STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
June 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: M.M. Jr.

No. 11-1599 (Mercer County 11-JA-69)

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Andrew Maier, arises from the Circuit Court of Mercer County, wherein his parental rights to his child were terminated by order entered on October 26, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by William L. Bands, has filed its response. The guardian ad litem, Andrea Paige Powell, has filed her response on behalf of the child. Respondent Maternal Grandmother B.P. has also filed a response, by counsel William O. Huffman.

This Court has considered the parties' briefs and the appendix record on appeal. The facts and legal arguments are adequately presented, 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.

The instant matter was initiated based upon a lengthy history of domestic violence between petitioner and the mother of his child. According to the initial abuse and neglect petition, this domestic violence necessitated legal intervention dating back to at least October of 2010. On October 8, 2010, petitioner filed a domestic violence petition against the mother, alleging that she had hit him with closed fists, had attempted to cut him with a knife, and would not let him leave for work. According to the abuse and neglect petition, all of this took place in the presence of the then two-week-old child. Petitioner was granted custody of the child at that time, but within the next two weeks he filed a motion to terminate the domestic violence petition because he and the mother had reconciled. On March 11, 2011, petitioner was arrested for choking the mother, again in the presence of the child according to the initial abuse and neglect petition, which prompted her to file a domestic violence petition. The following month, the parents were making a visitation exchange at the mother's home when an altercation ensued in the child's presence. The petitioner was arrested on charges of domestic battery and violating a domestic violence protective order, and the mother was arrested for domestic battery. After this incident, a DHHR employee met with the parents separately, and both admitted that they should separate because, together, they could not provide a safe environment for the child. However, this same DHHR employee later witnessed the two parents together in direct violation of the domestic violence protective order.

Based upon these ongoing issues, the initial abuse and neglect petition was filed on May 4, 2011. Six days after the preliminary hearing, on May 19, 2011, the mother was shot and killed, and petitioner was later arrested for this act. Thereafter, the State filed an amended petition alleging aggravated circumstances against petitioner based on homicide. At adjudication, the circuit court found that aggravated circumstances did exist per West Virginia Code § 49-6-5(a)(7)(B), and that the DHHR was therefore relieved of its duty to make reasonable efforts to achieve reunification. The circuit court then terminated petitioner's parental, custodial, and guardianship rights to M.M. Jr.

On appeal, petitioner argues that the circuit court abused its discretion by terminating his parental rights upon a finding that he murdered the mother because that finding was not supported by the evidence. He further argues that he received ineffective assistance of counsel in the abuse and neglect proceedings below because his attorney failed to call police witnesses to testify that he was the victim of domestic violence at the hands of the mother. In support of his first assignment of error, petitioner argues that the circuit court made its finding that petitioner committed "at least second degree murder" even though he had not been tried or convicted. In short, petitioner argues that a criminal conviction is necessary before a finding of aggravated circumstances can be made. As to his second assignment of error, petitioner argues that mitigating witnesses should have been called to testify that he was the victim of domestic violence. According to petitioner, the record reflects that the adjudicatory hearing was continued so that witnesses could be called, but that his counsel rested without calling police witnesses. For these reasons, petitioner argues that the circuit court's termination should be reversed.

In response, the guardian ad litem argues in favor of affirming the circuit court's decision. The guardian argues that the West Virginia Code does not require a conviction for aggravated circumstances to be established. Merely that the killing occurred, the guardian argues, is sufficient for the court to make such a finding in light of the evidence. The guardian further cites our prior holdings dictating that the welfare of the child is the polar star by which such proceedings should be guided, and argues that the best interests of the child at issue are served by securing a permanent and safe home in a timely manner. In short, the guardian argues that "[t]here has been no compelling reason placed before the Court that forcing a continued association of the infant child with the self-confessed murderer of the child's mother would ultimately be in the child's best interest." Lastly, the guardian argues that it is questionable whether an assignment of error based upon alleged ineffective assistance of counsel in an abuse and neglect proceeding is even appropriate in this matter. The DHHR has also responded, and fully joins in, and concurs with, the guardian's response.

Respondent Maternal Grandmother has also responded, arguing in favor of affirming the circuit court's order. Respondent argues that petitioner's allegation that the evidence did not support the circuit court's finding that petitioner "murdered" the mother is "patently absurd." Respondent cites the fact that petitioner fired multiple shots in a fit of rage, and then fled to North Carolina to avoid apprehension. Respondent further argues that petitioner is barred from raising his ineffective assistance error on appeal because the same was essentially waived below. As such, she argues that the claim is without merit.

The Court has previously established the following standard of review:

> "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).

To begin, the Court declines to address petitioner's first assignment of error related to the circuit court's finding of aggravated circumstances, as review of the record clearly shows that the circuit court was presented with evidence of aggravated circumstances absent the mother's killing. West Virginia Code § 49-6-5(a)(7)(A) states, in relevant part, that "the [DHHR] is not required to make reasonable efforts to preserve the family if the court determines . . . [t]he parent has subjected the child . . . to aggravated circumstances which include . . . chronic abuse." Further, West Virginia Code § 49-1-3(1)(d) defines an abused child as one whose health or welfare is harmed or threatened by domestic violence. The initial petition in the proceedings below was based upon an extensive history of domestic violence perpetrated in the presence of the child at issue. This includes multiple instances in which petitioner was arrested for domestic battery, as well as multiple violations of domestic violence protective orders. As such, the circuit court was presented with sufficient evidence to have found aggravated circumstances based upon chronic abuse in the form of repeated exposure to domestic violence. For these reasons, the Court declines to find that petitioner was entitled to reasonable efforts from the DHHR to preserve the family, and further declines to address the merits of his allegation that the circuit court's finding as to aggravated circumstances based on murder was not supported by the evidence.

Further, the circuit court did not err in terminating petitioner's parental rights. As noted above, the circuit court found aggravated circumstances existed in this matter such that the DHHR was absolved of its duty to use reasonable efforts to preserve the relationship between petitioner and his son. Additionally, the appendix indicates that petitioner was incarcerated during the pendency of the proceedings below, and that "[Petitioner] Father's criminal trial will not be scheduled anytime soon." In fact, the circuit court declined to defer ruling in this matter until such time as petitioner's criminal matter was resolved because the two proceedings are separate and distinct, and because "the child needs permanence and a deferral does not serve that interest." As such, the circuit court did not err in terminating petitioner's parental rights based upon his chronic abuse of the child and his

inability to substantially correct the conditions of abuse in the near future. This ruling is in line with our prior holdings concerning abuse and neglect proceedings, wherein we have stated that "'the best interests of the child is the polar star by which decisions must be made which affect children.' *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989)." *Kristopher O. v. Mazzone*, 227 W.Va. 184, 192, 706 S.E.2d 381, 389 (2011).

As to petitioner's second assignment of error, the Court has never recognized a claim for ineffective assistance of counsel in the context of abuse and neglect matters, and declines to do so here. However, even if such a claim were recognized, it is clear from review of the record below that petitioner received effective assistance throughout the proceedings below. Petitioner's specific argument is that his counsel was ineffective in failing to call mitigating witnesses to establish that he was the victim of domestic violence at the hands of Respondent Mother. The record clearly shows that the circuit court was aware of the fact that the domestic violence between the parents herein was mutual. The initial petition contained facts related to at least one instance wherein Respondent Mother was arrested for domestic battery following an altercation with petitioner. Additional testimony on this issue would have had little to no bearing on the outcome of the proceedings below. For these reasons, the Court declines to find that petitioner received ineffective assistance of counsel.

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

[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.

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 circuit court's order, and the termination of petitioner's parental rights is hereby affirmed.

Affirmed.

ISSUED: June 25, 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