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:* I.P.**

No. 12-0110 (Mineral County 10-JA-31)

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Agnieszka Collins, arises from the Circuit Court of Mineral County, wherein Petitioner Father's parental rights were terminated by order entered on December 28, 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 September of 2010. Child Protective Services ("CPS") first became involved with this family in June of 2010 after a domestic violence incident between the parents, who were drunk and got into a fight. As a result of this incident, Petitioner Father was arrested and incarcerated and services were implemented with the child's mother. The petition specified neglect by both parents through alcohol use, but because the domestic violence incident occurred while the child, who was less than six months old at the time, was sleeping, and not in her presence, domestic violence was not substantiated in the original petition. Petitioner Father was released from incarceration in early 2011, at which time the circuit court placed him on a pre-adjudicatory improvement period with services, including those focused on parenting classes, his alcohol use, and his anger issues. DHHR filed an amended petition in June of 2011 that outlined Petitioner Father's failure to comply with his improvement period and discussed a more recent incident of domestic violence that occurred between Petitioner Father and I.P.'s mother in April of 2011. In December of 2011, the circuit court held Petitioner Father's adjudicatory and dispositional hearings together.

At Petitioner Father's adjudicatory and dispositional hearing in December of 2011, the circuit court heard testimony from Petitioner Father's service providers and Petitioner Father himself. The service providers all testified to Petitioner Father's failure to fully participate in services and to his denial of his alcohol and anger management issues. The circuit court terminated Petitioner Father's parental rights to I.P., without another improvement period, but granted visitation on a quarterly basis. Petitioner Father appeals the circuit court's decision, arguing four 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 granting him a pre-adjudicatory improvement period when he did not move for one and when there were no accusations contained in the petition against him. Petitioner Father argues that in doing so, the circuit court acted contrary to West Virginia Code § 49-6-12 and that consequently, this ruling necessitated that he comply with the terms of an improvement period he never requested. The guardian and DHHR respond, contending that the circuit court's decision to grant Petitioner Father a pre-adjudicatory improvement period was not in error. In particular, DHHR asserts that Petitioner Father's counsel argued to the circuit court that although it was not Petitioner Father's belief that the petition contained allegations against him, if the circuit court did find allegations against him, then Petitioner Father would request an improvement period.

The Court finds that the circuit court did not abuse its discretion in granting Petitioner Father a pre-adjudicatory improvement period. A review of the appendix provides a copy of the original petition and the amended petition against I.P.'s parents. Although most of the allegations in the original petition focus on I.P.'s mother, the petition also discusses the domestic violence incident between I.P.'s parents, which instigated CPS's involvement. From this incident, Petitioner Father was incarcerated and alcohol use and neglect of I.P. were substantiated against both parents. At the hearing following Petitioner Father's release from incarceration, the circuit court granted Petitioner Father a three-month pre-adjudicatory improvement period. In granting Petitioner Father a pre-adjudicatory improvement period, the circuit court directed that DHHR formulate a family case plan to provide Petitioner Father with supervised visitation and appropriate services. A copy of the minutes from the Multi-Disciplinary Treatment Team ("MDT") meeting in March of 2011 identifies issues between I.P.'s parents such as substance abuse, domestic violence, and alcohol use. The report also indicated that Petitioner Father became angry when talking about services, expressing that his feelings that he should not have to participate in services. By affording Petitioner Father a pre-

adjudicatory improvement period, the circuit court was giving Petitioner Father a chance to alleviate conditions which led to his child's removal. Instead, however, Petitioner Father took this opportunity for granted and now labels the circuit court's decision to grant him an improvement period as an error. We find no error in the circuit court's decision to grant Petitioner Father a pre-adjudicatory improvement period based on the petitions filed against him and I.P.'s mother.

Petitioner Father also argues that the circuit court erred in conducting his adjudicatory and dispositional hearing together, over objection by his counsel. Petitioner Father also argues that at this hearing, the circuit court failed to give him an opportunity to move for an improvement period and that DHHR was not given time to determine if under the new circumstances, there was a reasonable likelihood of reunification between Petitioner Father and I.P. In support of this argument, Petitioner Father asserts that he did not participate in services because he faced false accusations against him by I.P.'s mother. He further argues that due to the circuit court's procedure, he was unable to be meaningfully heard. In response, the guardian and DHHR contend that Petitioner Father had sufficient notice that these two matters would be heard together. Moreover, the guardian and DHHR argue that Petitioner Father had the opportunity at the hearing to present his own testimony and that he did not present any evidence or make argument which would have shown that he was entitled to another improvement period. Additional time in this case would not have made a difference in Petitioner Father's behavior. In December of 2011, the case had been ongoing for over a year and it had been several months since the last time Petitioner Father had seen I.P. He admitted at the hearing to not fully complying with services and he had the opportunity to argue his position that he did not fully participate in services because he feared being wrongfully accused of further domestic violence by I.P.'s mother.

The Court finds that the circuit court did not abuse its discretion in holding Petitioner Father's adjudicatory and dispositional matters together in one hearing. A review of the appendix reflects that although Petitioner Father was unable to be located for service in August and November of 2011 for his adjudicatory and dispositional hearing, his counsel was available and received notice and continuances for these matters both times. Both orders also indicated that the adjudicatory and dispositional hearing would be held together. Notice and opportunity were therefore available for Petitioner Father to have filed a motion for a post-adjudicatory improvement period. Pursuant to West Virginia Code § 49-6-12, a circuit court has the discretion to grant or deny such an improvement period upon the requesting parent showing by clear and convincing evidence that he or she would comply with such a period. We have also 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." Syllabus point 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). Evidence presented at the adjudicatory hearing did not demonstrate that Petitioner Father would have benefitted from further improvement period or, more importantly, that it would have been in I.P.'s best interests to prolong this case further. Petitioner Father admitted in his testimony that he did not participate in services and responded with, "What does that [anger management and alcohol abuse classes] have to do with me?" when asked about his lack of participation. We find no reversible error in the circuit court's movement from adjudication to disposition in December of 2011.

Petitioner Father next argues that the circuit court erred by requiring him to comply with the family case plan when the case plan was not discussed or formerly adopted by the circuit court. Petitioner Father argues that this denied him an opportunity to be heard with regard to any objections to the case plan and therefore, the circuit court erred in finding that Petitioner Father was non-compliant with the family case plan. In response, the guardian and DHHR contend that the circuit court committed no error in this regard. The guardian in particular argues that Petitioner Father failed to do anything that was requested of him and he was afforded every right to be heard throughout the case. DHHR asserts that petitioner had verbally consented to services before the case plan was implemented and never filed objections or made motions to be exempt from the recommended services. DHHR argues that accordingly, Petitioner Father is raising this issue not because the terms and conditions of his improvement period were unfair or burdensome but as an excuse for his non-compliance.

The Court finds no abuse of discretion in this regard. The Court is reminded that, "'the 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). A review of the appendix reflects that the circuit court granted Petitioner Father a pre-adjudicatory improvement period in February of 2011. The MDT met in March of 2011, at which time services for Petitioner Father were discussed. He denied any responsibility in the neglect of I.P. and did not take advantage of the services offered to address his anger management, alcohol issues, parenting, and domestic violence, and opportunities for supervised visitation. From early 2011 when services began to late 2011 when the circuit court terminated Petitioner Father's parental rights, Petitioner Father had not made any improvements or strides to work toward reunification with I.P. Although the appendix also reflects that DHHR did not file the family case plan with the circuit court until April of 2011, this does not change the fact that Petitioner Father failed to fully participate in services offered to him. As we have held, "'[t]he purpose of the family case plan . . . is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.' Syl. Pt. 5, [in part], *State ex rel. W.Va. Dep't of Human Servs v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987)." Syl. Pt. 3, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001). The family case plans filed in this matter outlined issues Petitioner Father needed to address. We decline to find that the timing of DHHR's filing of the family case plan constitutes reversible error.

Lastly, Petitioner Father argues that the circuit court erred by ordering him to pay child support after his termination hearing and thus, this child support was ordered in his absence and without notification to him. The guardian and DHHR respond, arguing that pursuant to *In re: Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003), the circuit court has the authority to award child support following the termination of parental rights. The Court finds no error in this regard. We directed in *In re: Stephen Tyler R.* that a circuit court may terminate a parent's parental rights while continuing his or her obligation of child support, pursuant to West Virginia Code § 49-6-5(a)(6). Syl. Pt. 7, *In re: Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003). The appendix reflects that copies of the circuit court's orders setting child support at $200 per month were sent to Petitioner Father's counsel. The Court finds no error by the circuit court in ordering child support and we find no error in the circuit court's order terminating Petitioner Father's parental rights to I.P.

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

[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.

> 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