STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
June 27, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: P.B., II, N.B., Z.B., E.B., I.B., and C.B.

No. 11-0348 (Mercer County 08-JA-19 - 24-WS)

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Mercer County, wherein the Petitioner Father's parental rights to his six children, P.B., II, N.B., Z.B., E.B., I.B., and C.B., were terminated. The appeal was timely perfected by counsel, with the petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR") has filed its response. The guardian ad litem for P.B., II has filed his response on behalf of the child, and the guardian ad litem for the remaining five children has filed her response on behalf of those children. The Court has carefully reviewed the record provided and the written arguments of the parties, and the case is mature for consideration.

Having reviewed the record 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 record 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." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Petitioner challenges the circuit court's order terminating his parental rights, alleging two assignments of error. Petitioner first argues that the circuit court erred in failing to employ the least restrictive

alternative to termination of parental rights as to two of his children (P.B., II, and N.B.), and in modifying its earlier dispositional order to the other four children (Z.B., E.B., I.B., and C.B.) without the need to do so. He argues that the children already placed in permanent legal guardianship were not endangered by his actions, and that the two children residing with him could also have been protected through a similar less restrictive disposition.

Following the filing of the initial petition alleging abuse and neglect against petitioner, he was able to achieve reunification with two children (P.B., II, and N.B.) while the remaining four children were placed in a permanent legal guardianship. After achieving reunification, the DHHR again took custody of the two children living with petitioner because he left them unsupervised overnight in the home in unsuitable conditions with no food while he participated in conduct leading to his arrest and charges of second degree robbery, petit larceny, and conspiracy to commit a felony. Around this time, two of petitioner's daughters revealed that they had been sexually abused by a sibling and that petitioner was aware of this ongoing and extensive sexual abuse. Due to the petitioner's conduct toward the two children returned to his custody and these newly-discovered facts concerning sexual abuse, the DHHR filed a new petition for abuse and neglect. Subsequent to the filing of this petition, a motion for modification of disposition as to the four children in legal guardianship was also filed in accordance with West Virginia Code §49-6-6, due to the change in circumstances created by the revelations of sexual abuse and petitioner's knowledge thereof. In ordering termination of the petitioner's parental rights to all six children, the circuit court cited petitioner's failure to admit the occurrence of sexual abuse and his failure to protect the children, as well as the living conditions to which the children were subjected. Petitioner was also found to have failed to follow through with the treatment ordered for him and his child, P.B., II. The circuit court further found that termination of petitioner's parental rights to all children was necessary given his unwillingness or inability to provide adequately for the children's needs, the finding that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, and the serious impairment to petitioner's proper parenting skills.

This Court has held 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." *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). The circuit court found that, given petitioner's extensive history of DHHR services and his continued failure to comply with said services, that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected. Per West Virginia Code § 49-6-5(a)(6), in such an instance, circuit courts can terminate parental rights when the children's welfare dictates the same. The DHHR's current permanent placement plan for all the children is adoption, which could not be achieved until petitioner's

parental rights were fully terminated. The circuit court found that petitioner failed to acknowledge the existence of the sexual abuse between the siblings, that the conditions of abuse and neglect could not be substantially corrected in the near future, and that the children's welfare necessitated termination of petitioner's parental rights. The Court finds no error in the circuit court's findings.

Petitioner next argues that the circuit court erred in its application of West Virginia Code § 49-6-5(a)(6) because it terminated his parental rights despite P.B., II's desire that petitioner's parental rights remain intact. The child was fourteen years of age at the time of disposition, and it is undisputed that he expressed to his guardian ad litem his desire for petitioner to retain parental rights. The applicable code section states that "...the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." The record in this matter shows that the circuit court was made aware of the child's wishes and that the same were considered. However, the language of that code section does not mandate that a child's wishes dictate disposition, but instead requires only that a circuit court must consider such wishes. This Court has held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948). The record demonstrates that the child's wishes and his best interests did not coincide in this matter, and the circuit court therefore ordered termination following an appropriate consideration of the child's wishes.

This Court reminds the circuit court of its duty to establish permanency for P.B., II, N.B., Z.B., E.B., I.B., and C.B. pursuant to Rules 36a, 39, 41 and 42 of the West Virginia Rules of Procedure for Child Abuse and Neglect. Further, this Court reminds the circuit court of its duty pursuant to Rule 43 to find permanent placement for the children within eighteen months of the date of the disposition order. 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.*, 2011 WL 864950 (W.Va.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 of West Virginia v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998).

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 27, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh