STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.K. and J.K.

No. 11-1102 (Kanawha County 11-JA-37 & 38)

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 Kanawha County, wherein Petitioner Father's parental rights to his children, B.K. and J.K., were terminated. The appeal was timely perfected by counsel, Edward L. Bullman, with petitioner's appendix from the circuit court accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Jennifer R. Victor, 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 when Respondent Mother was retaining custody. He argues that the circuit court erred by failing to adopt the least restrictive alternative at disposition, as it could have simply terminated his custodial rights and left the question of future contact between petitioner and his children to be determined by a family court. He argues that this alternative would have provided the children with permanency of placement, but would have also allowed him to later demonstrate that contact would be in the children's best interest. As it stands, petitioner is foreclosed from demonstrating his ability to improve because he has been incarcerated for the abuse with no programs of rehabilitation available until after sentencing. Petitioner also alleges that it was error for the circuit court to deny him post-termination visitation, because no evidence was adduced that the same would be harmful to the children. He argues that post-termination visitation should have been left to the discretion of the care providers and the children, and not completely foreclosed by the circuit court.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. She argues that at disposition, the petitioner continued to deny and minimize the behavior that resulted in his child's serious injuries and provided no reasonable explanation that was consistent with the medical evidence. Petitioner has a long history of domestic violence with his ex-wife and their two children, and also with Respondent Mother and their two children. According to the guardian, the petitioner continued to violate the terms of a restraining order from jail by contacting Respondent Mother. Petitioner was not able to participate in an improvement period because of

incarceration, but even if he had not been in jail, his unwillingness to acknowledge his violent behavior and the tragic consequences would have precluded such improvement period. As to post-termination visitation, the guardian argues that such visits are not the right of the parent, but of the child. She further argues that strong emotional bonds take years to develop, and post-termination visitation is therefore more appropriate for older children. In the instant matter, petitioner demonstrated that such visitation would not be in the children's best interests by his unwillingness to abide by the rulings regarding contact with his family. The guardian argues that on his release, petitioner should not be allowed to harass the children and Respondent Mother with repeated demands for custody, contact or visitation, especially in light of his violent behavior and admitted drug use. The DHHR has also responded, and fully agrees, consents, and joins in the guardian's response.

"'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 matter was initiated based upon the following severe injuries to B.K., then seven weeks old: subdural hematomas; skull fracture in the left parietal area; right clavicle fracture; and, radius and ulna fractures in the left arm. Medical evidence indicated that the injuries appeared to be in various stages of healing. Further, termination was ordered following petitioner's adjudication as abusive based upon these injuries, his abuse of illicit drugs, and also instances of domestic violence in the home. Most importantly, however, the circuit court found at disposition that petitioner "continued to deny and minimize his behavior [and] provided no reasonable explanation for [the child's] injuries that was consistent with the medical evidence." As such, the circuit court found that petitioner demonstrated an inadequate capacity to solve the problems of abuse and neglect on his own, or with help, and that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future.

West Virginia Code § 49-6-5(a)(6) states, in relevant part, as follows:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, [a circuit court may] terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to

> either the permanent guardianship of the department or a licensed child welfare agency.

As defined in West Virginia Code § 49-6-5(b)(5), no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future shall be considered to exist when "[t]he abusing parent . . . [has] . . . seriously injured the child physically . . . , and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child." Based upon the evidence before the circuit court, it is clear that the circuit court was correct in terminating petitioner's parental rights because of its finding that petitioner's serious physical abuse of the child on multiple occasions constituted a situation in which there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. Petitioner's assignment of error asks, in essence, for an indefinite improvement period that would allow him to demonstrate an improved capacity to care for his children at any time in the future. Such a request is incongruent with the applicable statutes, the Rules of Procedure for Child Abuse and Neglect Proceedings, and our prior holdings on the matter.

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). The record shows that the injured child was an infant at the time of the injuries, and his sibling was not even three years old at that time. As such, these children are of the age the above-quoted holding was intended to protect. Therefore, we find that the circuit court's termination of petitioner's parental rights was proper, as the children's best interests required the same.

As to petitioner's second assignment of error, we find no merit in his argument that no evidence was presented concerning post-termination visitation being detrimental to the children. Petitioner has a history of past domestic violence, and even violated a domestic violence protective order while incarcerated by contacting Respondent Mother. Based upon his violent history and the severe nature of the injuries he inflicted upon B.K., the circuit court even went so far as to implement a restraining order barring petitioner from being within 1,000 feet of his children. As such, it is unreasonable for petitioner to now request that post-termination visitation be left to the discretion of Respondent Mother or the children. This Court has held as follows:

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of

> appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 5, *In re Austin G.*, 220 W.Va. 582, 648 S.E.2d 346 (2007). Based upon all of the foregoing, it is clear that the circuit court did not abuse its discretion in denying petitioner post-termination visitation, and the Court declines to disturb this decision on appeal.

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).

For the foregoing reasons, we find no error in the decision of the circuit court to deny petitioner post-termination visitation, and the termination of petitioner's parental rights is hereby affirmed.

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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.

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