STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: K.M., D.C., and J.C.:

No. 11-1140 (Taylor County 10-JA-6, 7 & 8)

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Taylor County, wherein Petitioner Father's parental rights were terminated by order entered on May 18, 2011. This appeal was timely perfected by Petitioner Father's counsel, Heidi Georgi Strum, with an appendix accompanying his petition. The children's guardian ad litem, Mary Nelson, filed a response on behalf of the children, along with a supplemental appendix. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response.

This Court has considered the parties' briefs and the appendices on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendices 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 appendices 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 criminal hearing transcripts revealed that the children's mother had testified that she had been ordered to stay away from her husband, Petitioner Father, but failed to do so. As a result, she suffered injuries to her wrist and teeth in a domestic violence incident with Petitioner Father. After the abuse and neglect petition was filed, subject children K.M., D.C., and J.C. were placed with their maternal grandmother. At the preliminary hearing, Petitioner Father failed to appear and the children's mother was absent because she was incarcerated.

At the adjudicatory hearing in July of 2010, the circuit court considered testimony presented by the children's mother, the children's maternal grandmother, Petitioner Father's sister-in-law, and the two oldest subject children. The witnesses provided corroborating testimony that Petitioner Father and the children's mother were physically and verbally abusive toward each other; abused drugs such as marijuana, cocaine, heroine, and suboxone; and at times, engaged in such conduct in front of the children. For instance, there was testimony that during a past argument, Petitioner Father had hit the children's mother in the stomach, causing a miscarriage; that Petitioner Father choked his sister-in-law; and that the children smelled marijuana behind closed doors and witnessed Petitioner Father snorting white powder. The court considered these accounts in contrast to Petitioner Father's own testimony, in which he denied abusing his wife, denied calling her names, denied abusing drugs, and denied engaging in any of these actions in front of their children. In particular, when asked about the children's mother's injuries to her wrist and teeth, Petitioner Father denied that grabbing his wife had caused these injuries; when asked about the miscarriage, Petitioner Father denied that it occurred; and when asked about choking his sister-in-law, Petitioner Father failed to take full responsibility for this, stating that he "guess[ed]" it happened. Throughout Petitioner Father's testimony, the circuit court observed he was wringing his hands, shaking, and digging at his legs in a manner consistent with that of drug abusers. The circuit court found that due to the parents' domestic violence and drug abuse, there were no available alternatives less drastic than removing the subject children from the home. Consequently, the circuit court ordered random drug screens and for the Multi-Disciplinary Team ("MDT") to meet before disposition, but did not grant Petitioner Father either an improvement period or visitation. The circuit court further admonished Petitioner Father regarding his aggression, including toward court personnel, his continued drug abuse, and continued contact with his wife. The circuit court also observed that eleven counts of animal cruelty against Petitioner Father were pending for trial in a neighboring county.

At the dispositional hearing in April of 2011, the circuit court considered testimony from Dr. Dana Morton of Valley Health Care; Dr. William Fremouw of Fremouw-Sigley Psychological Associates, PLLC; Tammy Narog, Director of the Community Corrections Program; and Petitioner Father. Testimony indicated that Petitioner Father continued to accept little responsibility for his actions involved with the domestic violence, drug abuse, and anger management issues. For instance, Petitioner Father's self-report submitted to Dr. Fremouw indicated that he identified himself as a non-substance abuser. Dr. Fremouw further provided his expert opinion that Petitioner Father had a "minuscule likelihood of remediating the [c]ourt's prior findings of abuse and neglect" and that despite recommendations for Alcoholics Anonymous and Narcotics Anonymous meetings, Petitioner Father failed to attend any until January of 2011 and then did so only sporadically. Ms. Narog testified that there were times when Petitioner Father had diluted drug tests and exhibited behavioral problems to the level that raised enough concerns that she almost called the sheriff's department. The circuit court found that Petitioner Father continued to contact the children's mother, despite orders to not do so; continued to use suboxone; had entered two no contest pleas to animal cruelty; and had not addressed the issues that gave rise to the abuse and neglect case and that he is unlikely to address these issues. Consequently, the circuit court found that the children's continuation in the home of Petitioner Father would be contrary to their welfare and the circuit court terminated Petitioner Father's parental rights, without visitation. It is from this order that Petitioner Father appeals, arguing

four assignments of error.

First, Petitioner Father argues that the circuit court erred in considering the guardian ad litem's recommendation for termination because the guardian ad litem failed to fulfill her duties and failed to consider the children's best interests in her recommendation. Petitioner Father argues that his children's love for him should have been considered. The guardian ad litem argues that she complied with the guidelines provided in Appendix A of the case *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), in which the Court adopted the "Guidelines for Guardians *Ad Litem* for Abuse and Neglect Cases." These guidelines provide directives to guardians ad litem such as interviewing the subject children, their caseworkers, and their caretakers; filing timely and appropriately motions for status, review hearings, psychological exams, et cetera; subpoenaing witnesses for testimony and preparing accordingly; and participating in any discussions regarding the proposed testimony of the subject children. DHHR responds that even if the record did support a desire by the children to be with their father, the guardian is not required to consider preferences from children under fourteen years old, pursuant to West Virginia Code § 49-6-5(a)(6)(C). The Court finds that the guardian fulfilled her duties in this case. Here, the appendix reflects that, pursuant to the "Guidelines for Guardians *Ad Litem* for Abuse and Neglect Cases," the guardian ad litem here brought forth several witnesses at the adjudicatory and dispositional hearings, prepared the subject children for in-camera testimony, and overall, has thoroughly involved herself with the children in considering their best interests. The circuit court did not abuse its discretion in agreeing with her recommendation for terminating Petitioner Father's parental rights. The Court finds no error here.

Second, Petitioner Father argues that he should have received improvement periods throughout this case. Petitioner Father asserts that had he been given improvement periods, he would have complied with services and would have likely remedied the issues relating to drug use, domestic violence, and anger management. The guardian and DHHR respond, contending that Petitioner Father's arguments are merely conclusive and lack support. The guardian argues that Dr. Fremouw testified that Petitioner Father lacks empathy, fails to see his own problems with anger, lacks insight concerning his personality disorder, and felt that substance abuse was only his wife's problem. Dr. Fremouw also testified to Petitioner Father's dishonesty in self-reports and opined that there was a "minuscule likelihood" of remedying the abuse and neglect. Further, Petitioner Father only went to eight Narcotics Anonymous meetings since January of 2011 and did not comply with the directives of the Multi-Disciplinary Team ("MDT"). The guardian further notes that the Court has held as follows:

> 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.

In re Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010) (quoting *W. Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)). DHHR also responds, arguing that an improvement period is not mandatory and that, pursuant to

West Virginia Code § 49-6-12, the subject parent has the burden of proving by clear and convincing evidence that he or she would substantially comply with an improvement period. DHHR further reiterates that Petitioner Father has not taken responsibility for the fear and sorrow he has inflicted upon his children and he was not any closer to changing his life at disposition than he was in prior hearings.

The Court finds no error in Petitioner Father's lack of improvement periods in this case. Although the appendix filed on appeal does not indicate whether the circuit court explicitly denied Petitioner Father an improvement period, the appendix supports that the standard for granting an improvement period was not met in this case. Respondent parents are not unconditionally entitled to an improvement period. *In re: Charity H.*, 215 W.Va. 208, 216, 599 S.E.2d 631, 639 (2004). Where an improvement period would jeopardize the best interests of the child, it will not be granted. *Id.* Parents bear the burden of proof in proving that an improvement period is appropriate. *State ex rel. Virginia M. v. Virgil Eugene S. II.*, 197 W.Va. 456, 461, 475 S.E.2d 548, 553, n.9 (1996). Here, the appendix reflects that the circuit court found that Petitioner Father failed to acknowledge his problems with drug abuse, domestic violence, or engaging in either in front of his children. Moreover, at disposition, the circuit court found that Petitioner Father "has not responded to or follow[ed] through with the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning." At a number of the review hearings, the circuit court found that Petitioner Father was still using drugs, and that Petitioner Father continued to contact the children's mother despite court orders to not do so. Throughout the case, Petitioner Father failed to take responsibility for his actions and failed to show that he would make positive changes with his children in an improvement period. Petitioner Father did not acknowledge his issues and did not show by clear and convincing evidence that he could have substantially complied with an improvement period. The Court finds no error in Petitioner Father's lack of improvement periods in this case.

Third, Petitioner Father argues that the circuit court erred in denying visitation with his children throughout the proceedings and following termination of his parental rights. Petitioner Father argues that he was never given the opportunity to demonstrate that he was able to appropriately care for, and interact with, his children. The guardian and DHHR respond, contending that the circuit court did not err in denying visitation. They both assert that the evidence supports this denial, raising Petitioner Father's lack of responsibility for his actions, aggression toward circuit court personnel, and ongoing use of threats and intimidation to control others.

The Court finds no error in denying Petitioner Father visitation with the subject children. The 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. 8, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. Pt. 8, *In re: Charity H.*, 215 W.Va. 208, 599 S.E.2d 631 (2004). The appendix reflects that the circuit court considered the history of Petitioner Father's case, his drug abuse, domestic violence, lack of anger management, and failure to accept responsibility for these issues. The circuit court considered testimony presented at adjudication and disposition, including testimony presented by two of the subject children during an in-camera hearing. Based on these considerations and of the circumstances of the case, the circuit court concluded that Petitioner Father was to have no form of visitation with the subject children. Given these considerations and the children's best interests, the circuit court did not abuse its discretion in denying visitation.

Lastly, Petitioner Father argues that the circuit court erred in denying him of any services during the course of this abuse and neglect case. In particular, Petitioner Father argues that he should have received services in adult life skills, individualized parenting skills, drug and alcohol counseling, anger management, domestic violence counseling, or supervised visitation. Petitioner Father argues that had he been provided such services, he would have fully cooperated. The guardian and DHHR respond, indicating that his argument that he did not receive services is inaccurate. They both note that Petitioner Father received a psychological evaluation, counseling, and drug screens. Petitioner Father was noncompliant with drug screens and did not take advantage of counseling services. Further, both the guardian and DHHR highlight that Petitioner Father failed to acknowledge his issues and failed to take responsibility for his actions in the abuse and neglect of his children. The Court has held as follows:

> "[C]ourts 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 appendix reflects that the circuit court granted Petitioner Father's requests for psychological and psychiatric examination, but denied Petitioner Father's request for drug testing in locations outside of Taylor County. Although both the psychological and psychiatric examinations were scheduled, Petitioner Father

refused to submit to the psychiatric examination. A review of the psychological examination indicates that Petitioner Father's "general approach to the evaluation was to minimize his problems while blaming most of the family problems on his wife." The circuit court ordered MDT meetings; at status review hearings, the circuit court found that Petitioner Father was continuing to use suboxone. On appeal, Petitioner Father only now makes speculations as to improvements he may have made with other services when throughout the case, he denied even having issues with drug abuse, anger management, or domestic violence. Accordingly, the Court finds no error in the circuit court's decision to deny Petitioner Father's requests for drug testing in a location outside of the Taylor County Day Report Center and to not order Petitioner Father other services.

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.[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).

[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 parental rights is hereby affirmed.

Affirmed.

ISSUED: April 16, 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