STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.M. and M.M.

No. 12-0013 (Mercer County 11-JA-08-DS & 11-JA-09-DS)

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

MEMORANDUM DECISION

Petitioner Father's appeal, by counsel Gerald R. Linkous, arises from the Circuit Court of Mercer County, wherein his parental rights to his two children were terminated by order entered on December 6, 2011. The West Virginia Department of Health and Human Resources ("DHHR"), by counsel William L. Bands, has filed its response. The guardian ad litem, Julie M. Lynch, has filed her response on behalf of the children.

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 abuse and neglect proceedings below were initiated in the circuit court in January of 2011, based upon medical neglect, deplorable living conditions, and physical abuse of the children. Initially, the children's mother and maternal grandfather, as custodian, were named in the petition, though the petition contained no allegations against Petitioner Father. In June of 2011, Respondent Mother's parental rights were terminated due to her failure to comply with services offered. Shortly thereafter, an amended petition was filed in September of 2011 to include petitioner as an abusing parent because his incarceration left him unable to provide for the children's basic needs. At adjudication, petitioner stipulated to neglect as a result of his incarceration, and was not awarded an improvement period below. Ultimately, the circuit court terminated petitioner's parental rights because he was unable to participate in services designed to achieve reunification with the children.

On appeal, petitioner alleges that the circuit court erred in terminating his parental rights without first granting him an improvement period. In support, petitioner cites to our recent decision of *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011), to argue that the circuit court did not properly weigh the factors set forth in that decision in terminating his parental rights. Specifically, petitioner argues that the circuit court improperly weighed the terms of his confinement and the length of his incarceration. According to petitioner, he is scheduled to appear before the parole board in June of 2012, and that a post-adjudicatory improvement period with an allowable extension would have expired on August 14, 2012, two months after his parole hearing. As such, petitioner argues that the circuit court should have granted him a post-adjudicatory improvement period so that he

could have obtained release and thereafter participated in services to achieve reunification. According to petitioner, this delay would not have been any longer than such delays caused by circuit courts routinely allowing parents to enter inpatient substance abuse treatment during abuse and neglect proceedings. Petitioner argues that the DHHR had the same information regarding his incarceration when it filed the initial petition as it did when it filed its amended petition, yet it chose not to allege any wrongdoing against petitioner initially. In short, petitioner argues that the DHHR's position below was patently unfair, in that it chose not to bring allegations of neglect against him until Respondent Mother had her parental rights terminated. According to petitioner, had Respondent Mother achieved reunification, his parental rights would not have been terminated. As such, petitioner argues that the circuit court should have, at the very least, placed the children in a guardianship until his release. For these reasons, petitioner argues that the circuit court erred in terminating his parental rights.

The guardian ad litem responds and argues that the circuit court did not commit error below. To begin, she argues that *Cecil T.* allows for termination of an incarcerated parent's rights when it is necessary for a child's best interests. Further, the guardian argues that the circuit court did not improperly weigh any of the factors set forth in that decision, noting that petitioner was previously denied parole in 2011 and was not guaranteed release in June of 2012. Assuming a best case scenario, the guardian argues that if petitioner were paroled at his next hearing, he would have been beginning reunification efforts at a time when the children have already been in the same foster home for approximately eighteen months. The guardian argues that petitioner has essentially been incarcerated since 2009 and has been absent for the vast majority of his children's lives. According to the guardian, three-year-old M.M. has never known petitioner in any meaningful way due to this incarceration. The guardian argues that the children deserve permanency, security, stability, and continuity, and argues that the circuit court did not err in terminating petitioner's parental rights. 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 review of the appendix in this matter, the Court finds no error in the circuit court's decision to terminate petitioner's parental rights without granting an improvement period. Petitioner argues that he should have been entitled to an improvement period in the hopes that he would be paroled in June of 2012 and could thereafter participate in the remainder of an improvement period. However, improvement periods are granted at the circuit court's discretion pursuant to West Virginia Code § 49-6-12. In order to obtain a post-adjudicatory improvement period, West Virginia Code § 49-6-12(b)(2) requires the parent to prove by clear and convincing evidence that he or she is likely to fully participate in the same. In its order terminating petitioner's parental rights, the circuit court specifically found that "because of the Respondent Father's incarceration, the [DHHR was] unable to make reasonable efforts aimed at reunification between the Respondent Father and these children." Because petitioner provided only speculative evidence that he may be paroled at some point, it is clear that he could not establish by clear and convincing evidence that he was likely to fully participate in an improvement period. As such, the circuit court was correct to deny petitioner an improvement period and the denial does not constitute error.

Further, based upon petitioner's inability to participate in services, the circuit court found that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. West Virginia Code § 49-6-5(b)(3) 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] not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.

As noted above, petitioner has been incarcerated since before the abuse and neglect proceedings were initiated, and the record indicates that his next parole hearing is scheduled for June of 2012. Due to his incarceration, petitioner was precluded from following through with any family case plan developed below. As such, the circuit court did not err in terminating petitioner's parental rights pursuant to West Virginia Code § 49-6-5(a)(6).

This 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 children's best interests and their need for permanency, security, stability, and continuity. This is supported by the fact that, at the time of disposition, the children had already been in foster care for approximately one year. The children would have remained in foster care approximately eighteen months awaiting petitioner's release, even assuming that he is granted parole in June of 2012. We have previously held that

> "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 part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). The appendix shows that the youngest child in this matter was three years old at disposition. Based upon our prior holdings and the evidence below, the Court finds no error in the circuit court's termination of petitioner's parental rights.

This Court reminds the circuit court of its duty to establish permanency for the children. 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 children 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

[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.

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 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