STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: A.B.:

No. 11-1567 (Kanawha County 11-JA-5)

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 Kanawha County, wherein Petitioner Father's parental rights were terminated by order entered on October 18, 2011. This appeal was timely perfected by his counsel, Jason Lord, with an appendix accompanying his petition. The child's guardian ad litem, Jennifer Victor, filed a response on behalf of the child in support of the circuit court's order, along with an amended list of appendix records. The Department of Health and Human Resources ("DHHR"), by its attorney Lee A. Niezgoda, 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 in January of 2011 based on allegations of the parents's drug use and domestic violence in the child's presence; Petitioner Father's physical and sexual abuse toward the child; the mother's knowledge of this abuse and failure to protect her; the mother's physical abuse toward the child; and the parents' neglect of the child by inadequately providing the necessary food, clothing, supervision, and shelter. Both parents waived their right to a preliminary hearing.

At the adjudicatory hearing in April of 2011, the child's counselor, Maureen Runyon, testified of the subject child's disclosures to her. Ms. Runyon testified that A.B. disclosed to her details of her father's sexual abuse toward her. In particular, A.B. told Ms. Runyon that her father has, on more than one occasion, laid on top of her naked and that when he touched her vagina, it would feel "like something weird and pointy was in her [vagina]." A.B. further disclosed to Ms. Runyon that there were times when her mother was present during these incidents, at least initially, and that afterwards, at times, A.B. would go take a warm shower and "there would be icky stuff that she would wash off of herself." A.B. also discussed her parents' drug use; she specifically explained that she had seen Petitioner Father crush up Adderall and snort it into his nose, her mother smoke marijuana, and her mother take pills. A.B. told Ms. Runyon that their house was dirty and that sometimes her father would get so drunk that he would urinate in the bed, on her toys, or on the furniture. Moreover, A.B. told Ms. Runyon that her father has also smacked her in the face, legs, and on her bottom and that her mother, as a method of discipline, would leave her outside in the cold for half an hour. Petitioner Father remained silent at the adjudicatory hearing and no other witnesses testified. The circuit court found both parents as abusive and neglectful and denied a post-adjudicatory improvement period to both of A.B.'s parents, but offered services to the child's mother.

At the dispositional hearing in July of 2011, DHHR worker Charles Batch testified and recommended termination of both parents' parental rights. With regard to Petitioner Father, Mr. Batch testified that Petitioner Father did not participate in any services due to incarceration and did not admit to any wrongdoing in this matter. Petitioner Father remained silent at disposition. In its dispositional order of October 17, 2011, the circuit court found that "[t]he abusing parents have sexually abused or sexually exploited the child and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or to assist the abusing parent or parents in fulfilling their responsibilities to the child." Accordingly, the circuit court found that termination was proper, denied improvement periods to both parents, and denied post-termination visitation to both parents. Petitioner Father appeals the circuit court's decision.

On appeal, Petitioner Father argues two assignments of error. He argues that the circuit court erred in denying him an improvement period and that it erred in denying him post-termination visitation. Petitioner Father argues that he should have received an improvement period because pursuant to *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 258, 470 S.E.2d 205, 212 (1996), an improvement period is designed to "facilitate the reunification of families whenever that reunification is in the best interests of the children involved." In support, he argues that he had represented to the circuit court that he was willing to participate in any services the circuit court ordered. Further, he disagreed that the conditions which led to the filing of the petition for this abuse and neglect case could not be corrected.

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in denying Petitioner Father an improvement period. The guardian and DHHR argue that Petitioner Father stood silent at the adjudicatory and dispositional hearings and did not move

for an improvement period. Accordingly, they argue that Petitioner Father did not show by clear and convincing evidence, pursuant to West Virginia Code § 49-6-12(b)(2), that he would likely participate in an improvement period. They both assert that Petitioner Father never admitted to any parenting inadequacies that would benefit from remedial or reunification services. DHHR further argues that under West Virginia Code § 49-6-3(d)(1), it is "not required to make reasonable efforts to preserve the family if the court determines: (1) [t]he parent has subjected the child . . . to aggravated circumstances, which include, but are not limited to . . . sexual abuse."

The Court finds no abuse of discretion in denying Petitioner Father an improvement period. 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 . . . ." 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). Further, under West Virginia Code § 49-6-12, a circuit court is not required to grant an improvement period, but rather, has the discretion to grant or deny one. It is the subject parent's burden to show that one would be beneficial. Moreover, the Court has held as follows:

> Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

In re Kaitlyn P., 225 W.Va. 123, 126, 690 S.E.2d 131, 134 (2010) (quoting *W. Va. Dep't. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)). Here, a review of the appendix record confirms that Petitioner Father never moved for an improvement period. The appendix record also indicates that Petitioner Father stood silent at the adjudicatory and dispositional hearings and chose not to testify on his position in this case. His assertions that he would be willing to participate in an improvement period are not supported by facts that he would substantially comply with one. Accordingly, Petitioner Father did not meet his burden before the circuit court to show by clear and convincing evidence that he would benefit from an improvement period. The Court finds no error in the circuit court's decision to not grant an improvement period to Petitioner Father.

Petitioner Father also argues that the circuit court erred in denying post-termination visitation. In support, he asserts that there was no evidence presented that visitation would be harmful to the child and there was no evidence presented that visitation would not be in the child's best interests. He asserts that, accordingly, the option of visitation should have been left to the discretion of licensed professionals.

The guardian ad litem and DHHR respond, contending that the circuit court did not abuse its discretion in denying Petitioner Father post-termination visitation. The guardian asserts that the Court has held as follows:

> "'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. Pt. 8, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Syl. Pt. 8, *In re: Charity H.*, 215 W.Va. 208, 599 S.E.2d 631 (2004).

Furthermore, the guardian asserts that visitation is a right that belongs to the child, not the parent. *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Moreover, such visitation should not be permitted to "'unreasonably interfere with [a child's] permanent placement.' *State ex rel. Amy M. [v. Kaufman]*, 196 W.Va. [251] at 260, 470 S.E.2d [205] at 214 [(1996)]." *In re Alyssa W.*, 217 W.Va. 707, 711, 619 S.E.2d 220, 224 (2005). The guardian asserts that visitation would be contrary to A.B.'s best interest due to the history of her case, particularly Petitioner Father's violent nature; substance abuse problems; physical abuse toward the child's mother and the child herself; sexual abuse perpetrated upon the child; and the chronic state of filth, clutter, and disrepair of the home. DHHR shares the guardian's position in support of the denial of post-termination visitation.

The Court agrees and finds no abuse of discretion in denying post-termination visitation to Petitioner Father. A review of the appendix record indicates that the child never had visits with Petitioner Father nor did she indicate a desire to have visitation with Petitioner Father. The appendix record also indicates that Petitioner Father never testified at the hearings and thus, never admitted to any wrongdoing in this case. Given these circumstances and lack of emotional bond between Petitioner Father and the subject child, the Court finds no error in the circuit court's decision denying Petitioner Father post-termination visitation.

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).

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights, denial of an improvement period, and denial of post-ptermination visitation 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

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[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.