STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: R.H.:

No. 11-1598 (Calhoun County 11-JA-9)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel Daniel Grindo, appeals the Calhoun County Circuit Court's October 26, 2011, order terminating his parental rights to R.H.[1] The guardian ad litem, Tony Morgan, has filed his response on behalf of the child. The West Virginia Department of Health and Human Resources ("DHHR"), by Lee A. Niezgoda, 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 initially filed against several adults, including R.H.'s grandmother, the grandmother's boyfriend, and Petitioner Father. R.H.'s mother, who was a minor when the petition was filed, is now an adult. The petition alleged that Petitioner Father was using methamphetamine and had failed to provide clothing, food or shelter for the child. Petitioner Father

[1] Other children were named in the petition, but these children are unrelated to Petitioner Father. Thus, this petition deals only with R.H., petitioner's daughter.

admitted to the allegations in the petition, and he was adjudicated as an abusing and neglecting parent. He requested an improvement period on the basis of his need for drug rehabilitation. He also signed a case plan indicating, among other things, that he would attend Alcoholics Anonymous ("AA") and/or Narcotics Anonymous ("NA") meetings on his own, would engage in services, would call in daily regarding drug screens, would participate in drug screens, and would participate in drug treatment. Although the DHHR set up parental fitness evaluations and services, Petitioner Father failed to appear for most of the services and never appeared for the fitness evaluations that were scheduled. Further, Petitioner Father admitted to using methamphetamine during his improvement period, and he failed two drug screens. He also failed to attend any drug treatment and never attended any AA or NA meetings. Additionally, Petitioner Father only engaged in one visitation with the child after removal and did not request any further visitation. The DHHR indicated that petitioner did not contact their offices regarding services or drug screens, although petitioner disputes this, alleging that he frequently telephoned as requested but never got an answer, although he often failed to leave a message. Petitioner's improvement period was revoked after an evidentiary hearing, for failure to comply with the case plan. Petitioner Father's parental rights were then terminated and post-termination visitation was denied.

Petitioner Father argues that the circuit court erred in terminating his parental rights because he had made substantial progress in completing his improvement period. He argues that he had become employed, had begun to pay child support, and had improved his living situation. He contends that he did not fully participate in services due to his employment, and argues that he could not fully participate and still maintain employment that would allow him to provide for his child. Petitioner Father admits that his failure to participate was a result of him not understanding the seriousness of the situation, but that given additional time he could remedy the situation. Petitioner Father also argues that the circuit court disregarded his bond with his child in terminating his parental rights.

The guardian responds in support of termination, arguing that Petitioner Father has failed to take personal responsibility in arranging and receiving services and failed to engage in drug treatment. The guardian argues that petitioner failed to visit the child, failed to participate in most services, failed to stop using methamphetamine, and failed to attend his parental fitness evaluation. The guardian argues that the petitioner failed to make any progress and that the best interests of the child require termination and no post-termination visitation.

The DHHR also responds in favor of termination, and asserts that petitioner is not entitled to an improvement period that lasts until he makes the decision to participate and improve. Petitioner Father had an opportunity to participate in the improvement period and to make progress, but chose not to do so. Further, the DHHR notes that even after the improvement period was revoked, the DHHR attempted to offer services to Petitioner Father, and even rescheduled his parental fitness evaluation, but, even then, petitioner failed to appear. The DHHR argues that petitioner failed to take the proceedings seriously, and after the improvement period was revoked, he still failed to seek

drug treatment or attend Alcoholics Anonymous or Narcotics Anonymous meetings, and even consumed alcohol on at least two occasions in the twenty days between the revocation hearing and the dispositional hearing. While petitioner argues that he has a substantial bond with the child, the DHHR notes that he only saw the child one time after his removal.

With regard to the termination of Petitioner Father's parental rights, this Court has held as follows:

> "[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, 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, 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. " Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). In the present case, the petitioner failed to comply with almost every aspect of the case plan during his improvement period. He used drugs, failed to maintain contact with the DHHR, failed to engage in services, and even failed to visit his child. Petitioner Father now argues that he was not initially taking the case seriously, but that he is ready to comply. However, the best interests of R.H. require termination in this matter, as petitioner failed to show any improvement during the pendency of this matter. R.H. is only two years old, which makes him particularly susceptible to further damage being inflicted by abusing or neglecting parents. Further, it is clear from the transcripts in this matter that the circuit court considered any possible bond between father and child, and found it to be in the child's best interests to terminate Petitioner Father's parental rights and deny post-termination visitation, since petitioner had only seen R.H. one time since his removal and had not even requested further 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.[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.

Affirmed.

ISSUED: May 29, 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

[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.