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:* C.M.**

No. 12-0074 (Hardy County 11-JA-22)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel J. Stuart Bowers II, arises from the Circuit Court of Hardy County, wherein Petitioner Father's parental rights were terminated by order entered on December 20, 2011. The child's guardian ad litem, Marla Zelene Harman, filed a response on behalf of the child in support of the circuit court's order. The Department of Health and Human Resources ("DHHR"), by its attorney Lee Niezgoda, also filed a response in support of the circuit court's order.

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.

DHHR filed the petition in the instant case against the child's parents in August of 2011, based on allegations of the mother's drug abuse, domestic violence incidents, and self-mutilation, and Petitioner Father's absence from the child's life since February of 2010 when he moved from West Virginia to Fort Worth, Texas, to be closer to his parents and to seek psychiatric treatment after his discharge from the military. At that time, the child C.M., born May 2, 2008, was less than two years old. Since February of 2010, Petitioner Father has not made any child support payments for the child and has not spoken to him since April of 2010. The petition further outlined that consequently, Petitioner Father has failed to provide for the child's physical and mental well-being. In October of 2011, the circuit court found that Petitioner Father had abandoned and neglected the child with his failure to provide any physical, emotional, or financial support for the child since February of 2010. It was also brought to the circuit court's attention that at one point, the child was under the belief that Petitioner Father was deceased. However, it is unclear from the record as to who relayed this information to him. Petitioner Father motioned for an improvement period. The circuit court ordered that Petitioner Father send his medical records to the circuit court for further consideration of his motion for an improvement period. The circuit court further directed that the child remain in his current placement with maternal relatives.

At the dispositional hearing in December of 2011, Petitioner Father's medical records had been requested, but had not yet been received for the circuit court's review. However, a letter from Petitioner Father's psychologist, Dr. Mathai, was provided to the circuit court. In his letter, Dr. Matahai explained that Petitioner Father is being treated with medications for post-traumatic stress

disorder and is able to handle family responsibilities such as childcare. A letter by the child's psychologist, Dr. Morris, was also provided to the circuit court. Dr. Morris explained in his letter that the child has had behavioral issues of hitting, head butting, hair pulling, and nighttime enuresis and that "[c]onsideration of visits or contact with [Petitioner] [F]ather seems . . . to be appropriately delayed at this point for a period of at least several months until these other issues are improved or at least modestly stabilized." Petitioner Father testified, by telephone, that he has made plans to move himself, his new wife and stepson, and his parents from Texas to West Virginia. C.M.'s relative placement and his great-grandmother both testified. Both testified that Petitioner Father has not spoken with C.M. since he has been in Texas. He has not paid any financial support. The child's guardian ad litem argued that what little Petitioner Father has done has occurred too late. The circuit court found that although Petitioner Father has expressed a desire to move closer to his child, therapeutic recommendations for the child indicate that there should not be any contact with him until the child has stabilized in his kinship placement. The circuit court further found that Petitioner Father cannot provide the child with a safe home, especially given the child's bond with his relatives in his current placement. After finding that the conditions of abuse and neglect could not be substantially corrected in the foreseeable future, the circuit court terminated both parents' parental rights with the permission for parents to have visitation when warranted upon therapeutic recommendations and at the discretion of the child's relative placement. Petitioner Father appeals this order, arguing two assignments of error.

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 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).

On appeal, Petitioner Father first argues that the circuit court erred in denying him an improvement period. He asserts that he complied with all statutory requirements and was never granted a prior improvement period. Petitioner Father argues that the circuit court gave too much weight to the letter of the child's psychologist because at that time, the psychologist had only met with the child once and they had not had a chance to focus on the child's belief that Petitioner Father was deceased. Petitioner Father also argues that the circuit court failed to adhere to its prior order

concerning Petitioner Father's medical records and failed to consider evidence which clearly shows that conditions of abuse or neglect could be substantially corrected in the near future. In support, Petitioner Father asserts that his psychiatrist in Texas had the opinion that Petitioner Father was in a position to handle family responsibilities such as childcare. Petitioner Father further asserts that he has the desire to move to Texas and has made plans to move his Texas family to West Virginia.

The guardian ad litem and DHHR respond, contending that the circuit court did not err in denying Petitioner Father an improvement period. Both highlight that although Petitioner Father expressed a desire to move to West Virginia, he has yet to actually do so. Both the guardian and DHHR also focus their response on the best interests of C.M., arguing that the psychologist who met with C.M. found that he was still adjusting to the changes in his life and recommended that C.M. not see his father for at least another several months. The guardian and DHHR argue that the circuit court did not err in concluding that young C.M. cannot wait several months for improvement by a father who has not been in his life for the previous two years.

The Court finds that the circuit court did not err in denying Petitioner Father an improvement period. Pursuant to West Virginia Code §§ 49-6-12(b) and (c), a parent moving for an improvement period must show by clear and convincing evidence that he or she will substantially comply with such. Moreover, the Court has held as follows:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . 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." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Here, a review of the appendix indicates that Petitioner Father admitted to not paying child support and knew of the mother's substance abuse problems when he left for Texas with the child in her care. Although he claims to have attempted to contact the child, testimony provided by the child's placement and other family members refutes this claim. Testimony in the record further indicates that even before Petitioner Father left for Texas in February of 2010, his presence in the child's life since birth was not consistent. Although Petitioner Father's medical records were never received by the circuit court for its review, the circuit court based its decision on Petitioner Father's absence and lack of action, and on C.M.'s best interests in his current placement. The report of the child's psychologist indicates that "[t]here may be some traumatic issues as well. [The child] is confused about his father and the current desire on father's part to begin telephone contact with him." The Court finds no error by the circuit court in denying Petitioner Father an improvement period.

Petitioner Father also argues that the circuit court erred in terminating his parental rights to C.M. In support, he argues that the circuit court failed to adhere to its prior order concerning its plan

to consider Petitioner Father's medical records in determining whether to grant an improvement period. He reiterates that the circuit court gave too much weight to the letter from the child's psychologist Dr. Morris, and failed to consider evidence that shows that conditions of abuse or neglect could be substantially corrected in the near future. Moreover, Petitioner Father argues that "abandonment," as provided in the case of *In re the Adoption of William Albert B.*, 216 W.Va. 425, 607 S.E.2d 531 (2004), did not occur. In that case, we defined abandonment to mean "'any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.' *Matter of Adoption of Schoffstall*, 179 W.Va. 350, 352, 368 S.E.2d 720, 722 (1988)." *In re the Adoption of William Albert B.*, 216 W.Va. at 429, 607 S.E.2d at 535. Here, Petitioner Father argues that the evidence does not rise to the level of abandonment on his part. In response, the guardian and DHHR contend that the circuit court did not err in terminating Petitioner Father's parental rights. Both reiterate that it has been nearly two years since Petitioner Father was present in the child's life and that he has not provided financial support and has not had ongoing contact with the child.

The Court finds that no error in the circuit court's decision to terminate Petitioner Father's parental rights. "'[T]he welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 304[, 47 S.E.2d 221 (1948)]." *Clifford K. v. Paul S.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). We have also held as follows:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code [§] 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code [§] 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

In re Cesar L., 221 W.Va. 249, 258, 654 S.E.2d 373, 382 (2007) (internal citations omitted). Here, the appendix includes Dr. Mathai's letter that advised that Petitioner Father would be capable of handling family responsibilities such as childcare. However, the letter is very succinct and does not expand on Petitioner Father's relationship with C.M. Further, the appendix includes the opinions and report by the child's psychologist. Given the circumstances of this case and the child's young age at termination, we cannot find that the circuit court erred in terminating Petitioner Father's parental rights to C.M.

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.

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

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[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.