STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.N.

No. 11-1078 (Marion County 10-JA-94)

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein Petitioner Father's parental rights to his child, J.N., were terminated. The appeal was timely perfected by counsel, Holly D. Turkett, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, has filed its response. The guardian ad litem, Frances C. Whiteman, has filed her response on behalf of the child. Petitioner has filed individual reply briefs in regard to each 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.

On appeal, petitioner argues that the circuit court erred in denying his motion for a post-adjudicatory improvement period because he proved by clear and convincing evidence that he was likely to fully participate as required by West Virginia Code § 49-6-12. Petitioner argues that he requested that services be provided at a January multidisciplinary team ("MDT") meeting, and further initiated his own services when the DHHR denied his request. Because he stipulated to the allegations below, petitioner argues that he acknowledged that the problem needed to be corrected, and he further sought to achieve the same by seeking anger management treatment. Additionally, petitioner argues that the circuit court erred in terminating his parental rights where less restrictive alternatives existed. He argues that termination was error because there was a reasonable likelihood that he could correct the conditions that led to the petition's filing, and because termination was not in the child's best interest. Citing West Virginia Code § 49-6-5 and associated case law, petitioner argues that termination of parental rights is the most drastic remedy at disposition, and that the circuit court erred in implementing that disposition without affording him an opportunity to correct the issues that led to the petition's filing.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. She argues that denial of an improvement period was appropriate because petitioner refused to be honest during the action below, lying to his counsel, the MDT, and his anger management therapist about his continued relationship with Respondent Mother, despite a protective order in place prohibiting such contact due to domestic violence. Further, the guardian argues that,

after having received no benefit from services in a prior abuse and neglect matter, it was evident that there were no additional services that the DHHR could recommend to petitioner to make him stop lying and to resolve the conditions of abuse and/or neglect that led to the removal of the child. As to petitioner's second assignment of error, the guardian states that termination was in the child's best interest, as visitation had previously been terminated because of the significant negative impact on the child, who would cry and scream uncontrollably during the visits. Because petitioner had already failed to benefit from services, it was clear that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future.

The DHHR mirrors the guardian's response, arguing that taking the prior abuse and neglect matter into consideration, petitioner had almost two years to remedy his tendency of violence, but failed to even begin to take steps to remedy the same until March of 2011. Further, even after he showed initiative to attempt to correct these issues, petitioner continued to fail to acknowledge the problems that needed to be corrected, and did not present with the genuine attitude of repentance necessary to effectuate change as evidenced by his continued dishonesty. The DHHR cites to petitioner's in-home service provider's testimony that there were no further services to help resolve these issues, and argues that petitioner offered no new information as to how these same services would offer any greater benefit to him. The DHHR cites petitioner's prior history of two domestic violence convictions in 1998, and a prior abuse and neglect matter in 1999 to argue that petitioner has exhibited a long pattern of problems. As such, both denial of an improvement period and termination of petitioner's parental rights were appropriate.

In his reply, petitioner cites to inaccuracies in the DHHR's response, including the fact that he requested services earlier than the DHHR claims, and further that he also sought services on his own initiative. Further, petitioner states that he admitted that he committed domestic violence at both the first MDT meeting in this matter and at the adjudicatory hearing, contrary to the DHHR's assertion that he failed to acknowledge the problems that needed correcting. Petitioner also argues that he initiated anger management services, which were wholly new to him and contradicts the DHHR's assertion that there were no new services available to petitioner. In his reply to the guardian's response, petitioner argues that his continued relationship with Respondent Mother is not sufficient grounds to deny an improvement period or terminate his parental rights, and further that he admitted to this relationship in open court. Petitioner also testified as to his dishonesty with the MDT about this relationship, and he argues that other allegations of dishonesty are not accurate.

"'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 had been dishonest throughout the proceedings with both the MDT and his anger management therapist, including dishonesty about his continued relationship with Respondent Mother, the Respondent Mother's role in the domestic violence incident, and his arrest for violating a domestic violence protective order. The circuit court also considered an in-home service provider's testimony regarding termination of services for petitioner because the provider did not know what more he could offer petitioner. Of further concern to the circuit court were petitioner's visitations with the child, during which she "wail[ed] and cr[ied] at the top of her lungs," indicating the visits were very traumatic for her and necessitating termination of visitation for petitioner. In short, the circuit court found that "[t]here is no reasonable likelihood that the conditions of neglect or abuse [could] be substantially corrected in the near future, and compelling circumstances of domestic violence and continued dishonesty justif[ied] denial of such improvement period."

The Court notes that improvement periods are not mandatory and are granted at the circuit court's discretion per West Virginia Code § 49-6-12. 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, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syllabus point 1, *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). Clear from the record is the fact that the welfare of the child was seriously threatened by continued contact with the petitioner, based upon the pattern of domestic violence he exhibited and also the detrimental effect that such violence had on the child when in petitioner's presence. The Court finds that the child at issue is of the age the above language was intended to protect, being less than two years old at disposition. Further, it is clear that petitioner failed to satisfy his burden of clear and convincing evidence that he was likely to fully participate in an improvement period, as evidence by his inability to appropriately parent his child after extensive DHHR services and involvement. For these reasons, the circuit court did not abuse its discretion in denying petitioner an improvement period.

As to petitioner's second assignment of error, the circuit court correctly found that there was no reasonable likelihood that petitioner could substantially correct the conditions of abuse and/or neglect in the near future due to petitioner's failure to be honest during the proceedings and the fact that his testimony concerning the change in his attitudes and beliefs was not credible, "given the length of time that he . . . had to improve his situation and take responsibility for his actions, be honest to the MDT, and seek the appropriate domestic battery counseling." This Court has held that "'[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va.Code [§] 49–6–5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood

under W. Va.Code [§] 49–6–5(b) (1977) that conditions of neglect or abuse can be substantially corrected.' Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 5, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). The circuit court determined that petitioner either willfully refused or was unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to his care, custody, and control as set forth in West Virginia Code § 49-6-5(b)(2), and further that he did not respond to or follow through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child as set forth in West Virginia Code § 49-6-5(b)(3). For these reasons, we find that the circuit court's termination of petitioner's parental rights was proper.

This Court reminds the circuit court of its duty to establish permanency for the child. 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 child 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 Procedure 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).

For the foregoing reasons, we find no error in the decision of the circuit court to deny

---

[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.

petitioner an improvement period, and the termination of petitioners's 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