STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: K.D.

No. 12-0062 (Mineral County 11-JA-08)

MEMORANDUM DECISION

Petitioner Father, by counsel Brian Joseph Vance, appeals the Circuit Court of Mineral County's November 9, 2011, order terminating his parental rights to K.D. The guardians ad litem, Kelley A. Kuhn and Meredith H. Haines, have filed their 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.

This Court has considered the parties' briefs and the 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 record 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.

Petitioner Father has a child, K.D., by the mother in this case. Mother has other older children including M.F. and D.F. III. The children were removed from mother when DHHR discovered that D.F. III, then a year old, had sustained a significant burn injury to his lower back and had not been provided any medical care. Immediate inquiry was made as to the cause of the burn. Mother's initial report to the DHHR worker was that "her man caused it" while she was away at bingo and that "she was dealing with it." DHHR also interviewed mother's oldest child, then three and a half year old M.F., who indicated that Petitioner Father had told him that Petitioner Father caused the burn. M.F. reported this same story to both his natural father and to the DHHR. Mother later indicated that the DHHR worker had misunderstood what she said and that mother had actually said that her man "did not do it." Mother also indicated that she had been cooking chicken and that D.F. III was accidently burned when he backed into the open stove door. Neither mother nor Petitioner Father testified at the adjudicatory hearing.

In reaching its adjudication that the Petitioner Father perpetrated the burn injury to D.F. III, the circuit court recognized the difficult nature of this case given the conflicting stories given by mother and the fact that some of the information was obtained from a three and a half year old child. The circuit court recognized that looking at the "totality of the circumstances," the clear and convincing proof established that D.F. III's burn was caused by the Petitioner Father. The circuit court noted that the child's statements were corroborated by mother's initial story that "her man did it." Further, the circuit court concluded that mother's later story of accidental injury

was suspect as "it appears extremely unlikely that these type of injuries could come from your typical stove door that's just down. The angle where these injuries are, it just seems to be not plausible that the child could have gotten the injuries the way [mother] is saying that it happened." The circuit court also believed that the failure to take the child to the doctor right away supported its conclusion. The circuit court did not grant Petitioner Father an improvement period.

At disposition, a CPS worker testified that mother had contacted her at the time that the children were removed from the maternal grandmother and told her that the Petitioner Father had caused the burn and that Mother had been away at bingo at the time. Maternal grandmother testified that Mother had told her that she was afraid of the Petitioner Father and that he had threatened Mother if she testified against him. Mother testified at the dispositional hearing that the petitioner father did not burn D.F. III and that D.F. III was accidently burned on the stove while she was cooking. Mother admitted that she lied multiple times during the case. The circuit court terminated the parental rights of the mother and the Petitioner Father.

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." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

Petitioner Father argues that the circuit court erred in terminating his parental rights as there was a lack of clear and convincing evidence to support adjudication. Petitioner Father contends that the circuit court erred in relying upon the statements of the mother, who lacked credibility, and the statements of M.F. The DHHR and the guardians ad litem argue that the evidence supported adjudication. The DHHR argues that Petitioner Father stood silent in this case and never offered any alternative explanation for M.F.'s statements against him or the cause of D.F. III's burn. In his own petition for appeal, Petitioner Father acknowledges that "[petitioner] himself never actually denied causing the injury, nor did he admit to it." The Court concludes from its review of the issue that the circuit court's findings upon adjudication should not be set aside as clearly erroneous.

Further, Petitioner Father argues that the circuit court erred in not granting him an improvement period. The DHHR and the guardians ad litem argue that Petitioner Father failed to acknowledge the abuse and failed to show he was likely to comply with the terms of an improvement period by refusing to cooperate with drug screens. The DHHR notes that when he perceived that drug screens would be a prerequisite to visits with K.D., Petitioner Father simply waived his request for such visits. Both the DHHR and the guardians ad litem assert that Petitioner Father failed to meet the requirements set forth in West Virginia § 49-6-12(b) for the granting of an improvement period. The Court concludes that there was no error in the failure to grant an improvement period in this case.

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 suitable adoptive home can not be found.

[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.

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: September 7, 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