STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In the Interest of: M.M. Jr., S.M., E.M., A.M., and B.M.:

No. 11-1018 (Mercer County 09-JA-123 through 126 & 11-JA-36-WS)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein Petitioner Father's parental rights were terminated. This appeal of the order terminating Petitioner Father's parental rights was timely perfected by his counsel Gerald Linkous, with Petitioner Father's appendix accompanying the petition. The children's guardian ad litem, Julie Lynch, filed her response on behalf of the children. The Department of Health and Human Resources ("DHHR"), by its attorney Thomas Berry, filed a response joining in the guardian ad litem's response.

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 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.' 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 instant petition was filed after the subject children's mother, who is the Petitioner Father's wife, gave birth to A.M. At A.M.'s birth, the subject children's mother tested positive for methadone and A.M. had health problems and was considered a "high risk infant." At adjudication, Petitioner Father and the children's mother stipulated to neglecting the subject children due to substance abuse problems and thereafter, the circuit court granted the parents post-adjudicatory improvement periods. At the parents' review hearings, the circuit court received reports of their noncompliance with services, including visitation, and stressed to them the importance of making

improvements. Petitioner Father began to comply with his treatment plan and the circuit court extended his improvement period, during which another child, B.M., was born in December of 2010. The parents waived the preliminary hearing for B.M. and upon adjudication for B.M., B.M.'s case joined those of Petitioner Father's other children. At the February 11, 2011, review hearing, Petitioner Father admitted a recent relapse into substance abuse. He later entered a treatment program, completed it, and was enrolled in another one at time of disposition. At disposition of all children, the circuit court considered testimony from caseworkers who worked with Petitioner Father and testimony from Petitioner Father. Caseworkers testified that Petitioner Father missed several appointments and services due to drug use and did not begin treatment until shortly before disposition. Petitioner Father admitted that he had missed appointments due to drug abuse, but that he has been clean for a month and a half. Consequently, the circuit court found that both parents made little progress, were noncompliant with services, continued to use drugs throughout the proceedings, and fell into relapse during treatment. In light of these circumstances, the circuit court found that it was necessary for the children's welfare to terminate Petitioner Father's parental rights. It is from this order that Petitioner Father appeals.

On appeal, Petitioner Father argues that the circuit court erred in finding that Petitioner Father was not entitled to any more improvement period time concerning B.M. because Petitioner Father had no more improvement period time left in the other children's cases. Petitioner Father asserts that each child in an abuse and neglect case is treated as a separate case with a family case plan to address each child and a child case plan for each child is filed individually, even if services for each child will be the same for all children in the family. Therefore, he asserts that a parent should have an improvement period for each child. He argues that under West Virginia Code § 49-6-12(c)(4), a criterion for granting a dispositional improvement period is finding that the parent has experienced a substantial change in circumstances. Here, Petitioner Father has completed one drug treatment program and is currently in another. The circuit court erred in failing to find that Petitioner Father has not shown that he is likely to participate in an improvement period and therefore, erred in failing to grant an improvement period with respect to B.M.

The guardian ad litem responds, contending that Petitioner Father's argument that each child warrants a separate improvement period is inconsistent with the plain language of the West Virginia Code. Rather, improvement periods are granted to, and for the benefit of, the respondent parents. A parent's Family Case Plan identifies problem areas that a parent must correct to successfully complete the improvement period for reunification. Allowing an improvement period for each child would lead to the possibility of parents having a new child every year and resulting in improvement periods going on indefinitely, which would be contrary to the West Virginia Code. Strict statutory time frames are stressed for children to obtain permanency within those guidelines. The Court agrees. It is within the circuit court's discretion to grant an improvement period within the applicable statutory time requirements, which it did. At B.M.'s birth, Petitioner Father was under an extension of his improvement period. The circuit court continued the original adjudicatory hearing for B.M. and stated on the record that it would consider any progress made by the parents before the adjudicatory/dispositional hearing for B.M. and the dispositional hearing of all children. At adjudication of B.M. and disposition of all children, the circuit court made findings that Petitioner

Father had not made the necessary progress for reunification. The circuit court was not required to restart a new improvement period for Petitioner Father once B.M. was born and joined into the case. The circuit court did not err in not granting Petitioner Father more improvement period time with respect to child B.M.

Petitioner Father also argues that the circuit court erred in terminating his rights to his first four children because it could have entered a less-restrictive disposition. He argues that because he should have been granted an improvement period for B.M., the circuit court should have also placed the other children in their existing placements for a "specified time" under West Virginia Code § 49-6-5(a)(5)(D)(i) as the duration of the improvement period for B.M. This disposition would have kept the first four children's cases within the statutory time frames. Accordingly, Petitioner Father would then have been given a chance to complete his current drug rehabilitation program and maintain his parental rights.

The guardian ad litem responds, arguing that although Petitioner Father's argument would certainly benefit himself, it would not benefit the subject children or serve their best interests. The circuit court had already exhausted all the statutory time available to work on reunification. Petitioner Father had eighteen months to improve and his entrance into the substance abuse programs was too late. The subject children have been raised by caregivers who they perceive as parents and have already waited two years in vain for their father to assume his parental responsibilities. The guardian ad litem argues that the circuit court's order was consistent with the children's best interests and should be affirmed.

A review of the appendix reflects the testimony and the Petitioner Father's history that the circuit court considered in terminating Petitioner Father's parental rights. Due to the Petitioner Father's noncompliance with services throughout the proceedings and overall minimal improvement, the circuit court concluded that the welfare of the children necessitated terminating Petitioner Father's parental rights. Under the circumstances, the Court finds that the circuit court did not abuse its discretion and did not commit error in this decision.

This Court reminds the circuit court of its duty to establish permanency for M.M. Jr., S.M., E.M., A.M., and B.M. 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 M.M. Jr., S.M., E.M.,

A.M., and B.M. within eighteen months of the date of the disposition order.[1] 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 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: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman

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[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.