests as dictated by this Court's prior holdings. Further, it is clear that the circuit court did not predicate its decision to relieve the DHHR of its duty to make reasonable efforts to achieve reunification upon petitioner's prior crime, and the same is not clearly erroneous.

Petitioner next argues that the circuit court erred in its application of West Virginia Code § 49-6-5 because it ordered termination of his parental rights instead of employing a less restrictive alternative. In the proceedings below, petitioner did not ask for an improvement period or visitation, but simply that the circuit court terminate his custodial rights and allow the child to contact him if she desired. He now argues that the circuit court should have entered a no-contact order because he poses no threat to the health or welfare of the child, and argues that but for the Respondent Mother's actions the case never would have been filed. However, as noted above, the child's best interests are the polar star by which proceedings of this nature are to be guided. In the instant matter, both Respondent Mother and Respondent Step-Father successfully completed improvement periods and achieved reunification. As such, the permanency plan for the subject child is adoption by Respondent Step-Father, which could not be achieved if petitioner's parental rights were left intact. Further, because the circuit court found there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, it was entitled to terminate petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6). For these reasons, the circuit court's decision to terminate petitioner's parental rights, as opposed to employing a less restrictive alternative, was not clear error.

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 26, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh