STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.C., A.C., A.C., and A.C.

No. 11-1088 (Berkeley County 09-JA-71 thru 74)

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 Berkeley County, wherein Petitioner Father's parental rights to his children, A.C., A.T.C., A.M.C., and A.N.C., were terminated. The appeal was timely perfected by counsel, Michael D. Thompson, 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, William P. Young, has filed his response on behalf of the children. Petitioner has also filed a reply brief.

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 asserts three assignments of error. To begin, he argues that the circuit court erred by allowing a Virginia probation officer to testify telephonically as a DHHR rebuttal witness. Petitioner argues that this decision deprived him of procedural due process of law under both the Fourteenth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution. This witness testified at disposition concerning petitioner's repeated drug screen failures, and petitioner argues that this testimony was highly prejudicial. Petitioner also argues that such telephonic testimony is generally not permitted by most courts because it deprives the court of the ability to observe the demeanor and deportment of the witness. Petitioner next alleges that the circuit court erred in denying him an improvement period based upon the finding that he failed to demonstrate by clear and convincing evidence that he was fully likely to participate in the same. Petitioner argues that the imposition of the clear and convincing burden of proof as found in West Virginia Code § 49-6-12(b) is a fundamentally unfair procedure and was again a deprivation of his due process rights under the state and federal constitutions. Lastly, petitioner argues that the circuit court erred in finding that the DHHR made reasonable efforts to achieve reunification, and that the evidence does not support such finding. Specifically, he argues that the DHHR made minimal efforts to provide appropriate services below, and that the circuit court's July 21, 2010, order does not appropriately recite the efforts put forth as required by West Virginia Code § 49-6-5.

The guardian ad litem has responded, arguing in favor of affirming the circuit court's decision. He argues that the probation officer's testimony did not concern a dispositive issue, that

the circuit court did not rely on the testimony in making its rulings, and that there would be sufficient evidence to justify the circuit court's findings even if the testimony were not considered. In short, the probation officer was called to rebut petitioner's assertion that his probation was revoked because the DHHR reported his positive drug screens to the probation officer, and this issue is trivial, at best, in the grand scheme of the proceedings below. The guardian further argues that West Virginia Code § 49-6-12 is constitutionally sound under both the United States and West Virginia Constitutions, and meets the due process standards set forth in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). The guardian notes that petitioner focuses on his fundamental liberty interest in custody of his children, while wholly ignoring the corresponding liberty interest of the children involved. According to the guardian, the parental rights in a child custody matter are subordinate to the interests of the child, per this Court's holding in *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989). Further, petitioner's reliance on Supreme Court precedence is misplaced because the authorities he relies up concern adjudication in abuse and neglect proceedings. Lastly, the guardian argues that petitioner's characterization of the DHHR's efforts minimizes both those efforts and also the petitioner's role in having his parental rights terminated. Petitioner testified that he understood that he was required to make daily call-ins and report for drug screening when directed, but then also testified that the safety plan requiring the same was voluntary and that he could simply choose not to appear for such screens. Further, the guardian cites to petitioner's testimony in which he stated that he did not recognize he had a drug problem until approximately one week after the series of dispositional hearings began.

The DHHR also supports termination below, arguing that allowing petitioner's probation officer to testify telephonically was not error because concerns regarding observation during testimony are less important in instances where the witness is an officer of the court. The circuit court reviewed the particular circumstances of the case, and the nature and purpose of the witness in determining that the testimony should be permitted, and the same should not constitute error according to the DHHR. As to petitioner's second assignment of error, the DHHR argues that the statute in question is not a violation of petitioner's due process rights because West Virginia's abuse and neglect procedures first require the State to prove by clear and convincing evidence that the child has been abused or neglected, and then later require the State to satisfy that same burden to achieve termination of parental rights. This burden shifting scheme balances the parent's rights with the rights of the innocent child to be free from abuse and neglect. Lastly, the DHHR argues that the petitioner fails to illustrate how he attempted to alleviate any of the problems of confusion to which he cites concerning the DHHR's efforts to achieve reunification, and also cites to no evidence showing his attempts to participate in those services. Throughout the proceedings, petitioner made little to no effort to overcome his serious drug addiction, the consequences of which rendered him incarcerated.

In reply, petitioner argues that the probation officer in question was not an officer of any West Virginia court, and that the cases upon which the DHHR relies are not applicable to the instant matter. In short, he argues that the impact of this testimony was to impeach his credibility on the issue of whether he would fully participate in an improvement period, and that allowing the same telephonically constitutes error and deprivation of his due process rights. Petitioner also argues that

the best interests of children in West Virginia might be better served if a parent had a lesser burden of proof in obtaining an improvement period, and goes on to distinguish his case from the cases upon which the DHHR relies. Lastly, the petitioner argues that the DHHR relies on cases involving parents who were granted improvement periods, and that the same parental responsibility to initiate services is not applicable to the instant matter because the circuit court was not monitoring the services provided on a regular basis to see if progress was being made.

"'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 his severe drug addiction impaired his ability to appropriately care for his children, two of whom have special medical needs. The record indicates that the initial petition was filed because of the petitioner's inability to care for the children with cystic fibrosis, as evidenced by his repeated failures to transport the children to medical appointments or to properly outfit them with special vests necessitated by their condition. It was noted below that the children suffering from cystic fibrosis were required to wear a special vest once a day, every day, and that if the same was not used as directed, then the children's lives were threatened. At disposition, the circuit court found that petitioner "continue[d] to use drugs and has been a drug addict who has engaged in continuous drug use for six years" before terminating his parental rights.

As to petitioner's first assignment of error, the Court declines to disturb the circuit court's decision to allow the Virginia probation officer to testify at disposition via telephone. It is clear upon review of the appendix that the probation officer was called specifically to rebut petitioner's claims that his probation was revoked based upon DHHR notification to the probation officer, and we find that petitioner was in no way prejudiced by this decision. Based upon our review, we find that if any error did occur, the same amounts to harmless error because it is apparent that sufficient evidence existed absent the probation officer's testimony upon which to both deny petitioner an improvement period and also terminate his parental rights.

As to petitioner's second assignment of error, 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. For this reason, we decline to disturb the circuit court's decision to deny petitioner an improvement period, as the appendix supports the finding that petitioner failed to satisfy his clear and convincing burden. 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 Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996)." *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010). Clear from the record is the fact that petitioner failed to acknowledge the underlying problem, i.e that his drug addiction was causing medical neglect of the children. As noted above, petitioner testified that he was not aware he had a problem with drugs until his probation was revoked, and further that he was unaware that his drug abuse would need to be resolved in order for him to be reunited with his children. This is in spite of the fact that petitioner was required to provide drug screens throughout the proceedings, and that both the petition and amended petition below clearly indicated that drug abuse and medical neglect were the basis thereof. Based upon petitioner's failure to acknowledge the neglect problem herein, namely drug abuse causing medical neglect, it is clear that petitioner failed to satisfy the clear and convincing burden necessary for an improvement period.

The Court further rejects the petitioner's challenge to the constitutionality of West Virginia Code § 49-6-12 in this context. As petitioner accurately stated, the United States Supreme Court of Appeals has held that parents have a fundamental liberty interest in the care, custody, and management of their children. *See Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). As this Court has addressed, such interest "cannot be terminated under the due process clause upon less than a 'clear and convincing' evidence standard." *State ex rel. W.Va. Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 691, 356 S.E.2d 181, 184 (1987) (citing *Santosky, supra*). Because of the substantial interest parents have in the custody of their children, the clear and convincing burden is imposed upon the DHHR at both adjudication and disposition. However, parents are not entitled to improvement periods, and we decline to find that a due process violation occurred in this matter by requiring petitioner to meet the clear and convincing burden when requesting the same.

Lastly, the Court declines to find that the evidence below does not support the finding that the DHHR made reasonable efforts to achieve reunification in this matter as required by West Virginia Code § 49-6-5. The circuit court's findings in this regard were not clearly erroneous. To begin, it is undisputed that the DHHR was involved with petitioner through a pre-petition safety plan before the abuse and neglect proceedings were ever initiated. This plan provided petitioner services related to his drug abuse and medical neglect, including random drug screens. The DHHR additionally provided services throughout the pendency of the abuse and neglect proceedings below, and it is undisputed that a referral was made to an outside contractor to provide petitioner with transportation services, supervision of visits with the children at issue, and also individualized parenting training and life skills training. What is also clear from the record is petitioner's overall non-compliance with the services offered.

Petitioner testified that he thought his involvement in the pre-petition safety plan was voluntary, and that he was therefore excused from the requirements of calling the DHHR daily and reporting for drug screens when directed. Further, there is evidence that from January of 2010

through disposition, petitioner was required to call-in for drug screens on 127 days, and that he made those required calls on only twenty-seven days. The evidence also established that petitioner was required to provide thirty drug screens, but only appeared for one such screen. Petitioner admits that he failed to complete an out-patient drug program, though he asserts that his participation was involuntarily ended when his medical card was revoked by the DHHR. The record is devoid, however, of information regarding petitioner contacting anyone at the DHHR to obtain assistance in obtaining a new medical card so as to complete this rehabilitation. The record is further devoid of any evidence that petitioner attempted to contact the DHHR concerning alleged delays in the initiation of services. Further, the evidence established that petitioner was required to undergo a substance abuse evaluation and was provided the necessary contact information to arrange for the same, yet never completed the evaluation. Lastly, the DHHR never received any documentation as to petitioner's required attendance at either Alcoholics Anonymous or Narcotics Anonymous. For these reasons, we find that the DHHR did make the reasonable efforts to achieve reunification as required by West Virginia Code § 49-6-5, and the circuit court's finding on this issue is not clearly erroneous. As to petitioner's allegation that the circuit court failed to list the services provided as required by West Virginia Code § 49-6-12, the Court finds that the series of dispositional orders contains a thorough summary of the testimony provided during disposition, and that the same includes a listing of services provided as required by that statute.

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

[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.

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 allow a Virginia probation officer to testify telephonically, to deny petitioner an improvement period, or in finding that the DHHR made reasonable efforts to achieve reunification of the family, 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