STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: R.B.

No. 11-0609 (Cabell County No. 09-JA-95)

FILED
September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Cabell County, wherein the Petitioner Great-Uncle's custodial and guardianship rights to the child, R.B., were terminated. The appeal was timely perfected by counsel, with the entire record from the circuit court accompanying the petition. The guardian ad litem has filed his response on behalf of the child, R.B..

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on April 12, 2011. 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 custodial and guardianship rights, alleging two assignments of error. Petitioner argues that the circuit court erred in failing to consider alternatives to termination of his custodial and guardianship rights, such as placement with the child's natural parents or other suitable relatives. Petitioner also asserts that the child's

extraordinary medical requirements do not make him a likely candidate for adoption. The record below, however, indicates that the circuit court was not presented with any other suitable placements for the child, and, as such, had no other alternatives to consider. The circuit court found that the child's biological parents transferred custody to the petitioner and his ex-wife approximately twelve years ago because his mother could not or would not care for him; the father has not played any substantial role in the child's past or present care. Though both parents were represented by counsel in this matter, neither suggested that they would care for the child. Further, the circuit court found that, after extensively searching for in-home services to assist petitioner and Respondent Ethel R. with their care of the child, the West Virginia Department of Health and Human Resources ("DHHR") found the child's current foster home could meet all of his extensive medical needs. The record shows that the child at issue is severely mentally challenged, suffers from cerebral palsy and seizure disorders, cannot use the bathroom on his own, has limited range of motion, and requires frequent breathing treatments daily. These numerous medical problems are most likely going to continue to worsen as he ages. Testimony from one of the child's current caregivers demonstrated that the child requires an average of eighteen hours of care each day. The record shows that his current placement was the only viable placement to protect the health and welfare of the child, and as such the circuit court did not err in failing to consider such alternative placement.

Petitioner next argues that the circuit court erred in its finding that the burden of proof was met in this case, alleging that the state failed to meet its burden of clear and convincing proof of the allegations against him. Petitioner points to the testimony of service providers and medical professionals that he participated in heavy lifting and was able to care for the child, and also asserts that the service providers who testified to arguments between petitioner and his ex-wife during visitations were hostile toward him. This Court has held that "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. Pt. 6, *In Re: The Matter of Ronald Lee Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). Petitioner does not dispute that this case was initiated following the child's admittance to the hospital because of severe malnourishment, fever, and respiratory problems leaving the child critically ill and semi-conscious after being in petitioner's care. Though already using a feeding tube, the child eventually required a tracheotomy, which will likely be necessary for the rest of his life. Further, the circuit court found that petitioner is simply incapable of caring for the child's extreme medical needs, and that subsequent to visitations with petitioner and Respondent Ethel R., the child's condition deteriorated to the point of hospitalization because of their inability to properly execute the education services they received. The circuit court found that the petitioner's mishandling of the child put him in significant mental and physical danger, that petitioner and his ex-wife often bickered during visitation, and that the child showed extreme agitation during these visits. Further, petitioner himself is physically ill and suffers from cancer so severe that he has been referred to Hospice care and receives dialysis three times weekly due

to his failing kidneys. The circuit court found that, "due to factors which [petitioner and Respondent Ethel R.] cannot control, such as their health and age, [petitioner and Respondent Ethel R.] must take measures to care for themselves and allow someone else to take over caring for the minor child who has such demanding special needs."

Further, in responding to the motion to terminate visitations with the child, the petitioner argued "1) That [petitioner and Respondent Ethel R.] have done nothing wrong or inappropriate; 2) There is not one scintilla of evidence that [petitioner and Respondent Ethel R.] have intentionally or unintentionally done anything to cause [R.B.] any harm; and 3) There is no evidence that [petitioner and Respondent Ethel R.], are unable to care for [R.B.] and that suggestion is without merit." Despite the circuit court's finding that the petitioner's mishandling of the child put him in significant mental and physical danger, petitioner refused to acknowledge the problems that constituted neglect in this matter. This Court has held that "in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense." *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Petitioner's refusal to acknowledge the conditions of neglect in this matter rendered them untreatable, and there was clear and convincing evidence supporting the rulings made by the circuit court.

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

Affirmed.

ISSUED: September 13, 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