

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: W.S.

No. 11-1724 (Jackson County 11-JA-21)

FILED

June 25, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Lee F. Benford II, arises from the Circuit Court of Jackson County, wherein his "Motion for Modification of Adjudicatory and Disposition Order" was granted, in part, and denied, in part, by order entered on November 17, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Richelle K. Garlow, has filed her response on behalf of the child.

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.

The abuse and neglect proceedings below were initiated upon allegations that the child was subjected to sexual abuse by both Respondent Mother's husband and her live-in paramour, and also that the child was exposed to multiple instances of domestic violence in the home.¹ At adjudication in this matter, the circuit court found that petitioner had abandoned his daughter due to his having been incarcerated since before she was born and for the entirety of her life. According to the appendix, petitioner never met the child because of his incarceration in federal prison for conspiracy to distribute Xanax, a Schedule IV controlled substance, and his earliest possible release from federal custody is August 8, 2014. At disposition, the circuit court terminated petitioner's parental rights based upon its finding that petitioner had abandoned the child and due to the length of his incarceration. Thereafter, petitioner filed a "Motion for Modification of Adjudicatory and Disposition Order" seeking to have the circuit court modify its findings as to his abandonment, neglect, and abuse of the subject child, and to further reinstate his parental rights. By order entered on November 17, 2011, the circuit court granted the motion, in part, and denied it, in part. In effect, the circuit court modified its prior orders to remove any findings related to abandonment by petitioner. However, it declined to modify the orders in regard to petitioner's neglect of the child,

¹W.S.'s sister was also the subject of the abuse and neglect proceedings below. However, petitioner is not the biological father of W.S.'s sister and, as such, does not assert any assignments of error related to that child.

or in regard to his adjudication as an abusing parent because of the neglect. The circuit court further found that, even after granting the partial modification, the orders “remain sufficient to support the Court’s finding that [petitioner] neglected [the child], and it is lawful and in the best interest of the child for [petitioner]’s parental rights to be terminated.”

On appeal, petitioner alleges the following assignments of error: that the circuit court erred in finding by clear and convincing evidence that, based upon conditions existing at the time of the petition’s filing, petitioner had neglected the infant child, was an abusing parent, and that the child was abused and neglected; that the circuit court erred in finding that the child’s health and welfare was harmed or threatened by petitioner’s neglect; that the circuit court erred in finding that the child had gone without necessary food, clothing, shelter, medical care, education, or supervision due to petitioner’s absence, and that such absence resulted in the child’s neglect; and, that the circuit court erred in permanently terminating petitioner’s parental rights. While petitioner specifically delineates these assignments of error in his petition for appeal, he more succinctly argues that the circuit court erred in adjudicating him as an abusing parent due to his neglect of the child, and further in terminating his parental rights. In support of these arguments, petitioner states that the initial petition did not allege that the child was presently without necessary food, clothing, shelter, medical care, education, or supervision, as is required to find that the child is neglected. Petitioner argues that despite this absence, the circuit court adjudicated petitioner as abusive due to his neglect of the child, and further based termination on his inability to substantially correct the conditions of abuse and neglect due to his incarceration. However, petitioner argues that the statutory definition of neglect as found in West Virginia Code § 49-1-3(10)(A)(ii) requires more than just the parent’s absence from the child’s life. Petitioner argues that because the abuse and neglect petition made no allegation that the child was without necessary food, clothing, shelter, medical care, education, or supervision due to his absence, he cannot be adjudicated as an abusing parent. He further argues that a review of the record shows that his absence did not result in such deficiencies.

The guardian ad litem responds and argues that the circuit court did not err in adjudicating petitioner as an abusive parent or in terminating his parental rights. The guardian argues that the child was exposed to multiple instances of domestic violence in the home, and further that she was sexually abused on multiple occasions by more than one man. Despite the child informing the Respondent Mother of this abuse, she did nothing to protect the child. Giving petitioner the benefit of the doubt, the guardian argues that had he not been incarcerated for approximately the last eight years, he would have been aware of these circumstance in his daughter’s life and taken steps to ensure her well-being and safety. However, the guardian argues that petitioner was unable to do so because his own wrong doing resulted in his incarceration. According to the guardian, the child was therefore neglected and abused in his absence, due to the failure of Respondent Parents to exercise proper parental supervision and protection of the child. For these reasons, the guardian argues that the conditions existing at the time the petition was filed made W.S. an abused and neglected child, and made petitioner an abusing parent. Additionally, the guardian argues that the child is entitled to permanence and stability, and that pursuant to our holding in *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011), termination was proper since petitioner would not be released from incarceration prior to the expiration of the eighteen-month limit for permanency to be achieved. According to the

guardian, no significant bond exists between the petitioner and the child such that a deviation from this eighteen-month standard is required. In fact, the two have never met in person, and the child only has “some abstract idea that [petitioner] is her dad.” The DHHR responds and fully joins in, and concurs with, the guardian’s response.

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).

Upon our review of the appendix, the Court finds no error in either the circuit court’s adjudication of petitioner as an abusing parent, or in its decision to terminate petitioner’s parental rights. To begin, it is apparent that based upon the conditions as alleged at the time of the petition’s filing, petitioner neglected the child. Petitioner argues that the petition did not contain allegations that the child was without necessary food, clothing, shelter, medical care, education, or supervision due to his neglect as required by statute, but the Court does not agree. As the guardian argued, petitioner’s neglect of the child caused her to be without appropriate supervision, and this is adequately alleged in the petition. This is evidenced by the multiple instances of domestic violence the child witnessed in the home, and the Respondent Mother’s failure to protect her from sexual abuse by two different individuals. Based upon these facts, it is clear that the child lacked appropriate supervision, and that petitioner’s neglect of the child deprived her of the same.

As such, the child meets the definition of a neglected child under West Virginia Code § 49-1-3(10)(A)(ii), as that section states that a neglected child is one “[w]ho is presently without necessary food, clothing, shelter, medical care, education *or* supervision because of the disappearance or absence of the child’s parent or custodian.” (Emphasis added). Clear from this statutory definition is the fact that a child need only be without one of the necessities enumerated therein to be considered neglected. As such, the fact that the child was without necessary supervision due to petitioner’s absence is sufficient to adjudicate her as neglected. Further, because the child meets the definition of a neglected child, petitioner meets the definition of an abusing parent under West Virginia Code § 49-1-3(2). For these reasons, we find no error in the circuit court’s adjudication of

the child as neglected due to petitioner's failure to provide proper supervision, or in adjudicating petitioner as an abusing parent.

Further, these same facts support the circuit court's finding that there was no reasonable likelihood that petitioner could substantially correct the conditions of neglect or abuse in the near future. West Virginia Code § 49-6-5(b)(2) states that a circumstance in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected includes situations where "[t]he abusing parent . . . [has] willfully refused or [is] presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control." As noted above, petitioner has been incarcerated since before the subject child was born, and the record indicates that his expected release date is not until August of 2014. Due to his incarceration, petitioner was unable to cooperate in the development of a reasonable family case plan. As such, the circuit court did not err in proceeding to disposition pursuant to West Virginia Code § 49-6-5(a)(6).

Further, the Court has previously held 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.

Syl. Pt. 3, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Based upon this holding, it is clear that the circuit court was permitted to terminate petitioner's parental rights due to the length of his incarceration, especially in light of the child's best interests and her needs for permanency, security, stability, and continuity.

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 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

DISQUALIFIED:

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.