STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: N.C.

No. 12-0087 (Mercer County 11-JA-115)

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel Gerald Linkous, appeals the Circuit Court of Mercer County's December 23, 2011, order terminating his parental rights to N.C. The West Virginia Department of Health and Human Resources ("DHHR"), by William Bands, its attorney, has filed its response. The guardian ad litem, Julie Lynch, has filed her response on behalf of the child.

Having reviewed the appendix 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 appendix 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.' 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).

The instant petition was filed based on Petitioner Father's two prior terminations of parental rights and ongoing domestic violence problems. Petitioner Father had the rights to one child terminated in 2003, and another in 2010. The orders from both of those cases indicate that Petitioner Father was offered extensive services both times, but failed to remedy the conditions leading to the filing of the petitions, which was ongoing domestic violence in the home. In fact, just prior to the filing of the instant petition, Petitioner Father was arrested on charges of domestic violence with another woman unrelated to this action. Petitioner Father was adjudicated as abusive and neglectful, and the circuit court found aggravated circumstances in this case. The circuit court then terminated

Petitioner Father's parental rights. The circuit court noted that Petitioner Father's parental rights had been involuntarily terminated on two prior occasions, and thus the DHHR is not required to make reasonable efforts at reunification. The circuit court also noted that Petitioner Father had an improvement period in each of the two prior terminations, and in at least one of those, petitioner "did not even put forth a minimal effort." The circuit court found that Petitioner Father is still having the same problems he had in 2002, namely domestic violence with his partners, and because these problems have continued for almost ten years, there is no substantial likelihood of change.

On appeal, Petitioner Father argues that the circuit court erred in terminating his parental rights without granting him an improvement period. Petitioner argues that in a case where there has been a prior termination, there must still be evidence of current abuse and neglect. Further, petitioner argues that evidence of current abuse and neglect does not automatically eliminate the possibility of an improvement period. Petitioner argues that he acknowledged his past problems and indicated that he was willing to participate in any services recommended by the circuit court or by the DHHR. He also indicated that he needed financial assistance for counseling. Petitioner argues that he was entitled to a "second chance."

The guardian responds in favor of termination and argues that Petitioner Father had his parental rights terminated twice before and has continued the same behaviors, which include domestic violence. The guardian argues that petitioner has failed to correct the conditions which led to the prior terminations, and was arrested on charges of domestic violence just prior to the instant petition being filed. The guardian argues that the best interests of the child require termination in this matter. The DHHR joins in and concurs with the guardian's response.

Aggravated circumstances as to the Petitioner Father exist, as he previously had his parental rights to two other children terminated.

> When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

Syl. Pt. 4, *In the Matter of George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). "Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syl. Pt. 2, in part, *In the Matter of George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). Moreover, termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child . . . ." W.Va. Code § 49-6-5(a)(6). In the present case, the two prior terminations were both based on domestic violence in the home. Clearly, this condition had not changed or improved, given Petitioner Father's arrest

for domestic violence against a woman during the same month that this petition was filed. Further, N.C.'s mother sought a domestic violence protective order against Petitioner Father in the past just after N.C.'s birth. Despite almost a decade, two prior terminations of parental rights, and a myriad of services, Petitioner Father has not substantially improved the conditions which led to the first abuse and neglect petition filed in 2002. This Court finds no error in the termination of parental rights without an improvement period.

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.

I
ISSUED: May 29, 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