STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

In Re: A.B., A.B., J.B., H.B. and B.T. :

No. 11-1473 (Kanawha County 10-JA-198, 199, 200, 201, and 202)

MEMORANDUM DECISION

Petitioner Father, by counsel Jason Lord, appeals the Circuit Court of Kanawha County's termination of his parental rights to A.B., A.B., and J.B.[1], by order entered on October 17, 2011. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition. The guardian ad litem, Robin Louderback, has filed her response on behalf of the children, A.B., A.B., and J.B. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response concurring in the response of the guardian ad litem.

Having reviewed the appendix and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the appendix presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. 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).

[1] H.B. and B.T. are not related to Petitioner Father; thus, this appeal only concerns A.B., A.B., and J.B.

This petition was initiated after the elder A.B. ("A.B. I") disclosed ongoing sexual abuse by her uncle, with whom she was residing, and her father. A.B. I testified several times regarding the abuse, noting that it had begun when she was approximately six years old, and had continued until she was fifteen. Moreover, A.B. I indicated that her father had recently offered her one hundred dollars to have sexual intercourse with him. The DHHR found two other women, now adults, who indicated that Petitioner Father had been sexually inappropriate with them during their childhood and had attempted to "groom" them. An adjudicatory hearing was held over the course of several days, and Petitioner Father was adjudicated as an abusing parent. Petitioner Father's parental rights were then terminated, and post-termination visitation was denied.

On appeal, Petitioner Father first argues that the circuit court erred in ruling that the State met its burden in proving that petitioner was an abusing parent. Petitioner argues that A.B. I initially only disclosed sexual abuse by her uncle, and only later disclosed abuse by her father. Further, A.B. I testified that she only remembered everything that had happened after being in therapy and at times gave differing stories as to where the abuse by her father occurred. Thus, Petitioner Father argues that the circuit court erred in relying on the conflicting testimony of A.B. I.

In response, the guardian argues in favor of termination, and argues that A.B. I's testimony was clear and convincing evidence of the sexual abuse. The DHHR concurs in the termination of parental rights and joins in the guardian's response.

West Virginia Code § 49-6-2(c) states that abuse and/or neglect must be proven by clear and convincing evidence. Further, an abused child can be defined as a child "whose health or welfare is harmed or threatened by ... [s]exual abuse or sexual exploitation." W.Va. Code § 49-1-3(a)(1)(B). In the present case, A.B. I testified several times to the sexual abuse by both her father and her uncle. The DHHR, the guardian, and the circuit court all found the testimony to be credible. Thus, this Court does not find that the circuit court's finding of abuse was clearly erroneous.

With regard to the termination of Petitioner Father's parental rights, this Court has held that "'[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, 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 . . . .' 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). In this case, the circuit court found clear and convincing evidence that A.B. I was sexually abused. Therefore, termination was proper.

Petitioner next argues that the circuit court erred in refusing to grant petitioner post-termination visitation. Petitioner argues that he loves the children and they may want contact with him in the future. Petitioner also argues that contact with him will benefit them and that the option for visitation should have been left open.

The guardian responds that both sixteen-year-old A.B. I and fifteen-year-old A.B. II did not want further contact with their father. Thus, the guardian concurs with the denial of post-termination visitation. The DHHR joins in the guardian's response.

> "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., *In re Alyssa W.,* 217 W.Va. 707, 619 S.E.2d 220 (2005). In the present case, the two older children did not want contact with the father. Furthermore, the guardian indicates that it would not be in any of the children's best interests to have visitation with Petitioner Father. Thus, we find no error in the circuit court's denial of post-termination visitation.

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.[2] 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,

[2] 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.

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 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