STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.S. and K.S.

No. 11-0966 (Raleigh County 10-JA-08-K, 11-JA-01-K)

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Raleigh County, wherein Petitioner Father's parental rights to the children, J.S. and K.S., were terminated. The appeal was deemed timely perfected by counsel, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem has filed her response on behalf of the children.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix 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.

On appeal, petitioner argues that the circuit court erred in terminating his parental rights based on the finding that there was no reasonable likelihood that the conditions creating the neglect could be substantially corrected in the near future. Petitioner relies upon a prior decision of the Court, in which it was held that:

> [w]hen a parent's intellectual incapacity is a factor in the possible termination of parental rights, *Billy Joe M.* requires that 'termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance.' Syl. pt. 4, *in part*, *Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 [1999].

In re Maranda T., 223 W.Va. 512, 518-19, 678 S.E.2d 18, 24-25 (2009). As such, petitioner argues that disposition must be vacated because the social services system in this matter made little, if any, effort to determine whether petitioner could adequately care for his children with intensive long-term assistance. Additionally, petitioner cites to a lone psychological evaluation report as being the only evidence speaking to petitioner's mental

capacity, and argues that this is insufficient as a basis for the circuit court's determination that petitioner did not have the capacity to be rehabilitated or improve his parenting skills.

In response, the guardian ad litem argues that termination was proper, as it was instead based on petitioner's failure to comply with the basic terms of the family case plan. Specifically, J.S. suffers from a chronic breathing problem and cannot be subjected to animals and smoke. Petitioner and Respondent Mother, however, refused to stop smoking in the home or remove animals, including a goat, a lamb, and dogs, from the home. The case plan required the home to be kept clean, including keeping it free of urine smell and keeping feces off the floor. However, the petitioner and Respondent Mother failed to comply with this condition, and a dead puppy was even found left gathering flies on a high chair tray for more than a day. The case plan further required that the home remain free of incidents of domestic violence, with which petitioner also failed to comply. As for services, weekly supervised visitations were conducted, during which the petitioner was instructed on how to care for the children. However, petitioner fell asleep during some visitations, and cancelled others by lying about other obligations. In short, the guardian argues that the circuit court based its decision on testimony establishing non-compliance with the family case plan and services, domestic violence incidents, and conditions in the home that rendered it a safety hazard. Further, the guardian argues that the psychological evaluation report noted that petitioner was not compliant with the services provided.

The State mirrors the guardian's assessment, noting that the allegations below concerned petitioner and Respondent Mother subverting "any and all attempts to educate them on creating a safe and suitable environment for their child," and that "both [were] more interested in the animals than they [were] in their child." The State argues that this is illustrated by the fact that petitioner's home had no running water because the parents allegedly could not afford it, yet they had recently purchased a horse and a goat, and had paid to put electrical fencing around their property. The State also cites a history of repeated instances of mutual physical abuse and domestic violence, as well as the fact that petitioner slept on a couch for at least forty-five minutes during one visitation with his children. The psychology report showed that, even with in-home services and support, petitioner's prognosis for improvement was not good. As such, the State argues that termination was proper.

"'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 Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010). The circuit court below terminated petitioner's parental rights after finding that he has limited intellectual ability and was "not . . . able to successfully complete the improvement of the parenting skills such to be able to raise these children in a safe environment and in a safe manner." In addition, the circuit court found that petitioner would not be capable of rehabilitation in the reasonable future, based upon a psychological assessment. As noted above, the circuit court was presented with evidence that petitioner failed to comply with the simple terms of the improvement period, despite receiving assistance through DHHR services.

While the prior holding to which petitioner cites does require that a thorough effort to determine whether the parent in question can adequately care for the children with intensive long-term assistance prior to termination, that holding also states that "'the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement.' Syllabus point 4, [in part,] *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999)." Syl. Pt. 4, in part, *In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009). Petitioner argues that because the parent in the cited case received fourteen months of services, that the DHHR did not put forth the "thorough effort" required to determine whether or not he could care for his children with long-term assistance. We decline to find, however, that the DHHR's efforts here do not meet this requirement.

A review of the record and briefs indicates that petitioner not only lacked the ability to follow through with the services provided, he refused to comply in many respects. Further, the psychological report contained a prognosis that was not positive concerning petitioner's ability to ever care for a child, even with long-term services in place. As such, and with the direction in mind that this decision should be made as soon as possible, we find that the decision as to petitioner's inability to care for his children with intensive long-term assistance was given the appropriate effort. This is especially true in light of the fact that petitioner willfully refused to comply with the simple terms of his improvement period and instead chose to value pets above the safety and well-being of his children.

Because of petitioner's unwillingness to follow through with the family case plan in this matter, the circuit court correctly concluded that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, per the terms of West Virginia Code § 49-6-5(b)(3). As such, the circuit court was completely within its discretion to move to disposition. Further, this Court has held that "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights

where it appears that the welfare of the child will be seriously threatened.' Syllabus point 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 Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). As noted above, petitioner refused to comply with the terms of his improvement period, and the prognosis for his ability to improve was not positive, even with long-term services. For these reasons, the circuit court was within its discretion to terminate petitioner's parental rights, based upon the best interest of the child.

This Court reminds the circuit court of its duty to establish permanency for the children. 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 children within eighteen months of the date of the disposition order. As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings[1] 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).

[1]Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

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: February 13, 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