STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: D.N.

No. 11-1538 (Clay County 09-JA-33)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by William Lester, his attorney, appeals the circuit court's order terminating his parental rights to D.N.[1] The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Christopher G. Moffatt has filed his response on behalf of the children. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response concurring in the guardian's response.

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).

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[1]Although this case dealt with six children, Petitioner Father is the biological father of D.N. only, and only appeals his rights as they relate to D.N.

The petition in this matter was instituted in September 2009, alleging that several of the children have been locked outside without adult supervision at a time when some of the children were less than two years old. The yard outside the home was scattered with debris and had exposed live wires within reach of the children. The home had holes in the floor and walls, an exposed fan, open bleach container, and no running water. Petitioner Father is accused of abandoning then thirteen-year-old D.N. since his birth, and failing to protect him. The mother has been provided with massive assistance and services. All adult respondents were eventually granted a two-year post dispositional rehabilitation improvement period and ordered to submit to alcohol and/or drug testing, and participate in services. Petitioner never appeared at any point to contest the petition or participate in any services. The State later moved to terminate Petitioner Father's parental rights. The circuit court denied the motion, but granted the State leave to file an abandonment petition, which it did. The State alleged that Petitioner Father had not had contact with the child in excess of eighteen months, failed to provide a suitable home, and failed to provide any financial support. Petitioner Father failed to appear at the dispositional hearing, and his parental rights were terminated. Petitioner Father never appeared at any hearing in this matter.

Petitioner Father argues that the circuit court erred in terminating Petitioner Father's parental rights based on the finding that there was no reasonable likelihood that the conditions creating the neglect could be substantially corrected in the near future. Petitioner Father argues that the DHHR made little to no effort to determine if he could care for D.N. with intensive long-term assistance. More evidence was necessary prior to the termination of parental rights.

The guardian ad litem responds, arguing in favor of termination, as Petitioner Father never appeared in this matter and never offered any evidence to rebut the allegation that he abandoned his son. The DHHR has joined in the petition of the guardian.

This Court has stated that:

> [W]hen the conduct forming the basis of the abuse and/or neglect allegations consists of abandonment, such parental recalcitrance is perceived as so egregious as to warrant the virtually automatic denial of an improvement period. "Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period." Syl. pt. 2, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

In re Emily, 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000). In the present case, Petitioner Father seems to argue for additional time and services. However, he failed to appear in any manner in this action. Furthermore, an improvement period should be denied according to our case law, as the State proved that the child was abandoned by the father. This Court finds no error in the termination of 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.[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, 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.

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[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.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman