STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: **G.R.**

No. 12-0102 (Wood County 11-JA-87)

FILED
October 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by counsel Michele Rusen, appeals the Circuit Court of Wood County's order entered on March 19, 2012, terminating his parental rights to G.R. The guardian ad litem, Joseph Troisi, has filed his 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. Petitioner Father has filed a reply.

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.

The abuse and neglect petition in this matter alleges that Petitioner Father sexually abused G.R. when she was two years old. Moreover, prior to the allegations of sexual abuse, several internet chats were discovered on Petitioner Father's computer, wherein he was conversing with pedophiles regarding G.R. G.R. disclosed the sexual contact in one interview with a DHHR employee, but has made no disclosures in play therapy. However, testimony shows some inappropriate sexualized behaviors from G.R., along with comments that her father taught her said behaviors.

Throughout the proceedings, Petitioner Father denied the allegations of sexual abuse, although he admitted to the internet chats. Petitioner Father was denied an improvement period based on his failure to admit to the sexual contact after the circuit court found that the contact did occur, and adjudicated G.R. as an abused child. Petitioner Father's parental rights were then terminated, and post-termination visitation was denied until G.R. turns fourteen years old, or is of an appropriately mature age to aid the circuit court in a decision regarding future contact with 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 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 argues several assignments of error regarding the admission of evidence. Petitioner argues that the circuit court erred in permitting the hearsay testimony of several witnesses, including DHHR employees, the child's mother, and others, to testify to out-of-court statements made by G.R. concerning the alleged sexual abuse. Petitioner argues that these statements do not fall under any of the hearsay exceptions found in the West Virginia Rules of Evidence. Additionally, petitioner argues that the circuit court should have dismissed the petition at the close of evidence, as the only evidence of sexual abuse came from the hearsay testimony and a flawed DHHR interview. Petitioner further argues that the circuit court erred in completely dismissing the fact that the allegations of sexual abuse arose during divorce proceedings.

The guardian responds that the child's statements to others were properly admissible under Rules 803(24) and 804(b)(5) of the West Virginia Rules of Evidence, as the child was unavailable to testify in this matter. Moreover, the guardian points to Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings which describes restrictions on the testimony of a child if the testimony would be psychologically harmful to the child, and indicates that it was not in the child's best interest to testify in this matter due to the allegations and her age. The guardian also argues that the circuit court did not err in not dismissing the petition, as the evidence of sexual abuse was admissible and the evidence, including the internet chats, the changes in the child's behavior, and the child's statements to others, all support a finding of sexual abuse. The DHHR agrees that the child's statements were admissible and states that both Rule 803 of the West Virginia Rules of Evidence and Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings create exceptions which allow such testimony when justice requires it. The DHHR also notes that there was no evidence of bias in the testimony, even upon cross examination, and that the circuit court was charged with determining the credibility of the witnesses. The DHHR argues that the testimony of witnesses combined with the admissions regarding the internet communications show that the circuit court's termination was not clearly wrong.

Upon a review of the record, this Court finds no error in the admission of the testimony. Pursuant to Rule 8 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, the three-year-old child did not testify due to the fear of psychological harm.

However, the circuit court deemed it proper to admit testimony regarding her statements and actions as probative and relevant evidence. We decline to disturb the circuit court's findings.

Petitioner next argues that the circuit court erred in denying him an improvement period, and erred in terminating his parental rights. Petitioner argues that he admitted he had a problem concerning the internet chats, sought help for the same, and, therefore, argues that he should have been granted an improvement period. Petitioner also argues that it was error to terminate his parental rights without an improvement period.

The guardian and the DHHR argue that petitioner was properly denied an improvement period as he failed to admit any sexual contact with his daughter. Moreover, both note that although petitioner was in counseling, he was not honest with his counselor regarding the true nature of the internet communications. This Court has stated as follows:

> [I]n 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.

W.Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996). As petitioner only admitted to the internet communications, but failed to ever admit to any curiosity regarding pedophilia or committing any sexual acts toward G.R., this Court finds no error in the denial of an improvement period. Regarding termination of parental rights, 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). In the present case, due to the finding of sexual abuse perpetrated on G.R. by Petitioner Father, we find no error in the termination of parental rights.

Petitioner also argues error regarding procedural issues, including the circuit court allowing the DHHR to verbally amend the petition in this matter at the conclusion of the State's evidence without requiring written amendment. Petitioner argues that the failure to properly amend the petition did not allow him to fully defend himself against the allegations. He argues that he had no notice that the DHHR was seeking termination and had no chance to determine what he needed to do to get an improvement period. He also argues that although the circuit court ordered a multidisciplinary treatment team meeting, one was never held.

The guardian responds that reasonable efforts, including convening an MDT, are not required in this matter due to the "aggravated circumstances" of sexual abuse. The guardian admits he made the motion to amend the petition out of an abundance of caution, but notes also that no harm came to petitioner from the amendment. The DHHR notes that the amendment did not materially change the allegations in the petition. This Court finds no merit in petitioner's assignments of error regarding these procedural issues. Petitioner was clearly aware of the allegations against him and knew that termination of parental rights was a possible disposition. Further, due to the aggravated circumstances after the finding of sexual abuse, reasonable efforts at reunification were not required.

Petitioner next argues that the circuit court erred in allowing him to be cross-examined regarding alleged infidelity in his first marriage, which had already been ruled irrelevant, and in allowing testimony regarding internet chats and transcripts of the internet chats to be admitted as evidence. Petitioner argues that the alleged infidelity in his first marriage was irrelevant and had already been ruled as such. Petitioner further argues that the internet chats were irrelevant since they occurred in 2010, and argues that the proceedings herein were fatally flawed by numerous errors.

The guardian argues that the internet communications led to the actions which caused the petition to be filed, and therefore were relevant to the proceedings. The guardian and the DHHR both argue that the proceedings were not fatally flawed. The DHHR notes that petitioner was the one to mention the "rumors" of alleged infidelity and thus opened the door to that line of questioning. In short, this Court finds no error in the testimony regarding the same, and finds that petitioner was the first to mention any alleged infidelity. The testimony in this regard was properly limited by the circuit court. Finally, this Court finds that the proceedings herein were not fatally flawed.

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 twelve months of the date of the disposition order. As this Court has stated,

> [t]he [twelve]-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: October 22, 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