STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.M., J.P., and J.G.

No. 11-1237 (Webster County 10-JA-35, 36 & 37)

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 Webster County, wherein Petitioner Father's parental rights were terminated by order entered August 1, 2011. The appeal was timely perfected by counsel, Dennis J. Willett, with petitioner's appendix 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, Joyce Helmick Morton, 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 of Appellate Procedure.

The instant matter was initiated upon allegations that petitioner's abuse of controlled substances was affecting his judgment and ability to properly provide for the subject children's health, safety, and welfare. The DHHR visited the home and discovered drug paraphernalia and white residue on items in the home and in petitioner's nostril. Petitioner admitted to both snorting prescription medication and taking some orally. At adjudication, petitioner again admitted to snorting and ingesting prescription medication, and also admitted that he may be addicted to and/or abuse controlled substances and that the same affects his judgment and ability to properly provide for the children's health, safety, and welfare. Petitioner was thereafter granted a post-adjudicatory improvement period, but the circuit court later revoked the same and terminated petitioner's parental rights based upon non-compliance with services offered and the terms of the improvement period. At disposition, it was found that petitioner violated the terms of the improvement period in the following ways: failure to comply with Seneca Health Services and not having had substance abuse counseling for a period of three months; failure to remain drug and alcohol free, including providing positive drug screens; having had alcohol in his residence in violation of the circuit court's order; failure to establish a fit and suitable home for the children; making threats toward third parties; failure to accept responsibility for his actions and showing an attitude that he would continue to fail to comply with services; and, failure to be truthful regarding his drug use.

On appeal, petitioner alleges that the circuit court erred in terminating his parental rights, arguing that the decision was clearly erroneous. Specifically, petitioner argues that he was addicted

to controlled substances throughout the proceedings below, and that the terms of his improvement period required him to complete in-patient substance abuse treatment if deemed appropriate by the local mental health agency providing services. However, petitioner argues he was never afforded in-patient treatment, despite the findings demonstrating that his addiction was of such pronounced nature that in-patient therapy was necessary. Petitioner cites to the DHHR's attempt to extend his improvement period for an addition ninety days to allow for more services as indicative of his need for in-patient therapy to address his issues of substance abuse. Petitioner argues that the DHHR inexplicably changed its mind after seeking this extension, and instead sought termination of his parental rights. Petitioner states that no evidence was adduced to show that an extension would have been detrimental to the children, and he argues that the additional services with a view toward reunification would have actually been in their best interest. In short, petitioner states that his alleged unwillingness to address his substance abuse was controlled by his addiction, and that the addiction itself would not have hampered his ability to willingly comply.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that petitioner did initially comply with services below, but toward the end of his improvement period he fell back into the lifestyle that had led to the initiation of the proceedings. The guardian argues that the circuit court had no reason to believe that the petitioner would substantially correct the circumstances of abuse in the near future, and argues that it is most telling that petitioner has still not entered into substance abuse treatment in order to obtain rights to post-termination visitation, as the circuit court allowed for in its dispositional order. To the guardian, the decision to not seek treatment in order to obtain visitation with the children makes petitioner's priorities clear. The guardian argues that the children involved need stability and permanency, as the circuit court recognized, and further that petitioner does not have rights to either J.P. or J.G. as a biological or psychological parent. As such, the guardian argues that the best interests of these children are promoted by the circuit court's termination of petitioner's parental rights. The DHHR has also responded, and fully concurs with the guardian's response, requesting that the circuit court's ruling be affirmed.

"'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).

In the proceedings below, the circuit court found that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected. Based upon the facts and

evidence as expressed above, the Court concurs in this finding. West Virginia Code § 49-6-5(b)(1) states that circumstances in which there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected include situations in which "[t]he abusing parent . . . [has] habitually abused or [is] addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person . . . [has] not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning." In terminating petitioner's parental rights, the circuit court noted multiple violations of the terms of petitioner's improvement period, as outlined above. Most importantly, the circuit court found that petitioner continued to abuse controlled substances and had alcohol in the home. As such, because there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected, the circuit court was within its discretion to terminate petitioner's parental rights in accordance with West Virginia Code § 49-6-5(a)(6).

Despite petitioner's argument that he should have been entitled to an extension of his improvement period for additional services, the circuit court found that petitioner demonstrated an attitude that he would continue in his failure to comply with services offered. We have previously 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). As noted above, the youngest child at issue was only two years old at the time of disposition, which is of the age that the above-quoted language was intended to protect. Lastly, as the guardian correctly noted, the unlikelihood of future compliance is reflected in petitioner's subsequent failure to gain increased post-termination visitation with the children. The circuit court held in its dispositional order that petitioner "must undergo in-patient substance abuse treatment, must remain drug and alcohol free and must submit to drug and alcohol testing before the [c]ourt will consider post-termination visitation other than granted herein." There is nothing in the record to indicate that petitioner has complied with these requirements, and petitioner does not allege compliance in his petition. For these reasons, the circuit court's decision to terminate petitioner's parental rights was not error, and we decline 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, and the 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

[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.