STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.D., K.D., D.D., K.P., A.P., and J.P.:

No. 11-1552 (Clay County 11-JA-79, 80, 81, 82, 83 & 84)

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

MEMORANDUM DECISION

Petitioner Father, by Wayne King, his attorney, appeals the circuit court's order terminating his parental rights to his children, A.D., K.D., D.D., K.P., A.P. and J.P. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Michael W. Asbury Jr. 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 joining 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).

The initial petition in this action was filed in November of 2009, after twins A.D. and K.D. were born addicted to drugs. At the time the twins were born, Petitioner Father was incarcerated. Petitioner Father appeared at one preliminary hearing in the proceedings below, as he was transported from jail during his incarceration. Petitioner Father has failed to appear for any other hearings, and has failed to contact the DHHR, request visitation, or contact the children since at least May 2010. In July of 2011, another petition was filed against Petitioner Father alleging abandonment and drug abuse. Petitioner Father's whereabouts were unknown, and thus the DHHR served him via

publication in the local newspaper. Said publication indicated that termination of parental rights was possible, and gave the time and date of the hearing. Petitioner Father failed to appear, and the circuit court therefore terminated his parental rights, finding that Petitioner Father has abandoned the children, and that he is not likely to comply with the terms and conditions of an improvement period.

On appeal, Petitioner Father first argues that the circuit court erred in terminating his parental rights at the preliminary hearing without making any findings of fact or conclusions of law outside of general statements regarding testimony. Petitioner Father argues that the evidence indicated that he "continued to monetarily support the six infants." Petitioner further argues that the service by publication was improper, as the State knew he was living in Mississippi but allowed publication in Clay County, West Virginia. Further, Petitioner Father argues that the circuit court erred in allowing evidence of his drug use prior to 2009 to be introduced, when it had not been included in the 2009 abuse and neglect petition.

In response, the guardian argues that termination is proper, as after Petitioner Father was released from jail, he failed to contact the children or the DHHR, never exercised visitation, and never contacted the foster parents to determine the status of the children. Further, Petitioner Father refused to comply with services or the case plan, and refused to submit to drug tests. The guardian notes that there was no evidence submitted that Petitioner Father was in fact financially supporting the children, although a trust fund for the children had been established by the petitioner after petitioner's father's death. Petitioner Father had no contact with the children for over a year prior to the filing of the 2011 petition. He refused compliance with the offered services, and there was no evidence that he would comply in the future. Adequate findings of fact and conclusions of law were made, and petitioner failed to do anything to reunite with his children.

Petitioner Father next argues that the circuit court erred in failing to give Petitioner Father proper notice of the possible termination, in that no motion to terminate was filed. The circuit court failed to make proper findings, and improperly terminated Petitioner Father's parental rights.

The guardian argues in response that the State did not know that Petitioner Father was definitely in Mississippi, as his counsel had indicated that he understood that Petitioner Father was first living in Nicholas County, West Virginia, then in North Carolina, then that he may be in Mississippi. Service by publication was prior under the West Virginia Rules of Civil Procedure. Again, petitioner failed to do anything to maintain his parental rights.

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). Moreover, 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 . . . .' 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 the present matter, Petitioner Father failed to appear for any hearings after his incarceration ended. He presented no evidence that he had financially or emotionally supported his children, nor did he show that he had even made contact with the children in over a year. This Court finds no error in the termination of Petitioner Father's parental rights.

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.[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

[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.

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: 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