STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.S.

No. 11-1160 (Kanawha County 10-JA-232)

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 Kanawha County, wherein Petitioner Father's parental rights to his child, B.S., were terminated by order entered on July 29, 2011. The appeal was timely perfected by counsel, Jason S. Lord, with petitioner's appendix 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, Edward L. Bullman, has filed his response on behalf of the child.

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.

The instant matter was initiated based upon Respondent Mother's bizarre behaviors as a result of untreated bipolar disorder, the petitioner's admissions that he had smacked the then two-month-old child for "testing" him, and because the petitioner's home was deemed unfit for human habitation. According to the circuit court's findings of fact, the home reeked of cat urine, and dirt and cat hair were prevalent throughout the home, even in the child's bed. At disposition, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future, and further that petitioner failed to follow through with the reasonable family case plan or other rehabilitative services, as evidenced by the continuation of conditions which threatened the child's health, welfare, or life. It is from this order that petitioner appeals.

On appeal, petitioner argues that the circuit court erred in terminating his parental rights without granting him an improvement period or locating services for him in the state of Maryland, where he relocated during the pendency of the action below. Petitioner cites to our prior holdings to argue that the goal of improvement periods are to facilitate reunification when the same is in the child's best interest, and goes on to argue that he should have been entitled to an opportunity to demonstrate his ability to effectively care for his child. While acknowledging that parents are not automatically entitled to improvement periods, petitioner argues that circuit courts are required to balance the interests of natural parents, and should also grant such an improvement period when the parent demonstrates that he or she is likely to fully participate. In short, petitioner argues that without

an improvement period, he simply had his parental rights terminated with no opportunity to address his parental shortcomings. Petitioner argues that he requested post-adjudicatory improvement periods on several occasions and represented to the circuit court that he was willing to participate, but asked for assistance in obtaining services in Maryland. Despite concerns from the child's pediatrician regarding petitioner's ability to parent, as well as the circuit court's order that the DHHR was to provide services, petitioner argues that he was provided no assistance in obtaining services in Maryland. Because the DHHR failed to establish services for petitioner, and because he was unable to do so himself, petitioner argues that he was unable to show the circuit court that he would be willing and able to participate in an improvement period.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that the petitioner had the burden to establish by clear and convincing evidence that he was likely to fully participate in an improvement period, but that he failed to do so. Further, the guardian cites petitioner's non-compliance with services designed to prevent removal prior to the filing of the petition, including parenting education four days per week, adult life skills training, and crisis services. Despite these services, however, the guardian argues that during this time period, the conditions in the home actually became worse. The guardian argues that the unsanitary conditions in the home remained, and the parents became so hostile to service providers that the providers refused to go to the parents' home. Only after petitioner and Respondent Mother caused discontinuation of services because of their resistance thereto was a petition even filed. After the proceedings were initiated, the guardian argues that the parents did not visit their child after they moved to Maryland. Further, evidence was presented that both parents had mental health problems and also unrealistic ideas of child development and how to raise and care for a child. Petitioner's argument ignores the fact that extensive services were available in West Virginia, and further that he failed to provide any information about what services would be available in Maryland. In short, the guardian argues that petitioner made the decision to leave his child in the DHHR's custody and go to another state, and nothing in his conduct indicated that he would participate in an improvement period. The DHHR has also responded, and fully agrees, consents, and joins in the guardian's response. The DHHR also stresses that petitioner participated in no services in this matter, and characterizes petitioner's move to Baltimore as "fleeing" West Virginia and refusing services from the DHHR.

"'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).

As to petitioner's first 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. Petitioner cites no evidence supporting his assertion that he was likely to fully participate in an improvement period. Further, petitioner's record of non-compliance with prior services clearly indicated that he was not likely to fully participate in any improvement period offered. As noted in the circuit court's dispositional order, petitioner was so hostile to the service providers who attempted to prevent removal of the child from his home that the providers refused to return. Also noted above are the extensive services petitioner was offered prior to the filing of the petition, and the representations of the guardian that the conditions in the home actually worsened during the period services were offered. 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). Based upon this language, the Court finds that termination in this matter was proper. The child at issue was an infant, and of the tender age that the above-quoted holding was intended to protect. For these reasons, the circuit court's decision to deny petitioner an improvement period was not error, and we decline to disturb this decision on appeal.

Based upon the circuit court's findings, we further decline to disturb the circuit court's decision to terminate parental rights. 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)(3), 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] not responded to or followed 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 evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child." Based upon the evidence, it is clear that the circuit court was correct in terminating petitioner's parental rights because of his failure to follow through with any of the services offered. Further, we find no error in the DHHR's failure to set up out of state services under the facts of this case. In the case of *In re Amber Leigh J.*, 216 W.Va. 266, 607 S.E.2d 372 (2004), we recognized that the mother

therein, similar to the instant matter, "did not utilize any of the services offered to her by the DHHR, nor did she participate in the family case plan. In fact, after her children were removed from her home, [the mother] left West Virginia because her husband obtained employment in another state." *In re Amber Leigh J.*, 216 W.Va. 266, 271, 607 S.E.2d 372, 376 (2004). While the facts differ slightly in that the parents in that matter did not remain in contact with the DHHR while petitioner herein did, the fact remains that services were offered in West Virginia in both cases, and in both cases the parents failed to participate in the same. As such, we find no error in the circuit court's termination of petitioner's parental rights without directing the DHHR to locate out of state services for petitioner.

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.[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

[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.

termination of petitioner's 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