STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: A.L. III:

No. 11-1471 (Mingo County 10-JA-23)

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 Mingo County, wherein Petitioner Father's parental rights were terminated by order entered on September 29, 2011. This appeal was timely perfected by his counsel, Marsha Webb-Rumora, with an appendix accompanying his petition. The child's guardian ad litem, Diane Carter Weidel, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of the circuit court's order.

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.

"'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 a year after a referral in October of 2009 alleged that Petitioner Father and subject child's mother and Petitioner Father's girlfriend at the time, B.R., engaged in domestic violence in front of subject child, A.L.III, and his half-siblings. By the time of the preliminary hearing in August of 2010, the parents had separated from each other and were no longer living together. At the preliminary hearing, both of the parents waived their right to a hearing. Subsequently, the circuit court found that the petition alleged that one of the children in the home, S.L., had a black eye, which the parents attributed to her falling down the steps. Mother B.R.

acknowledged that there was domestic violence in the home between herself and Petitioner Father and, at times, in front of the children. She discussed that on one occasion, Petitioner Father choked her. She further discussed that when S.L. fell down the steps, she and Petitioner Father had been arguing. In the year before the petition for this case was filed, Child Protective Services ("CPS") made unannounced visits to the residence. B.R.'s in-home service provider, Ron May, reported that on one of these visits, B.R. "exhibit[ed] unusual behavior and was extremely nervous" and that when several unknown individuals kept coming into the home, B.R. would motion for them to leave. Upon request for a drug test, B.R. tested positive for marijuana. She had expressed a concern that the test would be positive for marijuana, Lortab, and alcohol. On another occasion, the family's service provider observed Petitioner Father intoxicated. The circuit court further found that Petitioner Father had an extensive criminal history dating back to 1999 that included domestic assault convictions. Sergeant David Rockel of the Williamson Police Department reported to DHHR that local law enforcement was called to the home on several prior occasions for domestic violence issues. Upon these findings and the parents' waivers of a preliminary hearing, the circuit court found the subject child and his siblings endangered by Petitioner Father and B.R.

At the adjudicatory hearing in October of 2010, the family's case manager, Alonzo Croaff, testified that Petitioner Father denied any physical altercations with B.R. The circuit court found on the record that even though Petitioner Father completed anger management classes, the classes "didn't take" and he needed more classes. Consequently, the circuit court ordered DHHR to set him up with such classes. The circuit court denied the parents' motions for post-adjudicatory improvement periods, ordered for case plans to be filed, and set the matter for disposition in November of 2010. In November, the circuit court continued disposition and granted each parent a ninety-day improvement period. On January 25, 2011, the circuit court learned that Petitioner Father had a positive drug screen for cocaine, but extended each parent's improvement period for another ninety days, ordered in-patient rehabilitation for Petitioner Father, and again continued disposition. At disposition on May 16, 2011, the circuit court did not terminate the parents' rights. Rather, the circuit court granted a two-month post-dispositional improvement period for each parent under conditions that they complete services previously ordered by the circuit court and remain free of drugs and alcohol.

At a review hearing in August of 2011, the circuit court learned that since the dispositional hearing in May, Petitioner Father had again tested positive for cocaine and that B.R. had been in domestic altercations with a man named D.I., who had his parental rights terminated in a separate abuse and neglect case and with whom she made drug runs to Detroit, Michigan. B.R. also admitted that she allowed Petitioner Father more visitation with the subject children than the amount which was ordered by the circuit court. Consequently, DHHR moved for a supplemental dispositional hearing. At the September of 2011 supplemental dispositional hearing, the family's case manager, Alonzo Croaff, testified. With regard to Petitioner Father, Mr. Croaff testified that Petitioner Father has "complied to a point" by attending all of his visitations, court hearings, and Multi-Disciplinary Treatment Team ("MDT") meetings. At the same time, Mr. Croaff also testified that Petitioner Father denied having any problems with substance abuse or with anger management. Mr. Croaff further testified of his review of Petitioner Father's two positive drug screens for cocaine, one in

January of 2011 and the other in June of 2011. When Petitioner Father testified, he denied any issues with anger management or substance abuse. The circuit court concluded that Petitioner Father did not benefit from services, his circumstances did not improve, and it was not reasonably likely that the circumstances would improve in the future. The circuit court found that the evidence that Petitioner Father abused cocaine was credible and further found that Petitioner Father failed to enter an in-patient rehabilitation facility. Consequently, the circuit court terminated Petitioner Father's parental rights to A.L. III. It is from this order that Petitioner Father appeals.

On appeal, Petitioner Father argues that the circuit court erred in terminating his parental rights to A.L. III because he substantially improved and gave one hundred percent participation. He contends that the circuit court's decision to terminate was only based on his positive drug screen in June of 2011, to which his counsel objected based upon its reliability. Petitioner Father further asserts that the family's caseworker, Alonzo Croaff, testified that Petitioner Father complied with all of his services and that Mr. Croaff only recommended termination due to the June of 2011 positive drug screen for cocaine, admitting that he "could not testify to [its] accuracy" and could not deny that it was possible that the results could have been triggered by something else. Petitioner Father further argues that his psychological evaluation never recommended in-patient drug rehabilitation.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in terminating Petitioner Father's parental rights. The guardian points out that Petitioner Father never accepted the need for services to address his problems with anger and substance abuse. She argues that although he has attended parenting and visitation, he did not complete services to address his two largest problem areas, anger management and substance abuse. She further argues that despite extensive improvement periods, Petitioner Father failed to substantially complete their terms. DHHR also argues in support of termination, reiterating that Petitioner Father failed to complete in-patient substance abuse treatment and consequently, continues to expose the subject child to the drug culture. DHHR asserts that "the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 4, in part, *In re Samantha S.*, 222 W.Va. 517, 667 S.E.2d 573 (2008) (internal citations omitted). Moreover, DHHR asserts that this 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 Court agrees. A review of the submitted appendix supports the circuit court's findings of fact and conclusions of law at termination, including copies of Petitioner Father's two drug tests

positive for cocaine. Although Petitioner Father argues that these tests were not reliable, he offers no evidence or documentation in support of this argument, only that he was drinking a type of cocoa tea. Petitioner Father's argument that his psychological evaluation did not recommend in-patient rehabilitation to warrant his lack of such participation also lacks merit. The psychological evaluation occurred early in these proceedings, in the fall of 2010. A review of the January 25, 2011, transcript indicates upon learning of Petitioner Father's positive drug test for cocaine, the circuit court ordered that Petitioner Father should be "linked to in-patient rehab[ilitation]." However, nothing in the record indicates that Petitioner Father ever completed such a program. Given these circumstances over extensive improvement periods and given the subject child's young age, the Court finds no error in the circuit court's termination of Petitioner Father's parental rights.

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).

[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