STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: S.B.:

No. 11-1568 (Kanawha County 11-JA-15)

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

MEMORANDUM DECISION

Petitioner Father, by Jason Lord, his attorney, appeals the circuit court's order terminating his parental rights to S.B. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The guardian ad litem Jennifer R. Victor has filed her response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its 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).

The petition in this matter was filed alleging that S.B., then thirteen, was living with friends and his parents could not be found. Further, Petitioner Father has a prior termination of parental rights. The child disappeared after the preliminary hearing and was arrested while allegedly living with his parents in a motel for a period of time. After this, the child was placed in a residential placement. Petitioner Father was adjudicated as an abusing parent, and the circuit court found that he had abandoned the child. Petitioner Father then requested that the child be allowed to stay with an aunt and uncle for a weekend in order to attend a family funeral. However, Petitioner Father then took the child from the home, and later the police had to be called to get the child back. Petitioner

was found to be intoxicated at that time. Despite this, petitioner was granted an improvement period. Petitioner Father failed to comply in services, attending only two of his scheduled eleven drug screens, and zero screens on the scheduled dates. He was also noncompliant in other services, and failed to visit the child in his residential placement. He was also approximately $17,000 in child support arrears at one time. Petitioner Father failed to maintain a consistent residence throughout these proceedings. The child would repeatedly run away from foster homes when he was allowed out of residential placement, but Petitioner Father saw no problem with this conduct and indicated that the child could take care of himself. Petitioner Father also failed to appear at many of the hearings in this case. He requested an extension to his improvement period, although he failed to appear for that hearing. The extension was denied, and at disposition, Petitioner Father's parental rights were terminated.

On appeal, Petitioner Father argues that his parental rights should not have been terminated without the granting of an additional improvement period. Petitioner argues that the purpose of an improvement period is reunification, and that he wants to work with the DHHR to reunify with his son. Petitioner states that he wants to participate in services but that financial circumstances prevented him from doing so.

The guardian responds in favor of termination, arguing that the circuit court's rulings were supported by the evidence and should not be disturbed. Further, the guardian argues that Petitioner Father failed to meaningfully participate in the initial improvement period and has failed to pay child support, being at one point over $17,000 in arrears. Petitioner failed to show why he deserves an extension to his improvement period, and did not even appear at the hearing requesting an extension. The guardian argues that termination was the only reasonable alternative.

The DHHR also responds, arguing that petitioner failed to comply with services in this matter. Further, petitioner abandoned the child and has had his parental rights terminated previously. Petitioner Father has failed to take responsibility for his actions and perceives no abuse or neglect of S.B. The DHHR indicates that the termination of petitioner's parental rights was proper.

The circuit court has the discretion to refuse to grant an improvement period, or an extension to the improvement period, when no improvement is likely. Pursuant to West Virginia Code § 49-6-12(g), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the parent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the DHHR to permanently place the child; and that such extension is otherwise consistent with the best interest of the child. *See* Syl. Pt. 2, *In the Interest of Jamie Nicole H.*, 205 W.Va. 176, 517 S.E. 2d 41 (1999). This Court has stated that "in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. 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." *W.Va. Dept.of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). Furthermore,

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . 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." Syl. Pt. 1, in part, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). In the present matter, petitioner failed to fully comply in the improvement period. He only appeared for two out of eleven drug tests, failed to attend drug rehabilitation, failed to attend many of the hearings, and failed to attend most of his visitation. This Court finds no error in the failure of the circuit court to grant petitioner an extension to his improvement period.

As to the termination of parental rights in this matter, termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child . . . ." W.Va. Code § 49-6-5(a)(6). Petitioner Father failed to show any improvement, failed to comply in services, and failed to recognize the problems in his parenting. This Court finds no error in the termination in this matter.

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

[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.

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.

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