STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In the Interest of: A.G.:

No. 11-1583 (Kanawha County 08-JA-188)

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 20, 2011. This appeal was timely perfected by his counsel, Tim C. Carrico, with an appendix accompanying his petition. The child's guardian ad litem, Sandra Bullman, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, also filed a response in support of the circuit court's order, joining in and concurring with the guardian ad litem's response.

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 subject child, A.G., was born in June of 2003. In January of 2004, Petitioner Father was charged with breaking and entering. He was consequently sentenced in 2006 to imprisonment for this conviction. The instant petition was initially filed in 2008 for the subject child and his two half-siblings. At the time of this filing, the identity of the subject child's biological father was unknown. The petition alleged that the children's mother had a history of noncompliance with Child Protective Services ("CPS"), drug use and drug trafficking, and failure to care for her children. For instance, the mother was alleged to have beaten her children with a stick; left the youngest child wearing

diapers for extended periods of time; and inadequately feed her children to the degree that while playing outside, the children would beg passers-by for food.

An amended petition was filed in 2009, including and identifying Petitioner Father as the subject child's father, and identifying his location as the Huntington Work Release Center. This petition incorporated the allegations contained in the prior petition and also alleged that the children's mother had a history of domestic violence, once fleeing the home after an incident of domestic violence and leaving the children behind. The petition further alleged that the family's home was in deplorable conditions, reiterated the mother's history of drug distribution, and alleged that the respondent parents have "failed to provide the children with the necessary food, clothing, supervision, and housing." The children's mother's parental rights were eventually terminated and her motion for reconsideration of this termination was denied.

At Petitioner Father' adjudication in April of 2010, Petitioner Father's counsel advised the circuit court that Petitioner Father would make certain admissions, in accordance with an agreement with DHHR that it would recommend an improvement period. Consequently, Petitioner Father waived an adjudicatory hearing, made admissions that he "failed to support the infant respondent socially, emotionally, or financially, which has resulted in the neglect of the [subject child]," and the circuit court granted Petitioner Father an improvement period. Petitioner Father had been released from incarceration in March of 2010 and was able to have one visit with the subject child during his post-adjudicatory improvement period before he was incarcerated again in July of 2010.

At the dispositional hearing in February of 2011, the circuit court recapped the stipulations Petitioner Father made at adjudication and heard testimony from the family's CPS caseworker, Ann Stacklin, as well as from Petitioner Father. Ms. Stacklin testified that she recommended termination of Petitioner Father's parental rights because "[t]hroughout the majority of this case, he has been incarcerated." She further testified of Petitioner Father's brief release from incarceration in 2010 and how the one visit he and the subject child had been positive. However, very shortly after that visit, Petitioner Father was sent back to jail because he had broken rules at the halfway house where he was residing. She explained that the subject child was upset when he could not see Petitioner Father for any more visits after that, but that he has "since worked through that and is doing well now." Petitioner Father testified, explaining the circumstances of his violation at the halfway house. He asserted that after he was given a post-adjudicatory improvement period, he and his roommate at the halfway house got into trouble because his roommate had visitors over in their room. Even though they were his roommate's guests, Petitioner Father explained that the violation was applied to the room as a whole, including himself. However, at a hearing before the West Virginia Parole Board, he was found not guilty and allowed to keep his parole. Because he had no place to live, however, Petitioner Father argues, he was returned to jail. Petitioner Father further testified that he would be discharged from this sentence at the end of March of 2011. He testified that during his incarceration, he made child support payments for the subject child and participated in three different parenting classes. He asserted that after his release from incarceration, he planned on obtaining employment and a place to live and that he would agree to accept and follow through with any services provided. The circuit court considered the testimony at disposition, along with the circumstances and history

of this case. It found that Petitioner Father has "shown not even minimal efforts to rectify the circumstances that led to the filing of this [p]etition." It further found that Petitioner Father did not reduce or prevent the abuse and neglect of the child, "as evidenced by the continuation of conditions which threaten the health, welfare, or life of [the child.]" Accordingly, the circuit court terminated Petitioner Father's parental rights without visitation. It is from this decision that Petitioner Father appeals.

On appeal, Petitioner Father argues that the circuit court abused its discretion when it terminated his parental rights because the facts and circumstances relating to his conviction and subsequent incarceration did not warrant termination of his parental rights under this Court's recent holding in *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). In particular, Petitioner Father argues that Syllabus Point 3 of this case directs as follows:

> When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

In support, Petitioner Father argues that at the time of disposition, he was slated for complete discharge of his sentence in March of 2011, the month following the dispositional hearing. He further argues that he testified that he would fully cooperate with DHHR and services upon this release. Moreover, Petitioner Father asserts that he paid child support during his incarceration and there was no evidence presented at disposition to warrant termination. Petitioner Father argues that, accordingly, the circuit court abused its discretion in terminating his parental rights to A.G.

The guardian ad litem responds, contending that the circuit court did not abuse its discretion in terminating Petitioner Father's parental rights to A.G. The guardian argues that Petitioner Father only had one visit with A.G. during the pendency of this case and that for most of the child's life, Petitioner Father was incarcerated. The guardian highlights that in this case, the subject child is in the same foster care placement as his other siblings and the foster family has expressed its wishes to adopt the children. DHHR responds, joining in and concurring with the guardian ad litem's response.

The Court find no abuse of discretion in the circuit court terminating Petitioner Father's parental rights. 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). The Court has considered the circumstances of Petitioner Father's incarceration and A.G.'s best interests. The Court recognized in *In re Cecil T., supra*, at Syllabus Point 5 that "'[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Moreover, "incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights . . . [although it] may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect." *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873, 879 (2011) (quoting *In re Brian James D.*, 209 W.Va. 537, 540-41, 550 S.E.2d 73, 76-77 (2001)). Here, a review of the appendix record indicates that the subject child was born in 2003; Petitioner Father was charged with the crime of breaking and entering in 2004; and in 2006, Petitioner Father was sentenced to imprisonment. He remained incarcerated until 2010. The record does not indicate that Petitioner Father and the subject child were involved in each other's lives during any period before Petitioner Father's incarceration or during his incarceration. After his release in March of 2010, Petitioner Father was able to have one visit with the subject child during his post-adjudicatory improvement period. However, he was unable to complete this improvement period when he returned to prison just months later, without any other visitation or involvement with the subject child beyond child support payments. Although the Court recognizes Petitioner Father's efforts through child support and parenting classes, the Court reviews the circuit court's decision under an abuse or discretion standard and priority is given to the subject child's best interests. The Court finds no error in the circuit court's termination of Petitioner Father's 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.[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: 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